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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0399-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

KENYETTA DANYELL WALKER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Orange County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Kenyetta Danyell Walker.

* The trial judge was the Hon. Dennis Powell, Presiding Judge, 163rd District Court, Orange County, Texas.

* Counsel for Appellant at trial was Thomas Burbank, 2 Acadiana Court, Beaumont, Texas 77706.

* Counsel for Appellant on appeal was Christine Brown-Zeto, 1107 Green Avenue, Orange, Texas 77630.

* Trial counsel for the State at trial and on appeal before the court of appeals was Krispen Walker, Orange County District Attorney's Office, 801 Division Street, Orange, TX 77630.

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

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STATE'S PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

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

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

Appellant was indicted and convicted of engaging in organized criminal activity (EOCA), predicated on a felony not listed in the EOCA statute. CR 4, 20. Instead of considering whether the State proved the elements of EOCA, as Appellant urged, the court of appeals framed the issue as egregious jury charge error and remanded to the trial court.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals granted a new trial in an unpublished opinion. *Walker v. State*, No. 07-16-00245-CR, 2017 Tex. App. LEXIS 2817 (Tex. App.—Amarillo Mar. 30, 2017) (not designated for publication). No motion for rehearing was filed. This Court granted an extension of time to file this petition by May 31, 2017.

GROUND FOR REVIEW

Can a conviction for a charged, but nonexistent, offense be reformed to a subsumed and proven offense that does exist?

ARGUMENT

Background

Law enforcement had been investigating drug activity at Appellant's house for several weeks. 6 RR 9-10. One night a group of out-of-town intruders broke in. 5 RR 69-70, 88. Appellant engaged them in a gunfight that left one person dead and two others wounded. 5 RR 21, 47-48; 6 RR 131, 163, 179. When police responded, they discovered controlled substances and paraphernalia in such quantities and varieties that the house was considered a "major distribution point." 5 RR 50, 87; 6 RR 70. Appellant's surveillance cameras outside the house showed that, after the shootout but before police arrived, Appellant carried a bag out to a vehicle. 5 RR 30; 6 RR 20, 86; SX 70. It contained more than 400 grams of dihydrocodeinone pills. 5 RR 77, 80, 83; 6 RR 57, 191; SX 85.

A number of strange things occurred in the prosecution and appeal of this case. The State charged Appellant with EOCA and named possession of the dihydrocodeinone pills with intent to deliver as the predicate offense.[1] That variant of EOCA does not exist. Possession is a predicate offense only if committed "through forgery, fraud, misrepresentation, or deception." TEX. PENAL CODE § 71.02(a)(5). At trial, the jury was instructed in accordance with the indicted offense. CR 64. On appeal, Appellant raised sufficiency but did not challenge the lack of a qualifying predicate offense. *See* Appellant's Brief, at p.17-18. To its credit, the court of appeals noticed the problem and requested supplemental briefing. *See* Seventh District Court of Appeal's Feb. 28, 2017 letter to the parties. In its opinion, the court first measured the evidence against the indictment and rejected Appellant's sufficiency claim. *Walker*, slip op. at 4. It then framed the predicate issue as unassigned jury charge error and remanded the case without specifying an offense in the event of a retrial. *Walker*, slip op. at 6-7.

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[1] As relevant here, EOCA requires that, with the intent to establish, maintain, or participate with a group of three or more criminal collaborators, the defendant commits (or conspires to commit) a predicate offense named in the statute. TEX. PENAL CODE § 71.02(a)(1)-(18). The original indictment alleged simple possession as the predicate offense. CR 5. An amendment changed this to possession with intent to deliver. CR 4, 20. Neither offense qualifies. *See* TEX. PENAL CODE § 71.02 (a)(5).

