REVERSE and RENDER and Opinion Filed July 16, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00323-CR

MARCUS WAYNE HARPER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-81699-2018

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Reichek

Following a bench trial, Marcus Wayne Harper was convicted of felony tampering with evidence after he tossed a pill, "believed to be Alprazolam," onto the roadway during a traffic stop. The trial court sentenced appellant to five years in prison, probated for five years, a $250 fine, and $180 restitution. In three issues, appellant contends (1) the evidence is insufficient to support his conviction, (2) he was denied his constitutional right to a jury trial, and (3) he was denied due process when the trial court ordered restitution without evidence.

For the reasons set out below, we conclude there was insufficient evidence to support a conviction for tampering with evidence or attempted tampering. Accordingly, we reverse the trial court's judgment and render a judgment of acquittal.

BACKGROUND

Shortly after 11 p.m. on February 17, 2018, Celina Police Officer Alexander Jones followed appellant's truck after it left a house where there had been underage drinking in the past. Jones stopped the truck when he noticed its license plate was not lit. Two occupants were inside: 19-year-old appellant, who was driving, and his 16-year-old passenger. As Jones approached the truck's passenger side, he smelled marijuana and called for backup.

Within a couple of minutes, Officer Chris Armstrong arrived at the scene. He also smelled marijuana and asked appellant to exit the truck so that he could talk to him. While standing at the back of the truck, Armstrong asked appellant if he had "anything" on him, and appellant said he did not but "started to put his hands in his pockets." Armstrong told appellant to keep his hands out of his pockets. He asked appellant to turn around so that he could pat him down for weapons. As appellant turned around, "his hands went in front of him, around his waistband." Video evidence from the officers' in-car cameras showed that appellant had put his left hand in his left jacket pocket. As Armstrong peered around the front of appellant from his right side and asked what he was doing, appellant took his hand out of his

left pocket and tossed something off to his left side. Armstrong saw appellant "[take] his hand and kind of flung it out" and saw "something coming out of his hand and go off into the roadway."[1] Armstrong told appellant not to move and grabbed his arms.

Officer Jones, hearing the commotion, immediately went to assist Armstrong. The two officers "lifted [appellant] up" and then "took him to the ground" facedown and handcuffed him. Appellant asked what he had done, and Armstrong told him he saw him toss "weed." Appellant denied it. Once they had appellant cuffed, Armstrong shone his flashlight on the nearby area. Within seconds, he found pills lying on the roadway within a couple of feet of appellant and showed them to appellant. Appellant responded, "That isn't mine." Armstrong told him that by "tossing" the pills, appellant had "turned a misdemeanor into a felony." Once the officers stood appellant up from the roadway, Armstrong found more pills, including the pill he believed to be Xanax (Alprazolam),[2] underneath where appellant had been. The prosecutor offered the single pill as evidence of tampering but explained she was not bringing the lab person to testify and was not offering it as Alprazolam.

[1] Armstrong testified appellant "flung" the pills after the two had struggled and Armstrong was trying to get appellant's arms behind his back. The video, however, shows any struggle occurred after appellant tossed the pills.

[2] Alprazolam is sold under the brand name Xanax.

On cross-examination, Armstrong agreed that he never saw the pills until appellant removed them from his pocket and that, rather than being concealed, appellant brought them into plain view. He also testified that appellant did not alter or destroy the pills.[3]

At the conclusion of the evidence, the trial judge noted there was "no doubt [appellant] was trying to separate himself from whatever was in his pocket" but said he needed to look at case law to determine if that was concealment. After a recess, the trial court found appellant guilty and, after hearing appellant's testimony, assessed punishment.

SUFFICIENCY OF THE EVIDENCE

In his second issue, appellant contends the evidence was legally insufficient to support a conviction for tampering with evidence.

A. Applicable Law

In assessing the sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Alfaro-Jiminez v. State*, 577

[3] The other pills found by Officer Armstrong were not identified at the guilt-innocence phase. During punishment, in response to questions by the judge, appellant testified he had four other pills on him that night. Those pills, he said, were Promethazine, which is the generic form of the anti-nausea drug Phenergan.

S.W.3d 240, 243–44 (Tex. Crim. App. 2019). This standard requires that we defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). Each fact need not point directly and independently to the guilt if the cumulative force of all incriminating circumstances is sufficient to support the conviction. *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018). Circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Id*.

In making our review, we have an obligation and responsibility "to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Ross v. State*, 543 S.W.3d 227, 234 n.14 (Tex. Crim. App. 2018). Under the *Jackson* standard, evidence may be legally insufficient when the record contains no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes reasonable doubt. *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013).

A person commits the offense of tampering with evidence if, knowing that an investigation is pending or in progress, he alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. TEX. PENAL CODE ANN. § 37.09(a)(1). In this case, the indictment specifically alleged that appellant

"intentionally and knowingly alter[ed], destroy[ed], and conceal[ed] Alprazolam or a substance believed to be Alprazolam, with intent to impair its verity and availability as evidence in the investigation[.]" The parties do not dispute that the evidence did not show that appellant altered or destroyed the pill; rather, the critical element is the act of concealment.[4] Actual concealment "requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation." *Stahmann v. State*, No. PD-0556-18, 2020 WL 1934894, at *6 (Tex. Crim. App. Apr. 22, 2020) (quoting *Stahmann v. State*, 548 S.W.3d 46, 57 (Tex. App.—Corpus Christi–Edinburg 2018).

B. Tampering With Evidence

Here, appellant argues his actions show the "opposite of concealment," because the pills were concealed in his pocket and he only "displayed or exhibited" them when he took them from his pocket and "dropped" them next to him. Several courts of appeals have determined there was no concealment under similar circumstances.

