Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00856-CR

KEVIN DEWAYNE LAVIGNE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 777,461

O P I N I O N

Appellant was charged by indictment with the felony offense of possession of less than one gram of cocaine, enhanced with two prior felony convictions. A jury found appellant guilty as charged in the indictment, found both enhancement paragraphs true, and assessed punishment at confinement for ten years in the Institutional Division of the Texas Department of Criminal Justice. We affirm.

Appellant's court-appointed attorney filed a brief in which she concludes that the appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The brief presents a professional evaluation of the record

demonstrating why there are no arguable points of error to be advanced. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of his right to examine the appellate record and to file a *pro se* response. Appellant has filed a *pro se* response to the *Anders* brief asserting two arguable points of error: (1) that there is no evidence to support his conviction; and (2) that counsel rendered ineffective assistance at trial.

LEGAL SUFFICIENCY OF THE EVIDENCE

First, appellant claims there is insufficient evidence to support his conviction. In determining whether the evidence is legally sufficient to support the verdict, we will 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. *See Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). In conducting this review, we will not re-evaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). We do not weigh the evidence tending to establish guilt against the evidence tending to establish innocence. *See Ex Parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). If the evidence of guilt standing alone is sufficient for a rational trier of fact to believe in the guilt of the defendant, we do not care how much credible evidence was presented to establish innocence. *See id.* To establish unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised care, custody, control, or management over the contraband; and (2) the accused knew the matter possessed was contraband. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). We view the evidence in the light most favorable to the verdict to determine if the State met its burden.

On August 10, 1997, police observed appellant and two companions walking down the center of the street in an area known for narcotics dealings and prostitution. Appellant's right hand was closed in a fist. Police attempted to detain appellant and his companions for violating a city ordinance that prohibits walking in the street when sidewalks are provided. Appellant ignored an order to place his hands on the

hood of the police car. Instead, he walked toward the rear of the car, turned his back to the police car, tilted his head back, and placed his right hand to his mouth. Appellant was observed shoveling what appeared to be a handful of crack cocaine rocks into his mouth. While appellant was chewing the substance, officers exited their police car and ordered appellant to spit out the substance. Appellant continued chewing and began striking the officers with his fists. While officers attempted to subdue and handcuff appellant, appellant reached into his pants' pocket, retrieved what appeared to be more crack cocaine, placed it in his mouth, and chewed and swallowed the substance.

During the course of the struggle to handcuff appellant, when officers bent appellant's body over the hood of the patrol car, some flakes of the substance appellant had been chewing fell out of his mouth and landed on the hood of the car. After appellant fled on foot and was caught and handcuffed, officers retrieved a minuscule amount ("like a bunch of grains of salt") of the substance that had fallen from appellant's mouth from the hood of the car. A chemist performed five separate tests on the substance recovered from the hood which tested positive for cocaine.

After appellant was transported to the hospital emergency room, he went into convulsions and lost consciousness. A drug test performed on appellant on the date of his admission to the hospital was positive for cocaine. Medical records admitted in evidence at trial show that appellant was hospitalized following his arrest for about eighteen days for a drug overdose. A chemical dependency counselor who consulted with appellant at the hospital testified that appellant told him that he was not addicted to drugs but had swallowed large amounts of cocaine to avoid arrest.

Because (1) appellant was seen chewing and swallowing what was determined to be cocaine, and (2) a drug test performed on appellant was positive for cocaine, and (3)appellant was hospitalized for several weeks as the result of a drug overdose, and (4) appellant admitted he had swallowed cocaine to avoid arrest, we find that a rational trier of fact could have found beyond a reasonable doubt that appellant exercised care, custody, control, and management over the contraband and that appellant knew the substance possessed was contraband. *See Harmond v. State*, 960 S.W.2d 404, 406 (Tex. App.–Houston [1st Dist.] 1998, no pet.); *Nelson v. State*, 881 S.W.2d 97, 100 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). We hold that the evidence was legally sufficient.