Discussion

1. Insufficient evidence, not jury charge error.

The court of appeals was right to recognize that the indictment did not allege a proper predicate offense; what it did thereafter was wrong. A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (citing *Thompson v. Louisville*, 362 U.S. 199 (1960)). Because possession of more than 400 grams of "Dihydrocodeinone, hydrocodone" with intent to deliver—as the State alleged and the jury found—does not qualify as one of those predicates, evidence of that offense is insufficient to sustain Appellant's conviction for EOCA. Further, there was no evidence of a qualifying predicate offense, such as proof that Appellant possessed the dihydrocodeinone through forgery, fraud, misrepresentation, or deception.[2]

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[2] A different case might have raised interesting variance questions. *See Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (proof of a different statutory alternative than one specifically pled renders evidence insufficient); *see also Cole v. Arkansas*, 333 U.S. 196, 202 (1948) ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."). By specifying possession with intent to deliver in the indictment, the State likely intended to narrow the field of potential EOCA offenses to the drug offenses in Penal Code § 71.02(a)(5). Does the State's unsuccessful attempt to allege an offense under (a)(5) foreclose it from proving EOCA under a different subsection? What about

The court of appeals came to the opposite conclusion concerning sufficiency of the evidence because it measured sufficiency against the erroneous indictment, instead of the essential elements of the offense.[3] *Walker*, slip op. at 4 (finding "some evidence" proving possession with intent to deliver and intent to establish, maintain, or participate in a combination). This was error. It should have found the evidence insufficient for EOCA. Casting the issue as jury charge error with the remedy of retrial may implicate Appellant's right not to be twice placed in jeopardy. *See Burks v. United States*, 437 U.S. 1, 18 (1978) ("the Double Jeopardy Clause precludes a

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another offense within (a)(5)?

Here, there was no evidence of an offense under one of the other subsections and evidence of only one other offense under (a)(5): delivery of a controlled substance. But even that evidence was insufficient to sustain Appellant's conviction. The evidence showed that about a month before the home invasion, police sent a confidential informant to the house, and on two occasions, the informant purchased an unspecified amount of marijuana and synthetic marijuana. 6 RR 96-97. This offense would qualify as a predicate for EOCA. TEX. PENAL CODE § 71.02(a)(5) (delivery of a "controlled substance" qualifies as statutory predicate for EOCA); TEX. HEALTH & SAFETY CODE § 481.002(5) (substances listed in Schedule I are "controlled substance[s]"); *Whitaker v. State*, 572 S.W.2d 956, 956 (Tex. Crim. App. 1978) (marijuana is a Schedule I controlled substance). But because Appellant was convicted of first-degree-felony EOCA, with a 15-year minimum, TEX. HEALTH & SAFETY CODE §§ 481.104(a)(4) & 481.114(e); TEX. PENAL CODE § 71.02(b)(3), an equivalent EOCA conviction predicated on delivery of marijuana would require evidence that the informant left the house with more than 50 pounds of marijuana. *See* TEX. HEALTH & SAFETY CODE § 481.120(b)(5).

[3] *See Miles v. State*, 357 S.W.3d 629, 632 (Tex. Crim. App. 2011); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

second trial once the reviewing court has found the evidence legally insufficient"); *see also Edmonson v. State*, 951 S.W.2d 6, 6 (Tex. Crim. App. 1997) (requiring appellate courts to address issues of legal sufficiency before considering errors that result in remand for new trial). The court of appeals should have framed the issue as one of sufficiency and then considered whether reformation was possible.

2. Reforming the judgment to the predicate drug offense is the proper remedy.

The court of appeals should have considered whether to reform the judgment to the possession offense that the jury necessarily found beyond a reasonable doubt. Not only do the Rules of Appellate Procedure authorize reformation,[4] it is required when evidence of every element of the lesser-included offense is sufficient and the jury must have found these elements to convict of the greater.[5] *Thornton v. State*, 425 S.W.3d 289, 300 & n.55 (Tex. Crim. App. 2014). To do otherwise would usurp the jury's factual determinations. *Bowen*, 374 S.W.3d at 432.

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[4] TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993) (interpreting predecessor of TEX. R. APP. P. 43.2(b)); *Herrin v. State*, 125 S.W.3d 436, 444 (Tex. Crim. App. 2002) (recognizing this Court's authority to reform in TEX. R. APP. P. 78.1).

[5] This reformation authority does not depend on a request in the charge. *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012).

