IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 12, 2002 Session

STAT E OF TENNESSEE v. CHARLES KIRBY

Direct Appeal from the Circuit Court for Gibson County
No. 15948 L. T. Lafferty, Judge

No. W2001-00791-CCA-R3-CD - Filed May 24, 2002

The appellant, Charles Kirby, was found guilty of facilitation of the sale of cocaine in the amount of .5 gram or more. He was sentenced to five years incarceration in the Tennessee Department of Correction. The appellant timely filed a notice of appeal, alleging that the evidence is insufficient to support his conviction. After review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ALAN E. GLENN, J., joined.

Shannon A. Jones, Alamo, Tennessee, for the appellant, Charles Kirby.

Paul G. Summers, Attorney General and Reporter; Braden H. Boucek, Assistant Attorney General; Garry Brown, District Attorney General; and Larry Hardister and William Bowen, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On February 10, 2000, Charlotte Lumpkin, a cooperating individual, had been working with the Drug Task Force of the 28th Judicial District for approximately one year. On the day of the offense, Lumpkin and Jacque Bass, an undercover drug task force officer, were "cruising around Milan." At around 5 p.m. or 6 p.m., the pair drove to the home of Thomas Slates to purchase drugs. Unable to find Slates at home, the pair drove several blocks until they saw the appellant, also known as "Chubby," walking down the street. Upon seeing the appellant, Officer Bass and Lumpkin stopped their vehicle. The appellant approached the vehicle and was told by Officer Bass and Lumpkin that they wanted "a bill." Lumpkin explained at trial that "a bill" means $100 worth of crack cocaine. The appellant told the pair to "make the block and come back." Following the appellant's directions, Officer Bass and Lumpkin drove around the block and came back. When they

returned, they initially failed to see the appellant. However, they heard someone shout and saw the appellant standing on the railroad tracks. The appellant told Lumpkin to get out of the vehicle, and she complied. Prior to her departure, Officer Bass gave Lumpkin five twenty-dollar bills.

Lumpkin and the appellant walked up the street, where they encountered Thomas Slates. Following a brief conversation between Slates and appellant, Slates and Lumpkin went inside Slates' father's apartment while the appellant remained outside. Once inside the residence, Slates gave the appellant a small plastic bag containing crack cocaine, and, in exchange, Lumpkin gave Slates five twenty-dollar bills. They had a brief conversation, and Lumpkin left the apartment. When Lumpkin left the apartment, the appellant, who was standing in the yard, advised Lumpkin that Officer Bass had just driven up the street. Shortly thereafter, Officer Bass drove down the street, and Lumpkin got into the vehicle. She gave the bag of cocaine to Officer Bass and advised him that she had purchased the cocaine from Slates.

Lumpkin testified at trial that she had known the appellant "for a long time." She conceded that, in the past, she had smoked marijuana and crack cocaine. She explained that "[u]sually when you're making a deal with someone or you're buying crack cocaine someone comes to the vehicle and asks what you want. Initially, they're a runner. That means they're going to go get it or they're going to get somebody to bring it to you. . . . So I knew that he was going to get the– the drugs." Lumpkin admitted that she was paid for her work with the Drug Task Force and further admitted that she had forty-three prior convictions for forgery. She denied that she was promised leniency or any type of deal in exchange for her testimony.

Officer Bass explained at trial that, earlier on the evening of the offense, he followed the general procedure used by the Drug Task Force when working with cooperating individuals such as Lumpkin. He and Lumpkin met at the Drug Task Force Office, where his vehicle was equipped with video and audio surveillance equipment. Lumpkin was searched prior to leaving the office and was searched again upon their return. Officer Bass received the "buy money" from agents of the Drug Task Force, and he and Lumpkin decided to go to Milan. Lumpkin wore a body wire, and the video camera in the vehicle was activated. Officer Bass noted that he gave money to Lumpkin only moments before the purchase.

Officer Bass further testified that the drug purchase was initially set up with the appellant. After Lumpkin got out of his vehicle, he saw the appellant and Lumpkin walk to a house at the corner of Hale and West Front Streets. He conceded that he did not hear any conversation between the appellant and Lumpkin after the initial contact. Officer Bass also admitted that he did not see the appellant in possession of any drugs. Upon review of the video tape of their encounter with the appellant, Officer Bass identified the appellant as the person standing at the passenger window of his vehicle.

Kenneth Jones, a narcotics officer with the Milan Police Department, testified that he received the crack cocaine from Officer Bass. He placed the drugs in a bag and gave the bag to

Special Agent Danny Lewis, a Humboldt police officer assigned to the Drug Task Force. Officer Lewis then delivered the drugs to the Tennessee Bureau of Investigation (TBI) Crime laboratory.

The appellant elected not to testify and rested without presentation of proof. A jury convicted the appellant of facilitation of a sale of .5 gram or more of cocaine. Thereupon, the trial court sentenced the appellant to five years incarceration. On appeal, the appellant argues that the State presented no proof that the appellant "participated in or facilitated the transaction between Lumpkin and Slates," thereby failing to establish that the appellant facilitated the sale of drugs to Lumpkin. He contends that there was no proof that the appellant and Slates discussed the sale of drugs to Lumpkin, and, furthermore, he argues that he was not present at the time the drugs were sold. Essentially, the appellant alleges that his conviction was based upon conjecture or speculation.

II. Analysis

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992); Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."). This rule applies to findings of guilt based on direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. See State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). Because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also Evans, 838 S.W.2d at 191; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In reviewing the evidence, an appellate court must afford the State the "strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or the judgment of the trial court. Tuggle, 639 S.W.2d at 914.

Although the appellant was indicted for the sale of cocaine in violation of Tenn. Code Ann. § 39-17-417(a)(2) (1997), he was convicted of the lesser-included offense of facilitation of the sale of cocaine, Tenn. Code Ann. § 39-11-403 (1997). "A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under [Tenn. Code Ann.] § 39-11-402(2), the person

knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a).

The appellant contends that the only evidence connecting him to the drug sale was the testimony of Lumpkin and Officer Bass that the appellant told them to "make the block" after they asked for his assistance in getting a "hundred." He argues that Officer Bass never saw the appellant after the initial contact at Officer Bass' vehicle. Further, he argues that Lumpkin never saw the appellant meet with Slates, nor did she ever hear the appellant and Slates discuss the drug sale. Again, the appellant contends that the verdict is based on "speculation and conjecture." We must disagree.

Viewing the evidence presented in the light most favorable to the State, we conclude that the State presented sufficient evidence to support the jury's verdict. The proof showed that Officer Bass and Lumpkin were approached by the appellant as they drove around Milan. Lumpkin and Officer Bass told the appellant that they wanted to buy "a hundred dollars of crack cocaine." In response, the appellant told the pair to "make the block" and come back. See State v. William Lewis Houston, No. M1999-01430-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 936, at **12-13 (Nashville, December 7, 2000), perm. to appeal denied, (Tenn. 2001). Lumpkin explained that this pattern is consistent with that of runners for drug dealers. When they came back, the appellant shouted to them. He then walked with Lumpkin to Slates' apartment, entered into a conversation with Slates, and waited outside while Lumpkin purchased the drugs from Slates. A rational jury could conclude that the appellant knowingly furnished assistance to Slates in the sale of the cocaine. This issue is without merit.

III. Conclusion

Finding no error, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE