PD-0275&0276-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/12/2018 2:25 PM
Accepted 3/13/2018 4:19 PM
DEANA WILLIAMSON
CLERK

Nos. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/13/2018
DEANA WILLIAMSON, CLERK

SHANNA LYNN HUGHITT, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Brown County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Shanna Lynn Hughitt.

* The trial judge was Hon. Stephen Ellis, Presiding Judge, 35th District Court, 200 S. Broadway, Ste. 212, Brownwood, Texas 76801.

* Counsel for Appellant at trial was Stuart Holden, P.O. Box 633, Ballinger, Texas 76821.

* Counsel for Appellant on appeal was James Stafford, 515 Caroline Street Houston, Texas 77002.

* Counsel for the State at trial were Elisha Bird and Christina Nelson, Assistant District Attorneys, 35th Judicial District Attorney's Office, 200 S. Broadway, Ste. 323, Brownwood, Texas 76801.

* Counsel for the State before the court of appeals was Elisha Bird, Assistant District Attorney, 35th Judicial District Attorney's Office, 200 S. Broadway, Ste. 323, Brownwood, Texas 76801.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

IDENTITY OF JUDGE, PARTIES, AND COUNSEL i

INDEX OF AUTHORITIES iv

STATEMENT OF THE CASE 2

STATEMENT OF PROCEDURAL HISTORY 2

GROUNDS FOR REVIEW 3

1. Is possession with intent to deliver a predicate offense for engaging in organized criminal activity because it falls within "unlawful manufacture, delivery . . . of a controlled substance," which is one of EOCA's enumerated predicate offenses?

2. The court of appeals ignored basic rules of sufficiency review when it concluded Appellant could not jointly possess or be a party to the possession of contraband found on another's person.

ARGUMENT 3

I. Issue One 3

A. The court of appeals erred in its interpretation of § 71.02(a)(5). 3

B. Two other courts of appeals decisions and numerous other prosecutions 8

II. Issue Two 9

A. The evidence 9

B. The court of appeals's opinion 12

C. The court of appeals disregarded the basic sufficiency rules and fashioned one of its own for contraband on another's person 13

PRAYER FOR RELIEF 18

CERTIFICATE OF COMPLIANCE 19

CERTIFICATE OF SERVICE 19

APPENDIX

INDEX OF AUTHORITIES

Cases

Adkins v. State, No. 07-07-0387-CR, 2008 WL 1903465 (Tex. App.—Amarillo, Apr. 30, 2008, no pet.) (not designated for publication) 9

Allen v. State, No. 11-10-00354-CR, 2012 WL 3264488 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd) (not designated for publication) 9

Beardsley v. State, 738 S.W.2d 681 (Tex. Crim. App. 1987) 16

Boykin v. State, 818 S.W.2d 782 (Tex. Crim. App. 1991) 4

Bridgeforth v. State, No. 11-10-00356-CR, 2012 WL 3264490 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd, untimely filed) (not designated for publication) 9

Burt v. State, No. 11-15-00125-CR, 2017 WL 3923484 (Tex. App.—Eastland, Aug. 31, 2017, pet. ref'd on other grounds) (not designated for publication) 8

Evans v. State, 202 S.W.3d 158 (Tex. Crim. App. 2006) 14, 15

Gomez v. State, No. 03-05-00730-CR, 2007 WL 3306495 (Tex. App.—Austin, Nov. 9, 2007, no pet.) (not designated for publication) .. 17

Hernandez v. State, 538 S.W.2d 127 (Tex. Crim. App. 1976) 15

Horne v. State, No. 07-07-0498-CR, 2009 WL 649702 (Tex. App.—Amarillo Mar. 13, 2009, pet. ref'd) (not designated for publication) 8

Hughitt v. State, ___ S.W.3d ___, Nos. 11-15-00277-CR & 11-15-00278-CR, 2018 WL 827227 (Tex. App.—Eastland Feb. 8, 2018) ..... *passim*

Jackson v. Virginia, 443 U.S. 307 (1979) 10, 14

Lopez v. State, 108 S.W.3d 293 (Tex. Crim. App. 2003) 4

Maryland v. Pringle, 540 U.S. 366 (2003) 16

Nichols v. State, 653 S.W.2d 768 (Tex. Crim. App. 1981) 7

Smith v. State, No. 11-10-00355-CR, 2012 WL 3264489 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd) (not designated for publication) 9

State v. Colyandro, 233 S.W.3d 870 (Tex. Crim. App. 2007) 7

State v. Foster, No. 06-13-00190-CR, 2014 WL 2466145 (Tex. App.—Texarkana June 2, 2014, pet. ref'd on this issue) (not designated for publication) 8

Tate v. State, 500 S.W.3d 410 (Tex. Crim. App. 2016). 14

United States v. Batista-Polanco, 927 F.2d 14 (1st Cir. 1991) 15

Walker v. State, No. 07-16-00245-CR, 2017 WL 1292006 (Tex. App.—Amarillo, Mar. 30, 2017, pet. granted on other grounds) (not designated for publication) 8

Weinn v. State, 326 S.W.3d 189 (Tex. Crim. App. 2010) 4

Williams v. State, No. 11-12-00103-CR, 2014 WL 3865786 (Tex. App.—Eastland July 31, 2014, no pet.) (not designated for publication) 8

Willis v. State, No. 11-10-00224-CR, 2012 WL 3525622 (Tex. App.—Eastland Aug. 16, 2012, no pet.) (not designated for publication) 8

Statutes

Act of 1973, 63rd Leg., R.S., ch. 429, 1973 Tex. Gen. Laws 1132 (H.B. 447) 6

Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151).. 6

TEX. GOV'T CODE § 311.024 5

TEX. HEALTH & SAFETY CODE § 481.112 4

TEX. HEALTH & SAFETY CODE § 481.113 4

TEX. HEALTH & SAFETY CODE § 481.114 4

TEX. PENAL CODE § 30.02 5

TEX. PENAL CODE § 7.02(a)(2) 15

TEX. PENAL CODE § 71.02(a)(5) 3, 5

TEX. REV. CIV. STAT. art. 4476-15 § 4.03 6

TEX. REV. CIV. STAT. art. 4476-15 § 4.09 7

Other Authorities

Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 6

Nos. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SHANNA LYNN HUGHITT, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

The court of appeals in this published case, in addition to two other courts of appeals, have now determined that possession with intent to deliver is not a predicate offense for engaging in organized criminal activity (EOCA).[1] Their interpretation, however, is inconsistent with a plain reading of the statute as a whole. Regardless, there is a need for final, statewide resolution of this issue, as prosecutions of this

[1] The State Prosecuting Attorney has assumed the truth of that position in a case pending before this court. *Walker v. State*, No. PD-0399-17 (petitioning for review of Cause 07-16-00245-CR (Tex. App.—Amarillo, Mar. 30, 2017, pet. granted).

kind continue to arise. The court of appeals also undermines traditional sufficiency analysis and raises new doubts about joint possession and accomplice liability when contraband is found on someone else's person.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

A jury found Appellant guilty of engaging in organized criminal activity (EOCA) with possession of a controlled substance with intent to deliver as the predicate offense, 23116 CR[2] at 15, and possession of between 4 and 200 grams of methamphetamine with the intent to deliver. 23242 CR at 13. The court of appeals held that possession with intent to deliver is not a predicate offense for EOCA and vacated that conviction. It also reversed the possession conviction for insufficient evidence, reformed to the lesser of possession of between 1 and 4 grams of methamphetamine with intent to deliver, and remanded for new punishment.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its original opinion on October 31, 2017. The State's November 14, 2017 motion for rehearing was denied February 8, 2018. The

---

[2] The State will refer to the clerk's records by trial cause number.

court of appeals withdrew its prior opinion and issued a new published opinion Feb. 8, 2018. *Hughitt v. State*, ___ S.W.3d ___, Nos. 11-15-00277-CR & 11-15-00278-CR, 2018 WL 827227 (Tex. App.—Eastland Feb. 8, 2018). This petition is timely filed on or before March 12, 2018.

