Reversed and Remanded and Memorandum Opinion filed July 9, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00532-CR

ED DOUGLAS WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 19CR0267

MEMORANDUM OPINION

Appellant Ed Douglas Williams appeals his conviction for engaging in organized criminal activity. Tex. Penal Code Ann. § 71.02. In a single issue, appellant argues the evidence is insufficient to support his conviction. The State concedes that the evidence is insufficient to support appellant's conviction for engaging in organized criminal activity but asserts that the evidence supports a conviction for the lesser-included offense of delivery of marijuana in an amount of five pounds or less but more than one-fourth of an ounce. Tex. Health & Safety Code

Ann. § 481.120. Having reviewed the record, we conclude (1) the evidence is insufficient to support appellant's conviction for engaging in organized criminal activity and (2) the evidence supports a conviction for the lesser-included offense. We reverse appellant's conviction for engaging in organized criminal activity, and remand with instructions to the trial court to reform the judgment to reflect a conviction for the offense of delivery of marijuana in an amount of five pounds or less but more than one-fourth of an ounce, and to hold a punishment hearing attendant to this post-reformation conviction.

BACKGROUND

Appellant was indicted for the offense of engaging in organized criminal activity. The indictment alleged that appellant participated in a "combination or in the profits of a combination, said combination consisting of the defendant and Cameron Matthew Ano[n]sen, Mallory Paige Arbuckle, Lorenzo Antonio Alfaro, Jemel Cherrod Lewis, and Jimmy Perez who collaborated in carrying on criminal activity, intentionally and knowingly commit[ing] the offense of Delivery of marihuana in an amount of five pounds or less but more than one-fourth ounce." The indictment also contained two enhancement paragraphs alleging appellant previously had been convicted of the felony offenses of aggravated sexual assault and failure to register as a sex offender.

Galveston Police Department officers instituted an undercover operation with the goal of purchasing marijuana from appellant. Detective Perez of the Galveston Police Department went undercover and asked to buy marijuana from appellant. Appellant supplied one ounce of marijuana in exchange for $200. In an effort to attach one criminal organization to another, Perez also asked appellant if he could purchase heroin from him. Appellant did not sell heroin but introduced Perez to Cameron Anonsen, described as a "middleman for heroin."

Perez subsequently arranged to purchase heroin from Anonsen. Perez told Anonsen he was not a heroin user but was looking to "get into the heroin game." After Perez's introduction to Anonsen, Anonsen did not follow up on the heroin transaction. Perez contacted appellant and expressed frustration with Anonsen's lack of communication. Perez asked appellant if he knew anyone else who sold heroin, but appellant said he did not. Perez eventually bought one gram of heroin from Anonsen.

When Perez asked to buy more heroin, Anonsen introduced Perez to Mallory Arbuckle, Jermel Lewis, and Lorenzo Alfaro. Perez subsequently purchased approximately three and a half grams of heroin from Arbuckle, and approximately two grams of heroin from Alfaro. When Perez tried to purchase heroin from Lewis, Lewis sold him liquid heroin. Perez did not recognize the liquid as heroin and instructed Anonsen to get a refund, which Anonsen did. Anonsen acted as intermediary in all three transactions; appellant was not present at any of the heroin transactions.

Detective Healy of the Galveston Police Department testified that there was no direct connection, outside of Anonsen, between appellant and Arbuckle, Lewis, and Alfaro. Healy testified that in his experience it was common in the drug trade for organizations to specialize in one type of illegal drug but to refer potential buyers to other organizations. In other words, the dealers collaborated to generate more sales but did not cross boundaries with the same product. Arbuckle, Lewis, and Alfaro were strictly heroin dealers; they did not supply marijuana to appellant.

Officers executed a search warrant on appellant's home and recovered marijuana and "narcotics paraphernalia," including scales, a ledger, baggies, and cigarette wrappers. The officers recovered appellant and Anonsen's cell phones. Extraction of evidence from the phones showed texts between appellant and

Anonsen discussing purchasing marijuana.

