Opinion issued July 23, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00594-CR

NO. 01-18-00595-CR

BARRY WAYNE BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Tarrant County, Texas[1]
Trial Court Case Nos. 1499938D and 1499940D

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 18–9083 (Tex. June 19, 2018); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Second District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

MEMORANDUM OPINION

A jury found appellant, Barry Wayne Brown, guilty of two separate offenses of possession with intent to deliver a controlled substance: namely heroin and cocaine, weighing more than four grams but less than 200 grams.[2] After appellant pleaded true to the allegation in the enhancement paragraph in each indictment, the trial court assessed his punishment at confinement for twenty years for each offense, to run concurrently. In a sole issue, appellant contends that the trial court erred in denying his request for a jury instruction of entrapment.

We affirm.

Background

Arlington Police Department ("APD") Sergeant R. Robertson testified that he had served as an undercover narcotics detective, and on May 25, 2017, he participated in an undercover investigation involving appellant. On that day, Robertson, using the undercover persona "Jerry," exchanged text messages with appellant about the purchase of "large amounts of heroin" by Robertson.[3] Robertson

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2 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(2), (3)(D), 481.112(a), (d); appellate cause no. 01-18-00594-CR; trial court cause no. 1499938D (possession with intent to deliver controlled substance, namely heroin, weighing more than four grams but less than 200 grams); appellate cause no. 01-18-00595-CR; trial court cause no. 1499940D (possession with intent to deliver controlled substance, namely cocaine, weighing more than four grams but less than 200 grams).

3 Screenshot images of the text messages on Sergeant Robertson's cellular telephone were admitted into evidence by the trial court. *See Villareal v. State*, 590 S.W.3d

arranged to buy one ounce of heroin on that particular day for $1,500, and appellant agreed. Later, Robertson met appellant in the parking lot of a gas station in Tarrant County, Texas.

At the gas station, after appellant arrived, Sergeant Robertson approached the driver's side of appellant's truck, and appellant told him to go to the passenger's side. Appellant then "displayed a baggie that had a black-tar like substance [in it] that [Robertson] immediately recognized to be black[-]tar heroin based on [his] training and experience as an undercover narcotics detective." After visually confirming that appellant had narcotics with him, Robertson notified nearby law enforcement officers, who moved in to arrest appellant.

According to Sergeant Robertson, upon searching appellant's truck and person, law enforcement officers found about fifty-six grams of heroin, about twenty-two grams of cocaine,[4] narcotics paraphernalia, and $1,278 in cash.[5] In

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75, 80 n.2 (Tex. App.—Waco 2019, pet. ref'd) ("[A] screenshot is a picture taken by a cell phone of what was on the cell phone's screen.").

4 Sergeant Robertson explained that the narcotics were found in three separate plastic baggies.

5 Other law enforcement officers similarly testified that these same items were found either in appellant's truck or on his person. APD Detective J. Maldanado stated that presumptive testing revealed that the substances believed to be narcotics were heroin and cocaine. Armstrong Forensics Laboratory senior analyst Karen Dice testified that she tested State's Exhibit 25A, which consisted of a black tar-like substance, and it constituted 56.39 grams of heroin. She also tested State's Exhibit 25C, which consisted of a white powdery substance, and it constituted 22.34 grams of cocaine.

Robertson's opinion, that amount of money indicates that a person is selling narcotics.

Sergeant Robertson further testified that he had originally received appellant's name from a confidential informant named "Steph," and law enforcement officers were told that appellant sold heroin. Steph first introduced Robertson to appellant, and on April 28, 2017, Robertson bought heroin from appellant. Robertson also bought heroin from appellant on another day before May 25, 2017. Robertson did not always use Steph or seek her assistance when contacting or dealing with appellant.

Appellant testified that he had been using heroin for "numerous years," but he had been participating in a methadone program for six years to try to "get off [of] heroin." That said, appellant still engaged in heroin-use at the time of trial. According to appellant, he was a "user" of narcotics, rather than a "dealer" of narcotics.