GROUNDS FOR REVIEW

3. Is possession with intent to deliver a predicate offense for engaging in organized criminal activity because it falls within "unlawful manufacture, delivery . . . of a controlled substance," which is one of EOCA's enumerated predicate offenses?

4. The court of appeals ignored basic rules of sufficiency review when it concluded Appellant could not jointly possess or be a party to the possession of contraband found on another's person.

ARGUMENT

I. Issue One

Is possession with intent to deliver a controlled substance included within "unlawful manufacture, delivery . . . of a controlled substance," an enumerated predicate offense for engaging in organized criminal activity?

A. The court of appeals erred in its interpretation of § 71.02(a)(5).

This Court should decide whether the enumerated predicate offense of "unlawful manufacture, delivery . . . of a controlled substance" in the EOCA statute, TEX. PENAL CODE § 71.02(a)(5), is (1) a single reference to the offense of

"Manufacture or Delivery of a Controlled Substance"[3] (and all that offense entails—including the manner and means of possession with intent to deliver),[4] or (2) separate references to "manufacture" and "delivery" as those words are defined in the Controlled Substances and Dangerous Drugs Acts. The court of appeals chose the latter. *See Hughitt*, 2018 WL 827227, at *3. It agreed with another court of appeals that "incorporating 'possession with intent to deliver' into the meaning of 'delivery' under Section 71.02 of the Penal Code is inconsistent with the definition of the term 'deliver' in the Controlled Substances Act, which means 'to transfer, actually or constructively, to another a controlled substance." *Id*. But the former is more consistent with how the rest of the statute is interpreted and with the laws in effect at the time EOCA was enacted.[5] The statute is not ambiguous; it just requires

---

[3] TEX. HEALTH & SAFETY CODE §§ 481.112, 481.113, 481.114.

[4] Possession with intent to deliver is one of the statutory alternatives of proving manufacture or delivery of a controlled substance. TEX. HEALTH & SAFETY CODE § 481.112(a); *Weinn v. State*, 326 S.W.3d 189, 194 (Tex. Crim. App. 2010); *Lopez v. State*, 108 S.W.3d 293, 297 (Tex. Crim. App. 2003) ("[T]here are at least five ways to commit an offense under Section 481.112," including possession with intent to deliver).

[5] When attempting to discern this collective legislative intent or purpose, attention must be focused on the literal text of the statute in question to discern the fair, objective meaning of that text at the time of its enactment. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). The text is the only definitive evidence of what the legislators had in mind when the statute was enacted into law. *Id*.

a more careful interpretation.

EOCA makes it an offense to commit particular offenses with the intent to establish, maintain, or participate in a combination. TEX. PENAL CODE § 71.02(a). The subsection begins:

> (a) A person commits an offense 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 one or more of the following:
>
> (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous sexual abuse of young child or children, solicitation of a minor, forgery, deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, or unauthorized use of a motor vehicle;
> (2) any gambling offense punishable as a Class A misdemeanor;
> (3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
> (4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons;
> (5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception;
> . . . .

Id. § 71.02(a)(1)-(5). This part of the list almost exclusively refers to offenses by their section headings.[6] "Murder" is the section heading for Penal Code § 19.02,

---

[6] While the "heading of a . . . section does not limit or expand the meaning of a statute," TEX. GOV'T CODE § 311.024, the legislature sometimes uses headings as cross-references to other statutes. *See, e.g.*, TEX. PENAL CODE § 30.02 (defining

"capital murder" is the section heading for Penal Code §19.03, and so on. Section 71.02(a)(5) should be interpreted in a consistent manner—as referring to entire offenses, not discrete acts (like "delivery").

The Legislature is presumed to know the law on related matters and should be able to assume that new legislation will be interpreted *in pari materia* with existing law. This is part of a textualist approach. *See* Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 252 ("Related Statute Canon"). At the time Section 71.02 was enacted in 1977,[7] there was a single, comprehensive offense with the heading "Unlawful Manufacture or Delivery of Controlled Substances." Act of 1973, 63rd Leg., R.S., ch. 429, § 4.03, 1973 Tex. Gen. Laws 1132, 1153 (H.B. 447) (effective Aug. 27, 1973) (originally at TEX. REV. CIV. STAT. art. 4476-15 § 4.03 and recodified at TEX. HEALTH & SAFETY CODE §§ 481.112, 481.113, 481.114). It provided that "a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or

---

burglary to include entering a habitation with intent to commit "theft or an assault").

[7] Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (effective June 10, 1977).

deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4."[8] *Id*. Given the identical language in the original heading for manufacture or delivery and the use of headings in the other parts of § 71.02(a) to refer to statutory offenses, the reference to "unlawful, manufacture . . . of a controlled substance" should be interpreted to include possession with intent to deliver.

This is also consistent with this Court's contemporaneous interpretation of the statute. In *Nichols v. State*, 653 S.W.2d 768, 771 (Tex. Crim. App. 1981), the defendant argued that "delivery" and "controlled substance" in § 71.02(a)(5) were vague terms because they were undefined in the penal code. This Court rejected the argument and explained:

> We think it obvious that the references of Sec. 71.02(a)(5) to 'unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception' are necessarily references to those offenses as defined in the Controlled Substances Act and the Dangerous Drugs Act.

---

[8] Likewise, there was a single, comprehensive offense behind § 71.02(a)(5)'s reference to possessing a controlled substance "through forgery, fraud, misrepresentation, or deception," namely TEX. REV. CIV. STAT. art. 4476-15 § 4.09(a)(3) (prohibiting possession of a controlled substance "by misrepresentation, fraud, forgery, deception, or subterfuge.") (recodified at TEX. HEALTH & SAFETY CODE § 481.129(a)(5)) (cited in *State v. Colyandro*, 233 S.W.3d 870, 883 (Tex. Crim. App. 2007)).

Id. None of the three lower courts deciding this issue considered *Nichols*.

B. Two other courts of appeals decisions and numerous other prosecutions

In deciding this issue, the court of appeals parroted the holdings of two other courts of appeals decisions: *State v. Foster*, No. 06-13-00190-CR, 2014 WL 2466145, at *2 (Tex. App.—Texarkana June 2, 2014, pet. ref'd on this issue) (not designated for publication) (arising out of Hunt County), and *Walker v. State*, No. 07-16-00245-CR, 2017 WL 1292006, at *2 (Tex. App.—Amarillo, Mar. 30, 2017, pet. granted on other grounds) (not designated for publication).[9] But there are numerous other prosecutions for EOCA with possession with intent to deliver as the predicate offense.[10] While the issue was not raised in these cases (except for *Horne*), their convictions have been affirmed.