Here, the court of appeals should have reformed the judgment to reflect a conviction for possession of more than 400g of dihydrocodeinone with intent to deliver. Ordinarily, the enumerated predicate offenses are lesser-included offenses of EOCA since they are "established by proof of the same or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PROC. art. 37.09(1); TEX. PENAL CODE § 71.02(a); *see Garza v. State*, 213 S.W.3d 338, 351 (Tex. Crim. App. 2007) (finding only difference between EOCA and predicate offense is commission of predicate as a gang member). Thus, when the evidence is insufficient to support a conviction for EOCA but sufficient to support the predicate offense of theft, for example, this Court has reformed the judgment to the predicate offense. *Hart v. State*, 89 S.W.3d 61, 66 (Tex. Crim. App. 2002).

Even though possession with intent to deliver is not a predicate offense of EOCA, it was established by proof of all the "elements" charged in this case except the intent to establish, maintain, or participate in a combination. TEX. PENAL CODE § 71.02. Consequently, it should be treated like a lesser-included offense. The indictment shows that possession was entirely subsumed within the other:

> [Appellant] did then and there intentionally and knowingly possess [with intent to deliver] a controlled substance, to wit Dihydrocodeinone, hydrocodone with one or more active nonnarcotic ingredients, in an amount by aggregate weight including adulterants and dilutants, of 400 grams or more

> And the defendant did then and there commit said offense with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity[6]

CR 5. As with a lesser, Appellant was on notice that he could be convicted of the possession offense. *See Hall v. State*, 225 S.W.3d 524, 532 (Tex. Crim. App. 2007) (explaining that a necessarily included lesser provides notice of that charge).

Also, a prosecutor has authority to abandon elements and prosecute the defendant for a lesser-included offense. *See Grey v. State*, 298 S.W.3d 644, 651 (Tex. Crim. App. 2009) (citing *Eastep v. State*, 941 S.W.2d 130, 134 (Tex. Crim. App. 1997)). If the State could have abandoned the paragraph alleging the element of intent to establish, maintain, or participate in a combination, it follows that the court of appeals, in finding no evidence of EOCA, could have struck that paragraph and, having already found sufficient evidence of the possession with intent to deliver,[7] reformed the conviction to that offense.

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[6] The way the indictment was laid out, with the possession offense set out first followed by the intent element for EOCA in a separate paragraph, is similar to the pattern of setting out the principle offense followed by an enhancement.

[7] The evidence was sufficient to show an intent to deliver. In the weeks before the home invasion, there was a high volume of brief visits to the house by people well-known to law enforcement and the house contained digital scales and materials for the packaging of controlled substances. 6 RR 10, 33-37, 40, 78-79.

The jury necessarily found all the elements of possession with intent to deliver because it found Appellant guilty of those elements *and* the intent to establish, maintain, or participate in a combination. CR 64. As in *Bowen*, reforming the verdict to possession with intent to deliver preserves the jury's fact-finding determination. Moreover, it would not require the needless expense and delay of a retrial or pretrial litigation over double jeopardy. And to conserve resources, this Court should reform the verdict to show a conviction for possession of 400g of dihydrocodeinone with intent to deliver. Alternatively, the court should summarily remand and direct the court of appeals to reform. Either way, the case should be remanded to the trial court for a new punishment determination.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reform the judgment to possession of a controlled substance with intent to deliver (or, alternatively, remand to the court of appeals for reformation), and remand to the trial court for new punishment proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 1,913 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 25th day of May 2017, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals's Opinion

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00245-CR

KENYETTA DANYELL WALKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 163rd District Court
Orange County, Texas
Trial Court No. B-150206-R, Honorable Dennis Powell, Presiding

March 30, 2017

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

We have before us an appeal from a conviction for "engaging in organized criminal activity." Kenyetta Daniel Walker, through her attorney, poses one issue questioning both the legal and factual sufficiency of the evidence underlying the conviction. We reverse but not for the reasons cited by appellant's counsel.[1]

[1] Because this appeal was transferred from the Ninth Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this court. *See* TEX. R. APP. P. 41.3.