FACTUAL SUFFICIENCY OF THE EVIDENCE

After an appellate court determines that the evidence is legally sufficient to support the verdict, the court may proceed to determine factual sufficiency. *See Clewis v. State*, 922 S.W.2d at 129. Factual sufficiency review begins with the presumption that the evidence supporting the jury's verdict was legally sufficient to support the conviction. *See Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.–Austin 1992, pet. ref'd, untimely filed). Because the reviewing court is not bound to view the evidence in the light most favorable to the prosecution, it may consider the testimony of defense witnesses and the existence of alternative hypotheses. *See Schexnider v. State*, 943 S.W.2d 194, 198 (Tex. App.–Beaumont 1997, no pet.). We are only to reverse if, upon viewing all of the evidence and taking into account all reasonable inferences, we find the verdict is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. *See Clewis v. State*, 922 S.W.2d at129.

In this case, appellant presented no witnesses nor physical evidence in his behalf. He attempted to raise reasonable doubt during the trial through cross-examination of the State's witnesses by his trial counsel. This was an attempt to raise an alternative hypothesis that appellant had ingested Tylenol 3 instead of cocaine. The jury chose, however, to disregard appellant's hypothesis. We cannot say that the jury's verdict was so contrary to the overwhelming weight of the evidence as to be manifestly unjust, or that the verdict shocks the conscience, or clearly demonstrates bias. *See Clewis v. State*, 922 S.W.2d at 129; *Stone v. State*, 823 S.W.2d at 381. Thus, we conclude the evidence is factually sufficient to support appellant's conviction for possession of cocaine.

EFFECTIVE ASSISTANCE OF COUNSEL

Appellant claims that trial counsel rendered ineffective assistance as evidenced by his failure to: (1) object to the admission of appellant's oral confession; (2) object to the admission of appellant's medical records; (3) object to testimony involving the flake of cocaine; (4) request a verdict of not guilty from the jury; (5) request the judge to instruct the jury to render a verdict of not guilty; and (6) object to unspecified hearsay. In order to establish a claim for ineffective assistance of counsel, the defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different. *See Perrett v. State*, 871 S.W.2d 838, 840 (Tex.App.–Houston [14th Dist.] 1994, no pet.) (*citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App.1986). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *See Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

Judicial scrutiny of counsel's performance must be highly deferential. *See Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2052. A reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See id.* Counsel's performance must be judged by the totality of the representation. *See Chatham v. State*, 889 S.W.2d 345, 349 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd). An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *See id.* at 351. Under the *Strickland* test, the defendant bears the burden of proving ineffective assistance of counsel. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Contentions of ineffectiveness must be proved by the accused by a preponderance of the evidence. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993). Following *Strickland*, we must determine, for each instance of ineffective assistance cited by appellant, whether defense counsel's performance was deficient before we reach the prejudice prong of the *Strickland* test. *See Jackson v. State*, 877 S.W.2d at 771.

Oral Confession

Appellant argues that counsel was ineffective for failing to object to the introduction in evidence of appellant's oral confession. Robert Balderas, a chemical dependency counselor at Ben Taub Hospital, where appellant was admitted following a drug overdose, testified at trial. Balderas testified that it was his job to screen, assess and refer patients who had been referred to him by the medicine teams at the hospital after those patients had tested positive for illegal drugs. Appellant was referred to Balderas by one of the doctors at the hospital. Balderas visited appellant in the hospital and explained that "if he [appellant] had any problems with chemical dependency, I would be glad to give him information about all the resources

available." Appellant informed Balderas that he was not addicted to drugs and the reason he overdosed on cocaine was because he had swallowed large amounts of cocaine to avoid arrest. Appellant's attorney objected to the testimony on the basis of hearsay. The court overruled counsel's objection.