---

[9] The State Prosecuting Attorney's granted issue in *Walker*, PD-0399-17, assumes the truth of the court of appeals's holding that possession with intent to deliver is not a predicate offense of EOCA: "Can a conviction for a charged, but nonexistent, offense be reformed to a subsumed and proven offense that does exist?"

[10] *See Burt v. State*, No. 11-15-00125-CR, 2017 WL 3923484, at *2 (Tex. App.—Eastland, Aug. 31, 2017, pet. ref'd on other grounds) (not designated for publication); *Williams v. State*, No. 11-12-00103-CR, 2014 WL 3865786, at *1 (Tex. App.—Eastland July 31, 2014, no pet.) (not designated for publication); *Willis v. State*, No. 11-10-00224-CR, 2012 WL 3525622, at *1 (Tex. App.—Eastland Aug. 16, 2012, no pet.) (not designated for publication); *Horne v. State*, No. 07-07-0498-CR, 2009 WL 649702, at *3 (Tex. App.—Amarillo Mar. 13, 2009, pet. ref'd) (not designated for publication) (finding counsel not ineffective for failing to file motion to quash indictment alleging possession with intent to deliver as predicate offense);

This Court should interpret § 71.02(a)(5) to provide clarity and consistency for prosecutions of this kind across the State.

II. Issue Two

> The court of appeals ignored basic rules of sufficiency review when it concluded Appellant could not jointly possess or be a party to the possession of contraband found on another's person.

The court of appeals reversed Appellant's possession conviction because it found there was no evidence she possessed what Sliger had in his pocket. Even if possession with intent to deliver is not a predicate offense of EOCA, the evidence in the light most favorable to the jury's verdict shows she was a party to Sliger's drug possession.

A. The evidence

Police began surveilling Kevin Sliger and others who were bringing methamphetamine from elsewhere and distributing it in Brown County. Appellant was frequently seen in Sliger's company. 6 RR 243-44; 7 RR 10, 12, 117-18. Their

---

Allen v. State, No. 11-10-00354-CR, 2012 WL 3264488, at *4 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd) (not designated for publication); *Smith v. State*, No. 11-10-00355-CR, 2012 WL 3264489, at *4 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd) (not designated for publication) (co-defendant to Allen); *Bridgeforth v. State*, No. 11-10-00356-CR, 2012 WL 3264490, at *3 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd, untimely filed) (not designated for publication) (co-defendant to Allen); *Adkins v. State*, No. 07-07-0387-CR, 2008 WL 1903465, at *1 (Tex. App.—Amarillo, Apr. 30, 2008, no pet.) (not designated for publication).

relationship was long-standing; they had an eleven-year-old child together. 6 RR 241-42; 7 RR 11-12, 140, 161, 164, 168. They also moved from place to place together. 6 RR 243; 7 RR 12, 113-14, 246. To his bondsman, Sliger referred to Appellant as his wife.[11] 8 RR 33-34; SX 108. Others called her Sliger's "old lady." 7 RR 210, 220, 243.

Appellant was a meth user, and she and Sliger used meth together. 7 RR 147-48. Neither Appellant nor Sliger had a job. 7 RR 48, 121; 8 RR 107-08. Sliger, who didn't have a driver's license, had Appellant drive him around. 6 RR 244-46. According to the lead investigator, Appellant made her living by dealing drugs. 7 RR 48. Sliger was a self-described junkie and drug-dealer. 7 RR 151, 155, 159. Appellant knew it. 7 RR 163-64, 166. She was present for at least two transactions in the months preceding their arrests. 7 RR 259-63. It would have been "pretty obvious" that a drug deal was occurring.[12] 7 RR 145-46, 266-67.

---

[11] Sliger's characterization of their relationship differed. He testified he did not even like Appellant and spent only one or two days a month with her. But under a sufficiency standard of review, the view of the facts that matters is the light most favorable to the jury's guilty verdict. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[12] The State's narcotics experts testified that dealers do not let just anyone into their "inner circle"; it required a level of trust earned over time and through complicity in crime. 6 RR 239-40. Those in a relationship with a drug-dealer would also benefit from their partner's dealing, including getting narcotics. 8 RR 75-77.

On January 8, 2014, Appellant rented a house in Brownwood and had the utilities turned on, and she and Sliger moved in together. 7 RR 12, 33, 119, 161. A narcotics officer spoke to Appellant at the house, told her the police knew "what was going on," and offered to help her leave Sliger. 7 RR 14-15. She said virtually nothing. *Id*. Over the next week, Appellant continued to live with Sliger, who was high on meth most of the time. 7 RR 147.

When officers executed a search warrant on the house a week after they moved in, Sliger was in the dining room, and Appellant was in what looked to be their shared bedroom. 7 RR 21, 30, 32, 117. Among other things, Sliger had about 16 grams of meth in his front pants pocket. 7 RR 25, 30; SX 1-C. He estimated he would have sold some of the meth and used the rest. 7 RR 158, 167-68.

Under her clothing, Appellant had a little over a gram of meth and a glass pipe, which she attempted to toss away from her.[13] 7 RR 29, 115, 179-81; SX 1-B. An ounce of marijuana was in the closet in the same room. 7 RR 30. Under the mattress

[13] An eighth of a gram is a typical "user amount" of meth. 6 RR 235. Because it is contraband, users do not tend to keep more than one or two uses at a time; people who possess over a gram of meth are typically distributors. 6 RR 237; 7 RR 103.

on which Appellant sat, there was a broken meth pipe and a gallon-sized ziplock bag with methamphetamine residue.[14] 7 RR 30, 36-37, 49, 115, 125; SX 11; 8 RR 106.

In the rest of the house, police observed drug packaging, rolling papers, syringes, and scales out in the open. 7 RR 22-23, 35-36, 47, 52; 8 RR 106. Anyone walking in the living room would conclude they were in a drug house. 7 RR 52. Appellant's clothes and personal items were commingled with Sliger's. 7 RR 45-46; SX 28, 30. In the room where Appellant had stood while talking to the narcotics officer the week before, police found a surveillance camera and digital police scanner. 7 RR 14, 21-24, 44; SX 23. There had also been people "coming and going" from the house. 7 RR 54. The house was notorious enough within the neighborhood that when the officers left the house after executing the warrant, the neighbors applauded. 7 RR 34, 54.

B. The court of appeals's opinion

The court of appeals found the evidence insufficient to support a conviction for possession of between 4 and 200 grams of methamphetamine and reformed the conviction to possession of between 1 and 4 grams with intent to deliver, for the meth Appellant had on her at the time of the search. *Hughitt*, 2018 WL 827227, at

---

[14] Methamphetamine in such a large container was a sign of distribution because drug users would not store or buy a single-use dose in a bag that large. 7 RR 37, 39.