Background

Appellant was arrested after the investigation of a shoot-out occurring at a residence wherein she, two children, and at least one male lived. The incident was captured on surveillance cameras mounted outside the house, or at least the extent of the incident occurring outside the abode was filmed. The video obtained from those cameras revealed three individuals forcing their way into the abode, flashes of light appearing through the windows, and three men leaving or attempting to leave. One of the three appeared unscathed. One limped away. One crawled out only to die in the front yard. The video also captured appellant removing a bag from the house and depositing it in a car. It was eventually discovered that the bag contained controlled substances, including hydrocodone for which appellant would eventually be charged with possessing.

Other evidence indicated that the three men entered the abode and began firing weapons. In response, appellant acquired a gun and returned fire. Her return fire apparently struck one or more of the intruders.

The police arrived and found the dead body lying on the ground outside the house and a male occupant of the house sitting injured by or on the porch. Once inside, they discovered bullet holes in the walls, scales, plastic baggies, a large sum of small denomination dollar bills, raw marijuana, and other drugs. Many of the drugs and drug paraphernalia were found in a "man-cave" bedroom. Some evidence indicated that appellant kept a majority of her clothes in that "man-cave."

The State eventually indicted appellant. Through the instrument, it alleged that she committed the following acts:

> did then and there intentionally and knowingly possess a controlled substance, to wit: Dihydrocodeinone, hydrocodone with one or more active nonnarcotic ingredients, in an amount by aggregate weight including adulterants and dilutants, of 400 grams or more[.]
>
> And the defendant did then and there commit said offense with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity[.]

Before trial, the indictment was amended to read that she possessed the controlled substance "with intent to deliver." Trial was had on that indictment, and the jury charge tracked the indictment's language. Needless to say, the jury found appellant guilty of the alleged crime, and judgment was entered upon that verdict.

Sufficiency of the Evidence

Utilizing the standard of review specified in *Villa v. State*, we conclude that legally sufficient evidence supports the conviction, as charged. *See Villa v. State*, No. PD-0541-15, 2017 Tex. Crim. App. LEXIS 288, at *10 (Tex. Crim. App. Mar. 22, 2017) (stating that the standard of review for determining the legal sufficiency of the evidence is whether, after viewing all of 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. The standard requires the appellate court to defer to the responsibility of the trier of fact to fairly resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. The reviewing court must not engage in a divide and conquer strategy but rather consider the cumulative force of all the evidence. The obligation to defer to the trier of fact encompasses the inferences drawn from the evidence as long as they are reasonable

ones supported by the evidence and are not mere speculation.).[2] Simply put, more than some evidence appeared of record enabling a reasonable fact-finder to conclude, beyond a reasonable doubt, that (1) those residing in the house, including appellant, operated a drug business therefrom, (2) appellant possessed the quantity of hydrocodone alleged in the indictment with intent to deliver, and (3) she so possessed the controlled substance with the intent to establish, maintain, or participate in a combination or in the profits of a combination who collaborated in carrying on said criminal activity. So, we overrule her sole issue. However, in arriving at this conclusion we encountered a circumstance unmentioned by appellant, and that we now address.

Indictment and Charge Error

The circumstance encountered pertains to the crime alleged. Again, the State sought to prosecute appellant for and convict her of engaging in organized criminal activity under Texas Penal Code § 71.02. According to that statute, 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 predicate offenses mentioned in the statute. *See* TEX. PENAL CODE ANN. § 71.02(a) (West Supp. 2016). The predicate offense mentioned in the indictment and incorporated into the jury charge involved the possession of a controlled substance with the intent to deliver. Yet, that particular offense's language fails to appear within the litany of offenses itemized in § 71.02(a)(1)–(18). Indeed, it has been held that the mere possession of a controlled substance is not a predicate offense under the organized crime statute. *Garcia v. State*, No. 03-04-

[2] We have no obligation to conduct a "factual sufficiency" review as requested by appellant since the advent of *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010).