The voluntary statements made by appellant were not the result of custodial interrogation because the chemical dependency counselor was not a police officer, nor was he acting at the request of police officers to elicit incriminating information from appellant. The questions asked by the counselor, and appellant's responses to them, were for the purpose of determining whether appellant needed information on resources available to persons who are chemically dependant. There is no indication that the statement was not voluntary. Statements which are not the result of custodial interrogation are admissible under Article 38.22 of the Texas Code of Criminal Procedure on the question of guilt. *See Hoover v. State*, 603 S.W.2d 882, 883 (Tex. Crim. App. 1980) (finding that statements made by an accused to a counselor at a residential treatment center were admissible and not the product of custodial interrogation); *Arnold v. State*, 659 S.W.2d 45, 48 (Tex. App.–Houston [14th Dist.] 1983, no pet.) (holding that questions by nurse who treated the accused in the emergency room after his arrest did not constitute custodial interrogation and appellant's responses to her questions were voluntary and properly admitted in evidence). Since appellant's counsel did object to the testimony of the drug counselor in the instant case, but the testimony was properly admitted as discussed above, ineffective assistance of counsel is not demonstrated.

Medical Records

Appellant's argues that ineffective assistance of counsel is demonstrated by counsel's failure to object to the introduction of appellant's medical records. When the State moved to introduce appellant's medical records in evidence, trial counsel objected claiming improper notice. The court overruled the objection after determining that the medical records had been in the clerk's file for more than fourteen days.

The Texas Rules of Evidence allow the introduction of business records if they are filed with the clerk of the court at least fourteen days prior to the day on which the trial commences. *See* Tex. R. Evid. 902(10)(a). Counsel admitted that the records had been properly filed within the required time period; thus, his objection was properly overruled. There is no indication in the record that counsel had not

reviewed the medical records prior to trial and was therefore inadequately prepared. Ineffective assistance of counsel is not shown.

Testimony Regarding the Flake of Cocaine

Without elaboration, appellant complains that trial counsel was ineffective for failing to object to all testimony surrounding the flake of cocaine. We are unable to determine the basis for appellant's allegation. The police officer who observed the flakes of cocaine fall out of appellant's mouth onto the hood of the patrol car was entitled to relate the facts of the offense to the jury as he witnessed those facts on the date of the offense. It was also proper to allow testimony of the chain of custody of the flakes from the crime scene to the courtroom. Ineffective assistance of counsel is not shown by counsel's failure to object to such testimony.

Request For Verdict of Not Guilty

Appellant complains that trial counsel was ineffective for failing to: (1) request a verdict of not guilty from the jury; and (2) request the judge to instruct the jury to render a verdict of not guilty. In fact, trial counsel did argue to the jury at the guilt or innocence phase of the trial as follows: "And I am asking you to find Mr. Lavigne not guilty in [this case] because, in fact, the State did not prove all of the elements of the offense."

As stated previously, the evidence was sufficient to support the jury's finding that appellant knowingly possessed a controlled substance. Consequently, failing to request an instructed verdict after the admission of sufficient evidence does not render counsel ineffective. *See Jenkins v. State,* 870 S.W.2d 626, 630 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd); *McGarity v. State,* 5 S.W.3d 223, 229 (Tex. App.–San Antonio 1999, no pet.).

Failure to Object to Hearsay

Appellant queries without discussion, citation to the record, or supporting authority whether counsel was ineffective for failing to object to unspecified hearsay testimony regarding the events of the offense. Contrary to appellant's assertion, our review of the record reveals that counsel did object on the basis of hearsay during the trial.

Further, in order to successfully argue on appeal that his trial counsel's failure to object to evidence as hearsay constituted ineffective assistance of counsel, appellant must show that the trial judge would have committed error in overruling such an objection and that there was no reasonable trial strategy for failing to object. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996); *Johnson v. State*, 987 S.W.2d 79, 90 (Tex. App.–Houston. [14th Dist.] 1998, pet. ref'd). Appellant has not made such a showing. Further, isolated failures to object do not demonstrate ineffective assistance of counsel at trial. *See Bridge v. State,* 726 S.W.2d 558, 571 (Tex. Crim. App. 1986). No Texas court defines the right to effective counsel as the right to error-free counsel. *See Hernandez v. State,* 726 S.W.2d 53, 58 (Tex. Crim. App. 1986). Appellant has not demonstrated ineffective assistance of counsel.

After reviewing the record, counsel's brief, and appellant's response, we agree with appellate counsel that the appeal is frivolous and without merit. We find nothing in the record that might arguably support the appeal.

The judgment of the trial court is affirmed and the motion to withdraw is granted.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed April 27, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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