*6-7. In rejecting the State's joint possession argument for the meth found on Sliger, the court held that "the affirmative links analysis is not readily applicable because the sixteen grams of methamphetamine were not found in a place that was in the joint possession of Appellant and Sliger but, rather, were found in Sliger's exclusive possession—in his pocket." *Id.* at *5. The court acknowledged that Appellant used methamphemine herself, knew Sliger sold methamphetamine, was Sliger's "old lady," was occasionally present for his drug transactions, and was assisting him in the weeks before the execution of the warrant by driving him around and paying the utilities and rent. The court nevertheless found this evidence insufficient to convict Appellant as a party because the State did not prove that "Appellant was aware that Sliger was carrying sixteen grams of methamphetamine in his pocket on [the day of the search]." *Id.* at *7. Because the meth was not in plain view and no testimony explained where it had come from and how long it was there, the court found it would be speculation to infer Appellant knew it was there. *Id.*

C. The court of appeals disregarded the basic sufficiency rules and fashioned one of its own for contraband on another's person

When deciding whether evidence is sufficient to support a conviction, a reviewing court must assess all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. For possession cases,

courts frequently consider a non-exclusive list of factors[15] that may indicate a link connecting the defendant to the knowing possession of the contraband. *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016). It is a "helpful guide to applying the *Jackson* legal-sufficiency standard" and to ensure that a relative, friend, or stranger to the actual possessor is not convicted merely because of her fortuitous proximity to someone else's drugs. *Id*. at 414 n.6; *see Evans*, 202 S.W.3d at 161-62.

The court of appeals erred in rejecting a links analysis as "not readily applicable" here and dismissing the importance of any such links because the 16 grams of meth were in Sliger's "exclusive possession." *Hughitt*, 2018 WL 827227, at *5, 6. While the meth was in Sliger's physical possession, Texas law has never held that this would prevent another from having an interest in it. Indeed, one accomplice should not be able to defeat the extension of criminal liability to his compatriots by sticking the contraband in his pocket. The usual analysis should apply to determine the reasonableness of the inference that Appellant was not only jointly possessing the house but the meth in it, too.

The opinion also neglected the sufficiency rule that prohibits focusing on what is absent from the evidence instead of what is present and what can be reasonably

---

[15] *Evans v. State*, 202 S.W.3d 158, 161 n.9 (Tex. Crim. App. 2006) indicated a preference for "link" instead of "affirmative link."

inferred. *See Evans*, 202 S.W.3d at 162; *Hernandez v. State*, 538 S.W.2d 127, 131 (Tex. Crim. App. 1976) (absence of facts and circumstances is not evidence to be weighed against evidence connecting appellant to contraband). The court of appeals returned repeatedly to the lack of direct evidence of Appellant's knowing possession: "no one testified that Appellant knew about the drugs in Sliger's pocket"; "neither Appellant nor Sliger made any statements that indicated that Appellant was aware of the presence of the methamphetamine." *Hughitt*, 2018 WL 827227, at *6, *7. It also focused on irrelevant factors: "it was Sliger who was the primary drug distributor. Law enforcement officials were targeting Sliger, not Appellant. Further, many of the other targets of Operation Tangled Web testified that they bought and sold methamphetamine from Sliger." *Id.* at *7. Sliger's culpability does not preclude Appellant's. *See* TEX. PENAL CODE § 7.02(a)(2). And the court should not have dismissed Appellant's status as merely "Sliger's 'old lady' or girlfriend who was occasionally present during Sliger's drug transactions." *Hughitt*, 2018 WL 827227, at *7. While not the sole factor linking her to the meth, Appellant's relationship with Sliger was something the jury could have rationally considered. *See United States v. Batista-Polanco*, 927 F.2d 14, 18 (1st Cir. 1991) ("it runs counter to human experience to suppose that criminal conspirators would welcome innocent nonparticipants as witnesses to their crimes."). That spouses are

presumed to share equally in property acquired during marriage is one example of how relationships rationally affect ownership rights.

A proper sufficiency analysis would have credited the reasonable inferences that the jury was entitled to draw from Appellant's presence during Sliger's drug trades, her renting the house and setting up utilities for an open and notorious drug house, residing at the house for a week with a meth dealer who was high, driving him around, being a user and likely a seller herself, and being in possession of a different stash of meth on the same occasion as the dealer. *See Maryland v. Pringle*, 540 U.S. 366, 373 (2003) ("it was reasonable . . . to infer a common enterprise . . . . The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."). No direct evidence was necessary for the jury to conclude that Appellant was aware that Sliger, a man who made his living dealing meth and who had been high for most of that week, had meth in his possession, some part of which he intended to sell. *See Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987) ("Participation in an enterprise may be inferred from the circumstances and need not be shown by direct evidence. Circumstantial evidence may be sufficient to show that one is a party to an offense."). The jury was entitled to conclude that Appellant was aiding Sliger's methamphetamine-dealing enterprise and intended him to succeed at it. *Cf. Gomez*

v. State, No. 03-05-00730-CR, 2007 WL 3306495, at *4 (Tex. App.—Austin, Nov. 9, 2007, no pet.) (not designated for publication) (jury could rationally infer from sister's presence at the house at the time of the search, track marks on her arms, deed records and a utility bill in her name, drugs and paraphernalia in plain view that she was involved in her brothers' criminal activities).

Because the court of appeals's opinion misconstrues rational inferences from the facts as speculation and raises new doubts about whether one can be criminally responsible for contraband in the physical possession of another, this Court should grant review.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgments of the court of appeals, and affirm Appellant's convictions for EOCA and possession with intent to deliver.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,600 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of March 2018, the State's Petition for Discretionary Review was served electronically on the parties below.

Elisha Bird
Assistant District Attorney
35th Judicial District Attorney's Office
200 S. Broadway, Ste. 323
Brownwood, Texas 76801
elisha.bird@browncountytx.org

James Stafford
Counsel for Shanna Hughitt
515 Caroline Street
Houston, TX 77002
keyserstaf@aol.com

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

APPENDIX

Court of Appeals's Opinion

2018 WL 827227
Only the Westlaw citation is currently available.

Court of Appeals of Texas,
Eastland.

Shanna Lynn HUGHITT, Appellant
v.
The STATE of Texas, Appellee

Nos. 11-15-00277-CR & 11-15-00278-CR
|
Opinion filed February 8, 2018

Synopsis

Background: Defendant was convicted in the 35th District Court, Brown County, of engaging in organized criminal activity and possession with intent to deliver between four and 200 grams of methamphetamine in a drug-free zone. Defendant appealed.

Holdings: The Court of Appeals, John M. Bailey, J., held that:

[1] indictment was insufficient to charge offense of engaging in organized criminal activity;

[2] evidence was insufficient to support defendant's conviction of possession with the intent to deliver methamphetamine in an amount between four and 200 grams;

[3] there was insufficient evidence that defendant was a party to her boyfriend's possession of methamphetamine;

[4] evidence was sufficient to support defendant's conviction of the lesser included offense of possession with intent to deliver methamphetamine in an amount between one and four grams; and

[5] defendant failed to demonstrate that trial counsel's representation fell below an objective standard of reasonableness.

Vacated and dismissed in part; reversed and remanded in part.

On Appeal from the 35th District Court, Brown County, Texas, Trial Court Nos. CR23116 & CR23242

Attorneys and Law Firms

Elisha Bird, Assistant, Micheal Murray, District Attorney, for Appellee.

James T. Stafford, Houston, for Appellant.