At trial, after the State rested, appellant moved for a directed verdict on the charge of engaging in organized criminal activity. Appellant argued that to be convicted of the offense, the Penal Code requires participation by at least three individuals in the delivery-of-marijuana transaction. Appellant argued that the State presented evidence of only two individuals: appellant and Perez, the undercover officer. The State responded, arguing that Anonsen also was involved in the delivery of marijuana, making it a combination of three people, which met the Penal Code definition of a combination. The trial court denied appellant's motion for instructed verdict. (4RR 213) The jury found appellant guilty of the offense of engaging in organized criminal activity as charged in the indictment.

In a single issue on appeal appellant argues the evidence is insufficient to support his conviction for engaging in organized criminal activity.

ANALYSIS

I. Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, we must consider all of 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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012). In our review, we consider all of the evidence in the record, whether admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). We measure the sufficiency of the evidence supporting a conviction by comparing the evidence presented during the trial to the elements of the offense as defined in a hypothetically-correct jury charge. *Hernandez v. State*, 556 S.W.3d 308, 312 (Tex.

Crim. App. 2017). The jury is the sole judge of the credibility of witnesses and the weight afforded their testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may choose to believe or disbelieve all or a portion of a witness's testimony, and we presume that the jury resolved any conflicts in the evidence in favor of the prevailing party. *See Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016).

Evidence is sufficient if the inferences necessary to establish guilt are reasonable based on the cumulative force of all the evidence when considered in the light most favorable to the verdict. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Further, the jury's verdict will be upheld unless "a rational factfinder must have had reasonable doubt as to any essential element." *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009).

II. The evidence is insufficient to prove that appellant engaged in organized criminal activity.

Appellant was indicted under section 71.02 of the Penal Code for engaging in organized criminal activity by participating in a combination consisting of appellant, Anonsen, Arbuckle, Alfaro, Lewis, and Perez, who were alleged to have collaborated in delivery of marijuana in the amount of five pounds or less but more than one-fourth ounce. Section 71.02 provides that a person commits the offense of engaging in organized criminal activity "if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit . . . unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug[.]" Tex. Penal Code Ann. § 71.02(a)(5). The Penal Code defines "combination" as "three or more persons who collaborate in carrying on criminal activities[.]" Tex. Pen. Code Ann. § 71.01(a).

The record contains no evidence that three or more persons collaborated to deliver marijuana. To prove the offense, the State is required to prove that the defendant committed the predicate offense with the specific intent to participate in or facilitate a combination. *Smith v. State,* 500 S.W.3d 685, 691 (Tex. App.—Austin 2016, no pet.). In proving the existence of a combination, the State need not demonstrate the participation of all alleged members of the combination; the State need only prove the participation of at least three of the named members of the combination. *Id*.

Viewing the evidence in the light most favorable to the verdict, the only participants in the delivery of marijuana were appellant, Anonsen, and Perez. As the State concedes, "while the evidence shows [appellant] introduced Undercover Officer Perez to Anonsen for the purpose of buying heroin, there is no evidence [appellant] was involved in a combination with Alfaro, Lewis, or Arbuckle to deliver marijuana." The record reflects that Alfaro, Lewis, and Arbuckle were engaged in delivering heroin, but not marijuana. That leaves appellant, Anonsen, and Officer Perez to complete the combination of three persons engaged in the delivery of marijuana.

Perez, as an undercover officer, however, cannot be a member of a combination under the statute because, as an undercover officer, he was not engaged in carrying out criminal activities, but was engaged in the lawful activity of enforcing the law. *See Humphrey v. State*, 626 S.W.2d 816, 816–17 (Tex. App.—Corpus Christi 1981, no pet.) (holding evidence was insufficient to support an engaging-in-criminal-activity conviction where two undercover agents who were named in the indictment could not be members of the combination because they were carrying out lawful activities, i.e., the enforcement of State law). Here, Perez was engaged in the lawful activity of enforcing laws against delivery of illegal narcotics. Therefore,

applying the appropriate standard of review, and viewing the evidence in the light most favorable to the verdict, we hold the evidence is insufficient to support appellant's conviction for engaging in organized criminal activity. We sustain appellant's sole issue on appeal.