Appellant further testified that he met "Steph" at a methadone clinic, and he had known her for two or three months before being arrested in this case. Steph approached appellant several times trying to get heroin; Steph "called [him] over and over and over and over." Appellant explained that Steph put pressure on him, talked about how she knew a person named "Jerry," and "tr[ied] to get [him] to hook [Jerry] on so [they] c[ould] all have a good time on some [heroin]." Steph both

called and texted appellant. Eventually, Jerry made "two small buys" of heroin, and Steph was with him each time. The bulk of appellant's communications about these transactions were with Steph, and the transactions were at Steph's request. Appellant stated that he would not have sold narcotics if Steph had not put pressure on him. And the narcotics that appellant brought with him on May 25, 2017 were at the request of Jerry and Steph. Appellant testified that he did not get the $1,278 that law enforcement officers found on him and in his truck from selling narcotics.

On cross-examination, appellant stated that he did not deny that he committed the offenses with which he was charged and that he planned to meet Jerry on May 25, 2017 to sell him one ounce of heroin. He also thought that he was selling the cocaine in his possession to Jerry or to Steph that day. And although Steph introduced him to Jerry, appellant exchanged text messages with Jerry separately.

Standard of Review

We review complaints of jury-charge error under a two-step process. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). First, we must determine whether error exists in the charge, and, second, if error does exist, whether sufficient harm resulted from the error to require reversal. *Ngo*, 175 S.W.3d at 743–44; *Abdnor*, 871 S.W.2d at 731–32. If the defendant preserved error by timely objecting to the charge, an appellate court will reverse if the defendant shows that he suffered some harm as a

result of the error. *Sakil v. State*, 287 S.W.3d 23, 25–26 (Tex. Crim. App. 2009). We review a trial court's decision not to submit an instruction in the jury charge for an abuse of discretion. *See Wesbrook v. State*, 29 S.W.3d 103, 121–22 (Tex. Crim. App. 2000).

Entrapment Instruction

In his sole issue, appellant argues that the trial court erred in denying his request for a jury instruction on entrapment because appellant "produced more than a scintilla of evidence that he was coerced into committing the offenses" and he was harmed by the trial court's refusal. *See* TEX. PENAL CODE ANN. § 8.06(a).

A defendant is entitled to a jury instruction on any defensive theory raised by the evidence or testimony when such an instruction is properly requested. *Krajcovic v. State*, 393 S.W.3d 282, 286–87 (Tex. Crim. App. 2013); *Booth v. State*, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984); *see also* TEX. PENAL CODE ANN. § 2.03(c). Whether the evidence or testimony is presented by the defense or the State is irrelevant, as is the strength of the evidence or testimony. *Booth*, 679 S.W.2d at 500. Determining "[w]hether a defense is supported by the evidence is a sufficiency question reviewable on appeal as a question of law." *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). When the evidence fails to raise a defensive issue, the trial court does not err in refusing the defendant's requested instruction. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993).

"It is a defense to prosecution that the [defendant] engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense." TEX. PENAL CODE ANN. § 8.06(a). Conduct that merely affords a person a chance to commit an offense does not constitute entrapment. *Id.*

"[W]hen a defendant raises the defense of entrapment at trial, he has the burden of producing evidence to establish every element of that defense." *Hernandez v. State*, 161 S.W.3d 491, 497 (Tex. Crim. App. 2005). The defendant must show that (1) he engaged in the conduct charged, (2) because he was induced to do so by a law enforcement agent, (3) who used persuasion or other means, (4) which were likely to cause a person to commit the offense. *Id.*; *see also* TEX. PENAL CODE ANN. § 8.06(a). The defense has both subjective and objective elements. *Hernandez*, 161 S.W.3d at 497 n.11.

The subjective element requires evidence that the defendant, himself, was induced to commit the charged offense by the persuasiveness of law enforcement's conduct. *Id.* The objective element requires evidence that the persuasion was such as to cause an ordinarily law-abiding person of average resistance to still commit the offense. *Id.* Objective inducement occurs when law enforcement's tactics rise to the level of "active and overt persuasion, more than mere temptation." *England v. State*, 887 S.W.2d 902, 911 (Tex. Crim. App. 1994). Thus, "prohibited [law

enforcement] conduct c[ould] include pleas based on extreme need, sympathy, pity, or close personal friendship, offers of inordinate sums of money, and other methods of persuasion that are likely to cause the otherwise unwilling person—rather than the ready, willing and anxious person—to commit an offense." *Hernandez*, 161 S.W.3d at 497 n.11. Entrapment occurs when the activity of law enforcement induces a person, with no predisposition to illegal conduct, to commit a crime. *Martinez v. State*, 802 S.W.2d 334, 336 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd). Once a defendant makes a prima facie showing of each element of his entrapment defense, the State has the burden of persuasion to disprove entrapment beyond a reasonable doubt. *Hernandez*, 161 S.W.3d at 498.

