Opinion filed June 25, 2020

In The

Eleventh Court of Appeals

No. 11-18-00198-CR

FERNANDO GARCIA ALVARADO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 238th District Court
Midland County, Texas
Trial Court Cause No. CR50921

M E M O R A N D U M O P I N I O N

The jury convicted Appellant, Fernando Garcia Alvarado, of tampering with physical evidence. *See* TEX. PENAL CODE ANN. § 37.09 (West 2016). The trial court then assessed Appellant's punishment at confinement for a term of four years and sentenced him accordingly. In three issues on appeal, Appellant argues (1) that there was insufficient evidence to support his conviction for tampering with physical evidence, (2) that it was error for the trial court to order reimbursement of his court-

appointed attorney's fees, and (3) that the trial court erred when it denied Appellant's request for a mistrial based on a potential juror's prejudicial comment. We modify and affirm.

Background Facts

On January 16, 2018, Sergeant William Taylor Welch of the Midland Police Department was on patrol in an area in which a thief had been operating. While on patrol that evening, Sergeant Welch observed Appellant and another individual standing near a pickup in an alley; they were talking to the occupants of the pickup. As the driver of the pickup drove away, Appellant and the other individual started walking. Sergeant Welch drove his patrol vehicle toward the two men.

As Sergeant Welch got closer, he turned on his headlights and activated his spotlight; the individual with Appellant proceeded to take off running. Appellant continued walking, however, as Sergeant Welch pursued the fleeing suspect on foot. During the ensuing chase, the suspect dropped a red and black backpack in the middle of the street. Sergeant Welch ultimately apprehended the suspect, but when they returned to his patrol vehicle, the backpack was no longer where it had been dropped.

After a brief search, officers found Appellant at his girlfriend's house. When questioned, Appellant informed officers that the backpack was outside, in front of the neighbor's house. Officers found the backpack where Appellant said it was, and Appellant eventually confessed to moving the backpack. Accordingly, Appellant was arrested and charged with tampering with physical evidence.

During the voir dire stage of Appellant's trial, the prosecutor asked whether any of the veniremembers would give Appellant more or less credibility simply because he was the defendant. In response, one potential juror said, "I would do his credibility lower because I do know him." Defense counsel argued that the comment

tainted the jury, and he requested a mistrial or, alternatively, a limiting instruction. The trial court denied the request for a mistrial, granted the request for a limiting instruction, and ordered the potential jurors to disregard the statement and not consider it for any purpose.

At the conclusion of the trial, the jury convicted Appellant of tampering with physical evidence. The trial court then sentenced Appellant to incarceration for a term of four years. This appeal followed.

Evidentiary Sufficiency

In Appellant's first issue, he argues that the evidence presented at trial is insufficient to support his conviction for tampering with physical evidence. We review a sufficiency of the evidence issue under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The trier of fact may believe all, some, or none of a witness's testimony because the factfinder is the sole judge of the weight and credibility of the witnesses. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd). We defer to the trier of fact's resolution of any conflicting inference raised by the evidence and presume that the trier of fact resolved such conflicts in favor of the verdict. *Jackson*, 443 U.S. at 326; *Brooks*, 323 S.W.3d at 899; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Appellant contends that the evidence was insufficient to support his conviction for tampering with physical evidence. According to Section 37.09(a) of the Texas Penal Code, the offense of tampering with physical evidence contains the following elements: "(1) a person alters, destroys, or conceals; (2) any record, document, or thing; (3) with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; (4) knowing that an investigation or official proceeding is pending or in progress." *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017) (citing PENAL § 37.09(a)(1)). The offense thus requires both a knowing and an intentional mental state: "[A]n actor must know his action would impair the item as evidence and he must act with the intent to impair its availability as evidence." *Zuniga*, 512 S.W.3d at 907 (citing *Stewart v. State*, 240 S.W.3d 872, 873–74 (Tex. Crim. App. 2007)).

A person acts knowingly "with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist." PENAL § 6.03(b) (West 2011). By contrast, a person acts intentionally "with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." *Id.* § 6.03(a).

In this case, Appellant admitted to picking up the red and black backpack and placing it in the neighbor's front yard in satisfaction of elements one and two. Looking to the third element, Appellant did not merely pick the backpack up and take it with him. Instead, Appellant hid the backpack in a location away from his own and away from where the other individual had dropped it. Reviewing the evidence in the light most favorable to the verdict, a juror could have concluded that Appellant intended to impair the availability of the backpack as evidence by hiding it in the neighbor's yard. *See Jackson*, 443 U.S. at 319.