Panel consists of: Willson, J., Bailey, J., and Wright, S.C.J. [5]

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

Opinion

OPINION

JOHN M. BAILEY, JUSTICE

***1** This court's former opinion and judgment dated October 31, 2017, are withdrawn. This court's opinion and judgment dated February 8, 2018, are substituted therefor. The State's motion for rehearing is denied.

The jury convicted Shanna Lynn Hughitt of two offenses: (1) engaging in organized criminal activity (Cause No. 11-15-00277-CR) and (2) possession with intent to deliver between four and 200 grams of methamphetamine in a drug-free zone (Cause No. 11-15-00278-CR). The trial court assessed Appellant's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for eighteen years for the offense of engaging in organized criminal activity and ten years for the offense of possession with intent to deliver in a drug-free zone. The trial court ordered that the sentences run consecutively.

Appellant presents three issues on appeal. She asserts in her first issue that the trial court erred in denying her motion to quash the indictment and her motion for directed verdict on the charge of engaging in organized

criminal activity. In her second issue, she challenges the sufficiency of the evidence supporting both convictions. In her third issue, Appellant contends that her trial counsel was ineffective.

Because the indictment in Cause No. 11-15-00277-CR failed to allege an offense, we vacate the judgment of conviction for engaging in organized criminal activity and dismiss the indictment. Further, we conclude that there is insufficient evidence to support a conviction for possession with intent to deliver methamphetamine in an amount between four and 200 grams in Cause No. 11-15-00278-CR. However, because we find that the evidence is sufficient to support the lesser included offense of possession with intent to deliver methamphetamine in an amount between one and four grams, we remand that cause to the trial court to reform the judgment and to conduct a new trial as to punishment only.

Background Facts

This case originated from an investigation called "Operation Tangled Web," which was undertaken by the Brown County Sheriff's Department over a period of several months The purpose of Operation Tangled Web was to conduct surveillance on a group of people involved in methamphetamine distribution in Brownwood. Investigator Carlyle Noe Gover, a narcotics investigator for the Brown County Sheriff's Department, conducted surveillance of Kevin Sliger. Sliger was a drug dealer. He brought methamphetamine into Brown County from the Dallas-Fort Worth Metroplex and participated in buying and selling methamphetamine with several other drug dealers in Brownwood. Appellant was Sliger's romantic partner. [1]

[1] At trial, the extent of Appellant and Sliger's romantic involvement was contested. However, Appellant concedes that she and Sliger had an "on-again, off-again" relationship.

Appellant and Sliger used methamphetamine together. Appellant often drove Sliger around because Sliger did not have a driver's license. Appellant was present during a drug transaction between Sliger and another drug dealer named Butch Landon Spearman. Appellant and Sliger stayed together and moved from place to place until January 8, 2014, when Appellant and Sliger moved into a house on Eighth Street. Appellant paid the rent and utilities for the house. The house on Eighth Street was within 1,000 feet of a youth activity center.

***2** On January 15, 2014, law enforcement executed a search warrant on the house on Eighth Street. Appellant and Sliger were both present in the house during the search. Sliger was in the dining room. On Sliger's person, police found approximately thirty-two grams of "cut" (an additive used by drug dealers to dilute drugs), over sixteen grams of methamphetamine, some cocaine, some morphine tablets, lottery tickets, and forty-four dollars in cash. Elsewhere in the dining room, police found marihuana residue and rolling paper.

Appellant was located in the back bedroom. On her person, police found a little over one gram of methamphetamine. On the mattress where Appellant was sitting, police found a broken methamphetamine pipe and a gallon ziplock bag with methamphetamine residue inside. In the bedroom closet, police found almost an ounce of marihuana. Inside the pocket of a pair of men's jeans, police found $786 in cash.

In the kitchen, police found a bean can containing two quarts of "cut." Throughout the house and in plain view, police found packaging, syringes, scales, and a police scanner. Additionally, police found a surveillance camera in the front bedroom window. The contents of the house indicated that both a male and a female lived there.

In addition to Sliger, Operation Tangled Web involved surveillance of several other individuals who were a part of a network of methamphetamine distributors in Brown County, including John Philip Couch, John Simon Armendarez, Butch Landon Spearman, Auston Welker, Chad Cooper, Carri Vickers, Charles Burt, and others. Together, these distributors moved well over 400 grams of methamphetamine into Brown County.

The trial court recognized Investigator Gover and Sergeant James Stroope as experts in narcotics. Investigator Gover and Sergeant Stroope both opined that it is common for a male drug dealer to use a female companion to transport narcotics because it is more difficult for male law enforcement officers to search a female. Sergeant Stroope opined that it is common for someone in a relationship with a drug dealer to benefit from that relationship by receiving houses, cars, phones,

clothing, food, and money. Investigator Gover opined that the fact that the house on Eighth Street had drug paraphernalia, such as packaging, syringes, and scales, in plain view was an indication that there were no innocent parties residing in the house.

Analysis

Engaging in Organized Criminal Activity

[1] In Appellant's first issue, she asserts that possession with intent to deliver is not one of the enumerated offenses that may form the basis of a conviction for engaging in organized criminal activity. She contends that the trial court erred in denying her motion to quash the indictment in Cause No. 11-15-00277-CR based upon this contention. We agree.

[2] **[3]** **[4]** Sufficiency of an indictment is a question of law. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). Accordingly, we review de novo a trial court's ruling on a motion to quash an indictment. *See id.* The indictment must state facts that, if proved, show a violation of the law; the indictment must be dismissed if such facts would not constitute a criminal offense. *Posey v. State*, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977); *Rotenberry v. State*, 245 S.W.3d 583, 586 (Tex. App.—Fort Worth 2007, pet. ref'd).

The State sought to prosecute Appellant for engaging in organized criminal activity pursuant to Section 71.02 of the Texas Penal Code. TEX. PENAL CODE ANN. § 71.02 (West Supp. 2016). Under that statute, a person engages in organized criminal activity "if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination ..., [she] commits or conspires to commit one or more [enumerated offenses]." *Id.* § 71.02(a); *see Hart v. State*, 89 S.W.3d 61, 63 (Tex. Crim. App. 2002).

***3** The enumerated offense alleged in the indictment was "Possession of a Controlled Substance with Intent to Deliver in an amount of 400 grams or more." That specific offense does not appear within the list of enumerated offenses described in the organized crime statute. *See* PENAL § 71.02(a)(1)–(18). We note at the outset of our analysis that two of our sister courts have recently held that possession with intent to deliver is not a proper predicate offense for engaging in organized criminal activity under Section 71.02(a). *Walker v. State*, No. 07-16-00245-CR, 2017 WL 1292006, at *2 (Tex. App.—Amarillo Mar. 30, 2017, pet. granted) (mem. op., not designated for publication); *State v. Foster*, No. 06-13-00190-CR, 2014 WL 2466145, at *2–3 (Tex. App.—Texarkana June 2, 2014, pet. ref'd) (mem. op., not designated for publication).

Among the list of enumerated offenses is "unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception." PENAL § 71.02(a)(5). As noted by the Texarkana Court of Appeals, "[p]ossession of a controlled substance with intent to deliver does not explicitly violate Texas' organized crime statute, but delivery of controlled substances does." [2] *Foster*, 2014 WL 2466145, at *1. The State contends that possession with intent to deliver is encompassed within the meaning of "delivery" found in Section 71.02. The State bases this contention on Section 481.112 of the Texas Health and Safety Code, which sets out a list of offenses for manufacture and delivery of controlled substances in Penalty Group 1. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (West 2017) ("[A] person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1."). The State asserts that, under Section 481.112, possession with intent to deliver is the equivalent of delivery.