00515-CR, 2006 Tex. App. LEXIS 3204, at *2 (Tex. App.—Austin Apr. 20, 2006, no pet.) (mem. op., not designated for publication) (stating that the "mere possession of a controlled substance is not a predicate offense under the organized crime statute"). Nor is the possession of a controlled substance with intent to deliver a predicate offense. *State v. Foster*, No. 06-13-00190-CR, 2014 Tex. App. LEXIS 5877, at *3–7 (Tex. App.—Texarkana June 2, 2014, pet. ref'd) (mem. op., not designated for publication) (stating that "the terms of [§ 71.02(a)(5)] are not violated by simply possessing a controlled substance with the intent to deliver it" and concluding that the trial court properly quashed an indictment alleging organized criminal activity based upon the predicate offense of simply possessing a controlled substance with intent to deliver). So, it seems that the indictment failed to accurately allege a crime within the scope of § 71.02(a).[3]

Assuming *arguendo* that the failure to accurately allege a predicate offense is substantive defect in the indictment to which one must object or waive, *see* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (West 2005) (stating that when a defendant fails to object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives the right to object to the defect); *Garcia v. State*, 32 S.W.3d 328, 331–32 (Tex. App.—San Antonio 2000, no pet.) (finding a like defect in the indictment waived but noting that it was not waived when incorporated into the jury charge), the same language appeared in the jury

[3] The State was afforded opportunity to address the situation via supplemental briefing. And, though it concluded in its supplemental brief that the indictment legitimately charged appellant with committing the offense of engaging in organized criminal activity, it never really explained how it came to that conclusion. Rather, it merely opined that "[a]lthough not specifically worded in accordance with Section 71.02, the offense Appellant committed, particularly considering her committing or conspiring to commit *the illegal distribution of narcotics*, is a crime encompassed within Section 71.02." (Emphasis added). While the distribution of controlled substances may be a predicate offense, *see* TEX. PENAL CODE ANN. § 71.02(a)(5), the State did not accuse her of that predicate. Nor did it cite us to authority suggesting that it or we can unilaterally change the predicate offense after trial and conviction.

charge. That is, the charge submitted during the guilt innocence phase of the trial simply tracked the allegations in the indictment. Through it, the trial court informed the jurors that they could convict appellant of engaging in organized criminal activity by finding that she simply committed the predicate offense of possessing a controlled substance with the intent to deliver. Consequently, because that is not a legitimate predicate offense, as discussed above, the charge permitted the jury to convict appellant for committing an offense outside the scope of § 71.02(a).

So, it can be said that the jury charge is erroneous when it instructed the jury on the crime of engaging in organized criminal activity. It incorporated some of the elements of § 71.02(a) (those relating to the accused committing or conspiring to commit a predicate offense with "the intent to establish, maintain, or participate in a combination or in the profits of a combination") while omitting others (the statutorily designated predicate offense). More importantly, error in the jury charge need not be preserved through objection by the accused; it may be raised *sua sponte* by a reviewing court as unassigned error. *See Sanchez. v. State*, 209 S.W.3d 117, 120–21 (Tex. Crim. App. 2006).

The charge being erroneous is not enough to warrant reversal, though. We must assess whether the error was harmful. In doing that, we first note that appellant did not object to it. Consequently, the requisite harm must be egregious in nature. *See State v. Ambrose*, 487 S.W.3d 587, 594 (Tex. Crim. App. 2016); *Glaze v. State*, No. 09-13-00549-CR, 2015 Tex. App. LEXIS 10146, at *13 (Tex. App.—Beaumont Sept. 30, 2015, pet. ref'd) (mem. op., not designated for publication). And, such harm is present when the error "'affects the very basis of the case, deprives the defendant of a valuable right,

or vitally affects a defensive theory.'" *See Ambrose*, 487 S.W.3d at 597–98 (quoting *Marshall v. State*, 479 S.W.3d 840 (Tex. Crim. App. 2016)). Charge error permitting a jury to convict someone for acts outside the expressed language of a penal provision cannot but "affect the very basis of the case" or "deprive the defendant of a valuable right," namely his right to freedom unless convicted for violating a criminal statute. Consequently, the charge error in question is egregiously harmful and that warrants reversal of the judgment.

Accordingly, we reverse the judgment of the trial court and remand the cause for a new trial.

Brian Quinn
Chief Justice

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