**Affirmed and Opinion filed October 14, 1999.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-00592-CR**

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**RICKIE LYNN GRAVES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 268th District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 29,378 A**

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## O P I N I O N

A jury found Rickie Lynn Graves, appellant, guilty of possession of a controlled substance, and the trial court assessed his punishment at 50 years confinement. In two points of error, appellant contends: (1) the trial court erred in excluding Officer Chevalier as a witness for appellant, and (2) the evidence is factually insufficient to sustain his conviction. We affirm.

Appellant chose to represent himself with the assistance of an appointed trial counsel. Appellant is an inmate of TDCJ and was part of an inmate shakedown with other inmates in appellant's dormitory at TDCJ on June 3, 1997. Correctional Officer Connie Jackson (Jackson) was searching the inmates for contraband or weapons on that day. Appellant raised his hands to be searched, and Jackson took his

wallet out of his hand and opened it. While Jackson was taking things out of appellant's wallet, appellant asked Jackson to return his property. Jackson looked further and found a piece of toilet paper in appellant's wallet which contained two marijuana cigarettes. Jackson put the two cigarettes in her pocket to keep appellant from grabbing and disposing of them. Appellant asked Jackson to flush the cigarettes down the commode. At the trial, Jackson identified the two cigarettes and stated: "[I]t looks like the – two cigarettes I had gotten off of him, other than the torn part." Nguyen, a Department of Public Safety (DPS) chemist, testified that the two cigarettes were hand-rolled marijuana cigarettes and weighed 0.17 grams. He said the cigarettes were initially weighed by Stacy Little, a chemist who had since quit the department. Little determined the weight of the cigarettes as being .22 grams. Nguyen had to reanalyze the cigarettes because Little was no longer with the department. Little destroyed a small amount to conduct the initial test; the cigarettes weighed 0.05 grams less than when Nguyen first weighed the cigarettes. He determined the cigarettes weighed .17 grams, were wrapped in cigarette paper, and the contents were marijuana.

Lieutenant Louis Aguilar (Aguilar), the supervisor of correctional officers at appellant's unit in TDCJ, stated he was making his rounds and met Jackson. Jackson handed Aguilar the two marijuana cigarettes that she had taken from appellant. Aguilar completed a chain of custody form, and then dropped the cigarettes into a locked evidence box.

Tom Casey, an investigator with Internal Affairs of TDCJ, testified that he signed the chain of custody form as receiving the cigarettes from the evidence box on June 3 at 4:15 p.m., and turned them over to DPS for testing the next day. Before turning the cigarettes over to the DPS, Casey field tested the cigarettes, and they tested positive for marijuana. After appellant's motion for an instructed verdict was overruled, he made his opening statement to the jury to the effect that the State's witnesses had lied, and the whole case was a conspiracy to get appellant because he does a lot of legal work for fellow inmates. Appellant called Aguilar, Warden Green, and the unit's disciplinary investigator, Ben Vasquez. Appellant asked them questions concerning a prior disciplinary case against appellant filed by Aguilar that was subsequently dismissed because the wrong inmate had been named in the charge. Vasquez and the warden indicated that Aguilar had acted appropriately with the information he had at the time of the investigation.

Inmate Anthony Bordano testified that Jackson stopped appellant for a shakedown, and that appellant took "stuff" out of his pocket and handed it to her. Bordano stated appellant was helping him with a legal matter. Bordano stated Jackson bent down and picked "something up" from the ground, then said: "Look what we have here, we have some cigarettes." Jackson then called Aguilar who identified the cigarettes as marijuana. Another inmate, Cranston Smith, Jr., also stated that Jackson stooped over to "do something, and she came back out with something in a white paper." Jackson then ordered Smith to leave the area.

In his first point of error, appellant contends the trial court erred in refusing to allow Officer Chevalier to testify. Appellant subpoenaed fourteen TDCJ employees as witness for his defense, including Chevalier. Prior to appellant's presentation of his case, the trial court heard a motion by the State to exclude testimony from numerous witnesses appellant proposed to call. Officer Chevalier had been subpoenaed, and his subpoena had not been quashed at the time of trial. The trial court found that several witnesses did not know anything about the stated offense, and excluded these witnesses because their testimony was not relevant to the case. As concerned Chevalier, the following question/answer exchange between the trial court and appellant took place:

> [PROSECUTOR]: Well, hold on, Mr. Graves. The next witness that he has, Your Honor, is Officer Chevalier, who is, I believe, a corrections officer at the Central Unit.
>
> THE COURT: What is the necessity of those individuals?
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> APPELLANT: Well, he was ordered by the Lieutenant [Aguilar] to do certain things.
>
> THE COURT: What certain things?
>
> APPELLANT: Write false disciplinary cases against me.
>
> THE COURT: Scratch her. It has nothing to do with this case. It's not relevant to this case.
>
> APPELLANT: He told her to write a case for me for –

THE COURT: For this case?

APPELLANT: No –

THE COURT: Did she write this case against you?.

APPELLANT: No, sir.

THE COURT: Well, then it's not relevant to these proceedings, is it?

APPELLANT: But he ordered her to write a previous case for marijuana.

Appellant contends the trial court abused its discretion in not allowing Chevalier to testify, and that Chevalier's testimony had bearing on the bias and prejudice of Aguilar towards him. Appellant has not preserved this complaint for appellate review. Texas Rule of Evidence 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the court by offer or proof or was apparent from the context within which questions were asked. *Warner v. State*, 969 S.W.2d 1, 2 (Tex.Crim.App.1998). An offer of proof may be in question-and-answer form, or it may be in the form of a concise statement by counsel. *Love v. State*, 861 S.W.2d 899, 901 (Tex.Crim.App.1993); TEX. R. EVID. 103(b). An offer of proof to be accomplished by counsel's concise statement must include a reasonably specific summary of the evidence offered and must state the relevance of the evidence unless the relevance is apparent, so that the court can determine whether the evidence is relevant and admissible. *Love*, 861 S.W.2d at 901. In this case, appellant made no offer of proof nor a bill of exceptions to show the *facts* which appellant could have proved through cross-examination of Chevalier. Appellant stated generally that Chevalier had written up a false disciplinary report at some unknown time for some unknown reason at the alleged direction of Aguilar, which could establish bias and prejudice towards appellant in the present case. The trial court properly refused to hear Chevalier's testimony stating that such testimony would not be relevant to the pending case. We find appellant's statement on the record is insufficient to preserve error for review. *See Love*, 861 S.W.2d at 900-901. We overrule appellant's point of error one.

In point two, appellant challenges only the factual sufficiency of the evidence to sustain his conviction. Specifically, appellant contends that: (1) Jackson could not readily identify the marijuana offered into evidence as being the same evidence she took from appellant; (2) the evidence showed the cigarettes initially weighed .22 grams, yet later the chemist testified they weighed .17 grams; and, (3) two inmates testified that Jackson took appellant's wallet, put it down, then stooped over and picked up "something white." Appellant argues that the discrepancies in the evidence outweigh the State's proffered testimony.

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id*.

As stated, a factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id*.

Appellant's argument goes to the weight of the evidence and the credibility of the witnesses. The jury chose to believe the State's witnesses and disbelieve appellant's witnesses. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an

evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant possessed the drugs in a penal institution is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We overrule appellant's point of error two, and we affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed October 14, 1999.
Panel consists of Justices Draughn, Lee, and Hutson-Dunn*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe Draughn, Norman Lee, and D. Camille Hutson-Dunn, sitting by assignment.