III. The evidence is sufficient to support a conviction for the lesser-included offense of delivery of marijuana.

Concluding insufficient evidence supports appellant's conviction for engaging in organized criminal activity does not end our inquiry. The Court of Criminal Appeals has instructed the courts of appeals that in deciding whether a judgment of conviction may be reformed to reflect a conviction for a lesser-included offense, we must determine whether the following two conditions are met: (1) the jury necessarily found every element necessary to convict the appellant of the lesser-included offense when it convicted the appellant of the greater-inclusive offense, and (2) there is sufficient evidence to support a conviction for the lesser-included offense. *Thornton v. State*, 425 S.W.3d 289, 298–300 (Tex. Crim. App. 2014). These requirements satisfy the due process protections inherent in legal-sufficiency review by preventing arbitrary deprivation of liberty based on charges never filed while also ensuring that the State carries its burden to prove each element of the charged offense beyond a reasonable doubt. *Walker v. State*, 594 S.W.3d 330, 338 (Tex. Crim. App. 2020). It also serves to give effect to the jury's verdict by tying reformation to what the jury necessarily found when it reached that verdict. *Id.*

We first address whether the jury necessarily found every element necessary to convict appellant of the lesser-included offense when it convicted appellant of the greater offense. The indictment charged appellant with participating in a combination of individuals who collaborated in carrying on criminal activity, to wit: delivery of marijuana in an amount of five pounds or less but more than one-fourth

of an ounce. By its verdict the jury found appellant guilty "as charged in the indictment." To prove "engaging in organized criminal activity" the State must establish that the defendant committed the predicate offense, in this case delivery of marijuana, with the specific intent to participate in or facilitate by an agreement of the persons involved to act together to commit the offense. Tex. Penal Code Ann. § 71.02(a)(5); *see also Smith*, 500 S.W.3d at 691. By convicting appellant of the greater offense, the jury necessarily found that he committed the lesser offense of delivery of marijuana. *See Adams v. State*, 40 S.W.3d 142, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (holding that by convicting defendant for engaging in organized crime the jury necessarily found that defendant committed lesser-included offense alleged in indictment).

Turning to whether legally sufficient evidence supports a conviction for the lesser offense, we note that in this case, although not required for reformation under *Thornton*, the jury was instructed on the lesser-included offense of delivery of marijuana in an amount of five pounds or less but more than one-fourth of an ounce. A person commits the offense of delivery of marijuana if he knowingly or intentionally delivers marijuana. Tex. Health & Safety Code Ann. § 481.120. The record reflects that Perez engaged appellant for the purpose of purchasing one ounce of marijuana for $200 from appellant. After some negotiation appellant sold Perez one ounce of marijuana for $200. Appellant does not dispute the sale of marijuana to Perez, stating in his appellate brief, "The State proved nothing more than that the appellant sold one ounce of marijuana to [O]fficer Perez." Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient to convict appellant of the lesser-included offense of delivery of between one-fourth of an ounce and five pounds of marijuana.

In appellant's prayer for relief, he prayed for reversal and acquittal, or in the

alternative, "a new trial or that appellant's sentence will be set aside and for such other and further relief to which appellant may be justly entitled." Appellant's sole issue on appeal challenges the legal sufficiency of the evidence to support his conviction. Appellant has not raised an issue on appeal that would entitle him to a new trial on guilt/innocence. After concluding the evidence is legally insufficient to support appellant's conviction for engaging in organized criminal activity, we have determined that (1) the jury necessarily found every element necessary to convict the appellant of delivery of marijuana when it convicted the appellant of engaging in organized criminal activity, and (2) legally sufficient evidence supports a conviction for delivery of marijuana. In this context, the Court of Criminal Appeals has instructed that the appropriate disposition is to reverse the trial court's judgment and remand to the trial court to reform the judgment to reflect a conviction for the lesser-included offense and to hold a new punishment hearing attendant to this post-reformation conviction. *See Thornton*, 425 S.W.3d at 307.

CONCLUSION

We have determined that (1) the evidence is insufficient to support appellant's conviction for engaging in organized criminal activity; (2) the jury necessarily found every element necessary to convict appellant of delivery of marijuana when the jury convicted appellant of engaging in organized criminal activity; and (3) the evidence is sufficient to support a conviction for the lesser-included offense of delivery of marijuana. Therefore, we reverse the trial court's judgment and remand to the trial court to reform the judgment to reflect a conviction for the offense of delivery of marijuana in the amount of five pounds or less but more than one-fourth ounce and to hold a punishment hearing attendant to this post-reformation conviction.

/s/ Jerry Zimmerer
Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant.

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