Moving to the final element, Sergeant Welch was in a marked patrol vehicle when he initially engaged Appellant and the other individual. Sergeant Welch was also wearing his police uniform and announced himself as police when yelling for the fleeing suspect to stop. Sergeant Welch further testified that there was "no doubt" that Appellant knew Sergeant Welch was a police officer. This evidence allowed a rational jury to conclude, in satisfaction of element four, that Appellant knew that an investigation was in progress. *See Zuniga*, 512 S.W.3d at 907.

We believe that a rational trier of fact could have found all the elements of tampering with physical evidence beyond a reasonable doubt. Accordingly, we hold that the evidence is sufficient to support Appellant's conviction and overrule Appellant's first issue.

Attorney's Fees

In his second issue, Appellant argues that it was error for the trial court to require him to pay a $2,250 fee for his court-appointed attorney. The State agrees with Appellant in regard to his second issue. Though the judgment of the trial court does not explicitly require that Appellant pay for his court-appointed attorney, the judgment does require that Appellant pay "all costs in this proceeding." The Bill of Cost then delineates a $2,250 fee for "COURT APPOINTED ATTORNEY."

Under Article 26.05(g) of the Texas Code of Criminal Procedure, the trial court has authority to order reimbursement of the appointed attorney's fees "[i]f the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant." TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2019). The record before us, however, does not contain any such determination or finding by the trial court that Appellant has any financial resources or is able to pay the appointed attorney's fees. As a result, "there was no factual basis in the record to support a determination

that Appellant could pay the fees." *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). Accordingly, we sustain Appellant's second issue and modify the judgment to delete the following language:

> and that the State of Texas Do have and recover of and from the said defendant all costs in this proceeding incurred for which let execution issue.

The deleted language is replaced with the following:

> and that the State of Texas Do have and recover of and from the said defendant all costs, except court-appointed attorney's fees, in this proceeding incurred for which let execution issue.

Prejudicial Statement by Potential Juror

In Appellant's third issue, he argues that the trial court erred when it denied Appellant's request for a mistrial based on a potential juror's prejudicial comment. We review the denial of a motion for mistrial under an abuse of discretion standard. *See Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003).

> A mistrial is the trial court's remedy for improper conduct that is "so prejudicial that expenditure of further time and expense would be wasteful and futile." In effect, the trial court conducts an appellate function: determining whether improper conduct is so harmful that the case must be redone. Of course, the harm analysis is conducted in light of the trial court's curative instruction. Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required.

Hawkins v. State, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004) (footnote omitted).

To show harm based on the trial court's denial of a motion for mistrial, the defendant must show the following: (1) other veniremembers heard the remarks, (2) the veniremembers who heard the remarks were influenced by them to the prejudice of the defendant, and (3) the juror in question or another juror with a similar opinion was forced upon the defendant. *Callins v. State*, 780 S.W.2d 176, 188 (Tex. Crim. App. 1986) (citing *Johnson v. State*, 205 S.W.2d 773, 774–75 (Tex.

Crim. App. 1947)). Absent these three elements, no error will be found. *Id.* Notably, in most cases, an instruction by the trial court to disregard the comment will cure the prejudicial effect. *Wesbrook v. State*, 29 S.W.3d 103, 115–16 (Tex. Crim. App. 2000).

During voir dire of this case, a potential juror stated in open court that he "would do [Appellant's] credibility lower" because he knew Appellant. The trial court denied Appellant's request for a mistrial and, instead, issued an instruction to the other potential jurors, ordering them to disregard the comment and not consider it for any purpose. The trial court subsequently granted Appellant's challenge for cause with respect to the potential juror that made the objectionable comment.

The comment made by the potential juror during voir dire appears to have been heard by the entire panel; the comment was made in open court, and nothing in the record indicates that the comment was not sufficiently loud for the entire panel to hear. *See McGee v. State*, 923 S.W.2d 605, 607–08 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (inferring from the record that other members of the venire heard the remark). There is, however, also nothing in the record that indicates that any other members of the panel were influenced by the remark. *See Callins*, 780 S.W.2d at 188. Indeed, Appellant's entire argument on this point is a single sentence: "It can be inferred that the potential jurors were influenced as they convicted upon arguable weak evidence." We cannot agree with Appellant's proposed inference.

Similarly, there is nothing in the record that indicates the potential juror or another juror with a similar opinion was forced upon Appellant. *See Callins*, 780 S.W.2d at 188. Appellant's argument on this point is equally brief: "The remaining panel was forced upon the Appellant by the court's denial of the mistrial." Again, we cannot simply infer, based on the evidence before us, that other members of the

panel were influenced by the remark. Even if we could, we could not then additionally infer that influenced members of the panel were selected to be on the jury. Appellant has failed to demonstrate that he was harmed by the statement. Accordingly, we overrule Appellant's third issue.

This Court's Ruling

As set forth above, we modify the judgment of the trial court with respect to the costs for Appellant's court-appointed attorney; as modified, we affirm.

KEITH STRETCHER
JUSTICE

June 25, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.