2 The court noted in *Foster* that Section 71.02(a)(5) also includes unlawful "possession of a controlled substance or dangerous drug *through forgery, fraud, misrepresentation, or deception.*" *Foster*, 2014 WL 2466145, at *1 n.1 (emphasis added). As was the case in *Foster*, this provision is not applicable here.

The State presented the same argument in *Foster*. The Texarkana Court of Appeals rejected this argument, explaining that incorporating "possession with intent to deliver" into the meaning of "delivery" under Section 71.02 of the Penal Code is inconsistent with the definition of the term "deliver" in the Controlled Substances Act, which means "to transfer, actually or constructively, to another a controlled substance." *Foster*, 2014 WL 2466145, at *2–3 (citing HEALTH & SAFETY § 481.002(8)). We additionally note that the Amarillo Court of Appeals agreed with *Foster*'s holding. *Walker*, 2017

WL 1292006, at *2.[3] We also agree with the analysis in *Foster* and conclude that possession of a controlled substance with the intent to deliver does not constitute a proper predicate offense for engaging in organized criminal activity under Section 71.02(a).

3 In *Walker*, the Court of Criminal Appeals granted the State's petition for discretionary review on August 23, 2017. We note that the State did not seek a review of the Amarillo Court of Appeals' determination that possession with intent to deliver is not a proper predicate offense under Section 71.02 but, rather, sought a review of the disposition of the case ordered by the Amarillo Court of Appeals.

***4** The indictment in Cause No. 11-15-00277-CR failed to allege an offense under Section 71.02 for engaging in organized criminal activity. Thus, the trial court should have granted Appellant's motion to quash the indictment. We sustain Appellant's first issue to the extent that it challenges the trial court's ruling on the motion to quash. We need not consider the remainder of Appellant's first issue or the portions of her second and third issues challenging her conviction for engaging in organized criminal activity because her successful challenge to the indictment is dispositive of her appeal of that conviction. *See Rotenberry*, 245 S.W.3d at 589 (citing TEX. R. APP. P. 47.1). We vacate the trial court's judgment of conviction in Cause No. 11-15-00277-CR and dismiss the indictment. *See* TEX. R. APP. P. 43.2(e); *Rotenberry*, 245 S.W.3d at 589.

Possession with Intent to Deliver

[5] In Appellant's second issue, she asserts that the evidence is insufficient to support her conviction for possession with the intent to deliver methamphetamine in an amount between four and 200 grams in a drug-free zone. She focuses her evidentiary challenge on two contentions. Appellant contests the amount of methamphetamine that the evidence showed she possessed. She also challenges the evidence supporting the element that she possessed any methamphetamine with an intent to deliver it.

We review a challenge to the sufficiency of the evidence under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (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 of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict and defer to that determination. *Jackson*, 443 U.S. at 326, 99 S.Ct. 2781; *Clayton*, 235 S.W.3d at 778.

[6] It is undisputed that Appellant was in possession of a little over one gram of methamphetamine. Therefore, in order to convict Appellant of possession of between four and 200 grams of methamphetamine, the State needed to show that Appellant had possession of the sixteen grams of methamphetamine found on Sliger's person. A person need not have exclusive possession of a controlled substance in order to be guilty of possession—joint possession will suffice. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985). Appellant asserts that the evidence failed to demonstrate that she jointly possessed the methamphetamine found in Sliger's pocket. We agree.

[7] **[8]** A person commits the offense of possession with intent to deliver a controlled substance if she knowingly possesses a drug with the intent to deliver it. *See* HEALTH & SAFETY § 481.112(a). Possession is defined as "actual care, custody, control, or management." PENAL § 1.07(a)(39). To prove unlawful possession of a controlled substance, the State must show (1) that the accused exercised control, management, or care over the substance and (2) that the accused knew the matter possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005), *overruled in part on other grounds*

by Robinson v. State, 466 S.W.3d 166, 173 & n.32 (Tex. Crim. App. 2015). The evidence must establish that the accused's connection with the drugs is more than just her fortuitous proximity to someone else's drugs. *Id.* at 405–06.

***5** **[9]** **[10]** Texas courts have formulated the "affirmative links rule," which provides that, "[w]hen the accused is not in exclusive possession *of the place where the substance is found*, it cannot be concluded that the accused had knowledge of and control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband." *Id.* at 406 (alteration in original) (emphasis added) (quoting *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981)); *see Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006) (listing affirmative links recognized by courts).[4] The affirmative links rule is routinely employed to establish joint possession when the accused is not in exclusive possession of the place where the drugs are found. *Poindexter*, 153 S.W.3d at 406. "This rule simply restates the common-sense notion that a person—such as a father, son, spouse, roommate, or friend—may jointly possess property like a house but not necessarily jointly possess the contraband found in that house." *Id.*

4 Courts have identified the following factors as affirmative links that may establish an accused's knowing possession of a controlled substance: (1) the accused's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the accused's proximity to, and the accessibility of, the contraband; (4) whether the accused was under the influence of narcotics when arrested; (5) whether the accused possessed narcotics or other contraband when arrested; (6) whether the accused made incriminating statements when arrested; (7) whether the accused attempted to flee; (8) whether the accused made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the accused owned or had the right to possess the place where the contraband was found; (12) whether the place where the contraband was found was enclosed; (13) whether the accused was found with a large amount of cash; and (14) whether the conduct of the accused indicated a consciousness of guilt. *Evans*, 202 S.W.3d at 162 n.12. Many of these same factors have been used by courts to determine if a person possessed a controlled substance with the intent to deliver. *See Guttery v. State*, No. 11-12-00160-CR, 2014 WL 3398144, at *2–3 (Tex. App.—Eastland July 10, 2014, pet. ref'd).

The State relies on an "affirmative links" analysis to establish that Appellant had care, custody, or control of all of the methamphetamine found as a result of the officer's search pursuant to the search warrant. However, the affirmative links analysis is not readily applicable because the sixteen grams of methamphetamine were not found in a place that was in the joint possession of Appellant and Sliger but, rather, were found in Sliger's exclusive possession—in his pocket. There is no evidence that Appellant exercised control, management, or care over the methamphetamine found in Sliger's pocket.

In *Ward v. State*, the Texarkana Court of Appeals had to decide if there was sufficient evidence to convict the defendant of possession of drugs that were found on his companion. *Ward v. State*, No. 06-16-00059-CR, 2016 WL 7175292, at *1 (Tex. App.—Texarkana Dec. 9, 2016, pet. ref'd) (mem. op., not designated for publication). In that case, the defendant and a female companion were in a vehicle together when law enforcement pulled them over. *Id.* Law enforcement noticed movement between the defendant and his companion that indicated that the defendant had passed her the drugs. *Id.* at *3. The court determined that this was sufficient evidence to convict the defendant of possession of the drugs, even though they were found on his companion. *Id.* at *3–4. In reaching this result, the court did not conduct an affirmative links analysis to determine if the defendant knowingly possessed the drugs found on his companion.