The record reveals that appellant made a timely request for a jury instruction on entrapment and objected to the trial court's failure to include such an instruction in its charge. Appellant argues that he was entitled to a jury instruction on entrapment because "the deal was set up by a friend of his named Steph that he met at [a] methadone clinic," "Steph qualifies as a law enforcement agent for purposes of entrapment because she was acting as a confidential informant at the behest of law enforcement," "[i]t took Steph and undercover agents a full month to convince [a]ppellant to sell them narcotics," and appellant "would not have committed the offenses but for Steph's harassment." (Internal quotations omitted.)

An essential element of the defense of entrapment is evidence that the defendant was induced by *a law enforcement agent* to engage in the conduct with which he was charged. *See* TEX. PENAL CODE ANN. § 8.06(a); *Hernandez*, 161 S.W.3d at 497. Texas Penal Code section 8.06 states that the term "law enforcement agent" includes "personnel of the [S]tate and local law enforcement agencies as well as of the United States and *any person acting in accordance with instructions from such agents*." *See* TEX. PENAL CODE ANN. § 8.06(b) (emphasis added) (internal quotations omitted). Mere classification of a person as an informant is not enough, by itself, to establish that the informant meets the definition of a "law enforcement agent." *See id.* (internal quotations omitted); *Rangel v. State*, 585 S.W.2d 695, 699 (Tex. Crim. App. 1979); *Martinez*, 802 S.W.2d at 336. Rather, an informant must be acting under either the specific or general instruction of law enforcement. *Rangel*, 585 S.W.2d at 699; *Martinez*, 802 S.W.2d at 336.

Here, appellant makes no argument in his brief that Steph was acting under either the specific or general instruction of law enforcement. Instead, appellant merely asserts in a single conclusory sentence, without citation to appropriate authority or pertinent portions of the record, that "Steph qualifies as a law enforcement agent for purposes of entrapment because she was acting as a confidential informant at the behest of law enforcement." *See Tufele v. State*, 130 S.W.3d 267, 271 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Appellant has a

duty to cite specific legal authority and to provide legal argument based upon that authority."); *King v. State*, 17 S.W.3d 7, 23 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) ("Conclusory arguments which cite no authority present nothing for our review.").

An appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). And an appellant waives an issue on appeal if he does not adequately brief that issue by presenting supporting arguments, substantive analysis, and citation to authorities and the record. *See id.*; *Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000); *Wilson v. State*, 473 S.W.3d 889, 901 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *see also Wyatt v. State*, 23 S.W.3d 18, 23 n.5 (Tex. Crim. App. 2000) ("We will not make [defendant]'s arguments for him . . . ."). Because appellant, in his brief, offered no argument or authorities, nor any analysis, explanation, or appropriate citation to the record, to support his bald assertion that "Steph qualifies as a law enforcement agent" to establish the elements of his entrapment defense, we hold that appellant has waived his complaint that the trial court erred in denying his request for a jury instruction on entrapment. *See, e.g.*, *Watkins v. State*, 333 S.W.3d 771, 779 (Tex. App.—Waco 2010, pet. ref'd) (defendant's jury-charge complaint waived where defendant provided no authority

to support his position); *Torres v. State*, 979 S.W.2d 668, 674 (Tex. App.—San Antonio 1998, no pet.) (defendant's jury-charge complaint waived because of inadequate briefing); *see also Jones v. State*, No. 01-09-00267-CV, 2010 WL 5395682, at *8 (Tex. App.—Houston [1st Dist.] Dec. 30, 2010, no pet.) (mem. op., not designated for publication) (defendant waived complaint trial court erred by denying his requested instruction where defendant provided no meaningful argument or analysis in his briefing).

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

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