***6** *Ward* is distinguishable from this case. Here, there is no evidence that Appellant passed the sixteen grams of methamphetamine to Sliger. In fact, during the search of the house, law enforcement found Appellant and Sliger in different rooms. To infer that Appellant had any care, custody, or control of the methamphetamine found in Sliger's pocket would be speculation. Although Appellant leased the house, was a drug user, and had drug paraphernalia and cash at the house, Sliger exclusively possessed the large amount of methamphetamine contained within a single baggie in his pocket, and no one testified that Appellant knew about the drugs in Sliger's pocket.

[11] The State further relies on Section 7.02 of the Texas Penal Code to contend that Appellant was guilty as a party to the possession of the methamphetamine. *See* TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011). Under the law of parties, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id.* § 7.01(a). Under Section 7.02(a)(2) of the Penal Code, "[a] person is criminally responsible for an offense committed by the conduct of another if ... acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.* § 7.02(a)(2). When the defendant is not the primary actor, the State must prove conduct constituting an offense plus an act by the defendant done with the intent to promote or assist such conduct. *Beier v. State*, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985); *Peek v. State*, 494 S.W.3d 156, 163 (Tex. App.—Eastland 2015, pet. ref'd); *Schnidt v. State*, 357 S.W.3d 845, 855 (Tex. App.—Eastland 2012, pet. ref'd); *see also Longest v. State*, 732 S.W.2d 83, 85–86 (Tex. App.—Amarillo 1987, no pet.) (holding that there was sufficient evidence to convict the defendant of unauthorized use of a tractor when he assisted the primary actor in locating the keys to the tractor but did not actually operate the vehicle himself).

[12] Accordingly, proving possession of a controlled substance as a party requires showing (1) that another person possessed the contraband and (2) that, with the intent that the offense be committed, the defendant solicited, encouraged, directed, aided, or attempted to aid the other person's possession. *Woods v. State*, 998 S.W.2d 633, 636 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). For conviction, either as a principal or as a party to the offense, the State must show knowledge of the presence of the controlled substance. *See* HEALTH & SAFETY § 481.115(a). The evidence used to prove these elements can either be direct or circumstantial. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

[13] In its motion for rehearing, the State contends that the following evidence establishes that Appellant was a party to Sliger's possession of methamphetamine: Appellant was aware that Sliger was a drug dealer; a confidential informant told police that Appellant was a drug dealer; Appellant rented and paid the utilities for the house on Eighth Street; drug paraphernalia and a police scanner were found in plain view throughout the house; Appellant refused an offer by Investigator Gover to leave the relationship with Sliger and get help; Appellant often drove Sliger around; Appellant misled police about Sliger's identity during a traffic stop prior to the execution of the search warrant; and Appellant and Sliger lived together and were often seen together during the weeks leading up to the execution of the search warrant. However, none of this evidence is sufficient to show that Appellant knew about the sixteen grams of methamphetamine found in Sliger's pocket.

***7** Several cases have addressed situations where a defendant was convicted as a party to possession of a controlled substance. *See, e.g.*, *Rodriguez v. State*, No. 07-10-0051-CR, 2011 WL 2977488, at *3–5 (Tex. App.—Amarillo July 22, 2011, pet. dism'd) (mem. op., not designated for publication) (conviction upheld where the defendant's fingerprints were found on drug paraphernalia and the primary actor called the defendant to warn him that police were searching the house); *Rachal v. State*, No. 14-07-00410-CR, 2008 WL 4394758, at *4–6 (Tex. App.—Houston [14th Dist.] Sept. 11, 2008, no pet.) (mem. op., not designated for publication) (conviction upheld where the primary actor was recorded making statements to the defendant that incriminated the defendant and that the defendant did not deny, allowing the jury to infer that the defendant had knowledge of the crime); *Durant v. State*, No. 11-01-00044-CR, 2001 WL 34375764, at *1–2 (Tex. App.—Eastland Oct. 18, 2001, no pet.) (not designated for publication) (conviction upheld where marihuana was found underneath the primary actor's seat in the defendant's car, the defendant was the driver of the car, the defendant was acting nervously, and the car smelled strongly of marihuana); *Mares v. State*, 801 S.W.2d 121, 127–28 (Tex. App.—San Antonio 1990, no pet.) (conviction overturned where the defendant was found in the same house as the primary actor, but there was no evidence that he had knowledge of the presence of heroin found in another room).

Here, Appellant was a methamphetamine user and was aware that Sliger sold methamphetamine. However, as we discussed above, there is insufficient evidence that Appellant was aware that Sliger was carrying sixteen grams of methamphetamine in his pocket on January 15, 2014. The evidence in this case established that, although Appellant used methamphetamine and was assisting Sliger in the weeks prior to the execution of the search

warrant by driving him around and paying the utilities and rent on the house, it was Sliger who was the primary drug distributor. Law enforcement officials were targeting Sliger, not Appellant. Further, many of the other targets of Operation Tangled Web testified that they bought and sold methamphetamine from Sliger. Appellant was described by these witnesses as being Sliger's "old lady" or girlfriend who was occasionally present during Sliger's drug transactions.

No evidence was offered to explain where the sixteen grams of methamphetamine came from, how long Sliger had had it in his possession, or whether Appellant knew of its existence. The methamphetamine was not in plain view of Appellant; Appellant was in a different room in the house; and neither Appellant nor Sliger made any statements that indicated that Appellant was aware of the presence of the methamphetamine. While the jury is permitted to draw reasonable inferences from the evidence, the jury is not permitted to draw conclusions based on speculation. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (citing *Hooper v. State* 214 S.W.3d 9, 16 (Tex. Crim. App. 2007)). "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper*, 214 S.W.3d at 16. Speculation cannot support a finding beyond a reasonable doubt. *Tate*, 500 S.W.3d at 413. To assume that Appellant was aware of the sixteen grams of methamphetamine found in Sliger's pocket would be speculation. Accordingly, Appellant cannot be convicted as a party to possession of those drugs. *See* HEALTH & SAFETY § 481.115(a). Therefore, there is insufficient evidence to convict Appellant of possession of between four and 200 grams of methamphetamine.

[14] **[15]** Because we have found that the evidence is insufficient to support Appellant's conviction for possession with the intent to deliver methamphetamine in an amount between four and 200 grams, we must now decide whether the conviction should be reformed to reflect a conviction for the lesser included offense of possession with intent to deliver between one and four grams. *See Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014). A conviction should be reformed when (1) every element necessary to prove the lesser included offense was found when Appellant was convicted of the greater offense and (2) the evidence is sufficient to support a conviction for the lesser included offense. *Id.* at 300. Possession with intent to deliver methamphetamine, if between one and four grams, is a lesser included offense of possession with intent to deliver methamphetamine in an amount between four and 200 grams. *See* HEALTH & SAFETY § 481.112(c), (d). Therefore, we will review the evidence to determine whether it is sufficient to support a conviction for possession with intent to deliver methamphetamine in an amount between one and four grams. *See Thornton*, 425 S.W.3d at 300. As noted previously, there is no dispute that Appellant possessed over one gram of methamphetamine. Accordingly, we direct our analysis on the "intent to deliver" element.

***8** **[16]** **[17]** **[18]** **[19]** " 'Deliver' means to transfer, actually or constructively, to another a controlled substance...." HEALTH & SAFETY § 481.002(8). Intent to deliver may be proved with circumstantial evidence, including evidence that the defendant possessed the contraband. *Moreno v. State*, 195 S.W.3d 321, 325 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). "Intent can be inferred from the acts, words, and conduct of the accused." *Id.* at 326 (quoting *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995)). The expert testimony of an experienced law enforcement officer may be used to establish an accused's intent to deliver. *Id.* The factors to be considered in determining whether a defendant possessed contraband with an intent to deliver include the nature of the location where the defendant was arrested, the quantity of drugs the defendant possessed, the manner of packaging the drugs, the presence or absence of drug paraphernalia, whether the defendant possessed a large amount of cash, and the defendant's status as a drug user. *Kibble v. State*, 340 S.W.3d 14, 18–19 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); *Moreno*, 195 S.W.3d at 325; *see Guttery v. State*, No. 11-12-00160-CR, 2014 WL 3398144, at *3 (Tex. App.—Eastland July 10, 2014, pet. ref'd) (mem. op., not designated for publication). This list of factors is not exclusive, nor must they all be present to establish a defendant's intent to deliver. *Kibble*, 340 S.W.3d at 19.

We find that the evidence permitted a rational jury to determine that Appellant had the intent to deliver the methamphetamine that she possessed. In the bedroom where Appellant was located, police found a gallon ziplock bag with methamphetamine residue inside. Investigator Gover opined that the presence of this bag near Appellant indicated that, at one time, she possessed a larger amount of methamphetamine and that she was distributing, rather than simply using, the drug. Further,

during the execution of the search warrant, scales and packaging were in plain view throughout the house on Eighth Street. Investigator Gover opined that this was inconsistent with a house that had innocent parties residing there.

We sustain Appellant's second issue as it relates to her challenge to the sufficiency of the evidence supporting her conviction in Cause No. 11-15-00278-CR. However, because we find that the evidence is sufficient to support the lesser included offense of possession with intent to deliver methamphetamine in an amount between one and four grams in a drug-free zone, we remand that cause to the trial court to reform the judgment and to conduct a new trial as to punishment only.

Ineffective Assistance of Counsel

In Appellant's third issue, she asserts that her trial counsel was ineffective. In order to establish that trial counsel rendered ineffective assistance at trial, Appellant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that the result would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005); *Thompson v. State*, 9 S.W.3d 808, 812–13 (Tex. Crim. App. 1999). Courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

"[A]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814 (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). Under normal circumstances, the record on direct appeal is generally undeveloped and rarely sufficient to overcome the presumption that trial counsel rendered effective assistance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). The Court of Criminal Appeals has said that "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). If trial counsel did not have an opportunity to explain his actions, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

***9** We note that Appellant did not allege in her motion for new trial that her trial counsel rendered ineffective assistance, and the trial court did not receive any evidence supporting Appellant's ineffective assistance claim. Accordingly, the appellate record does not contain an explanation from trial counsel concerning his actions at trial or his trial strategy.

Appellant alleges four matters for which she contends her trial counsel was ineffective. First, Appellant contends that her trial counsel failed to file a motion for severance asking for separate trials for her charge of engaging in organized criminal activity and her charge for possession with intent to deliver. Because we have already determined that the indictment for organized criminal activity was defective and should have been quashed, we need not address this contention. We further note that many of Appellant's remaining claims of ineffective assistance of counsel stem from the conviction for engaging in organized criminal activity—a conviction that we are vacating.

[20] Appellant next contends that her trial counsel "fail[ed] to mount a defense." Specifically, Appellant contends that her trial counsel was ineffective for failing to give an opening statement, failing to present a "battered woman defense," and failing to suggest to the jury that Appellant would be better served by being sent to rehab than by being sent to jail. These are matters that are inherently a matter of trial strategy, and we may not second guess trial counsel's strategy decisions. *See Vasquez v. State*, 830 S.W.2d 948, 950 n.3 (Tex. Crim. App. 1992) ("Just because a competent defense attorney recognizes that a particular defense *might* be available to a particular offense, he or she could also decide it would be inappropriate to propound such a defense in a given case."); *Darkins v. State*, 430 S.W.3d 559, 570 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) ("Whether to deliver an opening statement is entirely optional.").

Third, Appellant contends that her trial counsel failed to object to several instances of hearsay, leading questions, and witness speculation. Specifically, Appellant points to four "inflammatory" statements made by Investigator Gover during direct examination, a leading question that the State's attorney asked one of its witnesses concerning the nature of relationships in the drug business, the introduction of testimony concerning several of Sliger's unrelated offenses, and the failure of Appellant's trial counsel to object that the State did not properly qualify an expert in forensic science who identified some of the substances seized in this case as methamphetamine. These are also matters that are inherently a matter of trial strategy. *See Thompson*, 9 S.W.3d at 814 (explaining that, when the record is silent as to why trial counsel failed to make an objection, the presumption that the decision not to object to the admission of evidence was a reasonable one has not been rebutted).

[21] Fourth, Appellant contends that her trial counsel failed to effectively cross-examine the State's witnesses. Appellant contends that her trial counsel was ineffective for failing to question Sliger regarding his relationship with Appellant and his exclusive possession of the drugs found in his pocket. Additionally, Appellant contends that her trial counsel was ineffective for failing to cross-examine several of the State's witnesses regarding the relationship between Appellant and Sliger. In order to show that her trial counsel was ineffective on this basis, Appellant must show what questions should have been asked and what the answers would have been. *See Davis v. State*, 119 S.W.3d 359, 370 (Tex. App.—Waco 2003, pet. ref'd). Appellant states in her brief that her trial counsel should have questioned Sliger further about the nature of his relationship with Appellant and about whether or not he had exclusive possession of the drugs found in his pocket. However, Appellant has not shown what Sliger would have testified to had he been asked these questions by trial counsel. Further, the record contains no explanation for why Appellant's trial counsel limited his cross-examination to the questions actually asked. *See Thompson*, 9 S.W.3d at 814; *Davis*, 119 S.W.3d at 370. Therefore, Appellant has failed to demonstrate that her trial counsel was ineffective on this basis.

***10** All of Appellant's claims of ineffective assistance of counsel are matters that are inherently matters of trial strategy, and many of them arise from a conviction that we have vacated. The record before us does not demonstrate that trial counsel's representation fell below an objective standard of reasonableness because there has been no inquiry into trial counsel's strategy. *See Thompson*, 9 S.W.3d at 812–13. We overrule Appellant's third issue.

This Court's Ruling

Appellant's judgment of conviction in Cause No. 11-15-00277-CR for engaging in organized criminal activity is vacated, and the indictment is dismissed. Appellant's judgment of conviction in Cause No. 11-15-00278-CR for possession with intent to deliver methamphetamine in an amount between four and 200 grams in a drug-free zone is reversed. We remand this cause to the trial court to reform the judgment to reflect a conviction for the offense of possession with intent to deliver methamphetamine in the amount of one gram or more but less than four grams in a drug-free zone and to conduct a new trial as to punishment only. *See Thornton*, 425 S.W.3d at 300, 307.

All Citations

--- S.W.3d ----, 2018 WL 827227