For example, in *Thornton v. State*, plainclothes police officers were patrolling in an unmarked car as "the sun was coming up." They saw two people, one of whom

[4] To the extent the State suggests that appellant altered the pill merely by changing its physical or geographic location (by moving it from his pocket to the ground), the court of criminal appeals recently foreclosed any such interpretation of the word alter. *See Stahmann v. State*, No. PD-0556-18, 2020 WL 1934894, at *4–5 (Tex. Crim. App. Apr. 22, 2020) ("We think the more reasonable interpretation is that, when a defendant is alleged to have altered a physical thing, like the pill bottle in this case, in its common usage "alter" means that the defendant changed or modified the thing itself, not that he merely changed its geographic location.")

was Thornton, walking in the street instead of on the sidewalk. 401 S.W.3d 395, 397 & n.3 (Tex. App.—Amarillo 2013), *rev'd on other grounds*, 425 S.W.3d 289 (Tex. Crim. App. 2014). The officers decided to stop the two people and issue a citation. From twenty feet away, one of the officers saw Thornton reach into his pocket and drop an object, which produced "the distinctive sound of shattering glass," before walking over to the officers. *Id*. at 397 & n.3; 425 SW.3d at 293. After the officers secured the two people, they walked to the area where the object was dropped and retrieved a broken glass crack pipe and a brillo pad. 401 S.W.3d at 397. Thornton was charged with misdemeanor possession of drug paraphernalia, but he was also indicted for felony tampering with evidence. A jury found him guilty, and the trial court sentenced him to forty-five years in prison. *Id*. The court of appeals reversed the tampering conviction, concluding that, under the plain and ordinary meaning of "conceal" and on the evidence and reasonable inferences drawn therefrom, no rational trier of fact could have found Thornton concealed the pipe as alleged in the indictment. *Id*. at 400.[5]

In reaching its decision, the court relied, in part, on this Court's prior opinion in *Blanton v. State*, No. 05-05-01060-CR, 2006 WL 2036615 (Tex. App.—Dallas July 21, 2006, pet. ref'd) (not designated for publication), where the defendant was stopped for a traffic violation. Before stopping, however, Blanton dropped two

[5] The court of appeals also concluded that Thornton had not committed the lesser included offense of attempted tampering, but that decision was reversed on appeal.

plastic baggies from his car window. The baggies were later retrieved, and although some of the contents had spilled onto the roadway, a measureable amount of cocaine remained. Blanton was charged with possession of cocaine and tampering with evidence. As to the latter charge, Blanton argued on appeal he had not "concealed" the evidence because he had, in fact, exposed it to the officer's view. This Court agreed that Blanton had not concealed the evidence (although we concluded he had "altered" the cocaine because the baggies ripped and the contents had spilled out), relying on our sister court's opinion in *Hollingsworth v. State*, 15 S.W.3d 586, 594–95 (Tex. App.—Austin 2000, no pet.).

In *Hollingsworth*, an officer investigating a knife fight saw the defendant walking near the scene. The officer followed appellant before asking him to stop. The appellant continued to walk away before he ducked behind a dumpster and spit two rocks of crack cocaine from his mouth. *Id*. at 589–90. There was evidence that crack cocaine users commonly carry the drug in their mouths. The Austin court concluded that the evidence was insufficient to support a tampering conviction because, by spitting out the cocaine, which the officer observed, the defendant exposed it to the officer's view rather than affirmatively acting to conceal it. *Id*. at 595.

In short, in each of these cases, the defendant, within view of the investigating police, (1) pulled a glass crack pipe from his pocket and dropped it on the ground, (2) tossed baggies of cocaine from a moving vehicle, or (3) spit out cocaine, and the

courts determined these were not acts of concealment but just the opposite. Similarly, here, appellant took the pills from his pocket and tossed them to the ground in view of Officer Armstrong. After a brief struggle, Officers Armstrong and Jones put appellant face down on the ground and handcuffed him. Once appellant was secured, Officer Armstrong used his flashlight to find the pills on the ground within two feet away. After standing appellant up, Armstrong found what he believed to be a Xanax pill or bar on the ground where appellant had been placed. We conclude, as did the courts in *Thornton*, *Blanton*, and *Hollingsworth*, that appellant did not conceal the pill; rather, he exposed it when he pulled it from his pocket and tossed it in view of Officer Armstrong.

The most recent case to address this issue does not suggest a different result. *See Stahmann*, 2020 WL 1934894. In *Stahmann*, the defendant was involved in a two-car accident. After the collision, eyewitnesses said he got out of his vehicle, walked over to a wire game fence, and tossed a bottle of promethazine. The bottle landed in plain view on top of the grass. *Id*. at *1. When officers arrived at the scene, the witnesses told them about the bottle. An officer retrieved the bottle, and Stahmann was convicted of felony tampering with evidence. *Id*. The court of appeals reversed his conviction for tampering because "there was no evidence from which a juror could have reasonably inferred that the pill bottle was ever hidden, removed from sight or notice, or kept from discovery or observation." 548 S.W.3d at 56. The evidence showed the object was never concealed and the officer on the

scene was able to "very clearly" see the object and identify it as a prescription medicine bottle. *Id*. The Court, however, found the evidence was sufficient to convict Stahmann of the lesser included offense of attempted tampering with evidence. The State appealed the court's decision to acquit on the greater charge.

The court of criminal appeals affirmed, rejecting the State's argument that it did not matter whether the bottle was in plain view of eyewitnesses because Stahmann concealed it from the officer when he threw it over the fence before the officer arrived to investigate. 2020 WL 1934894, at *6. The court agreed with the court of appeals that "actual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation." 2020 WL 1934894, at *6. The pill bottle was not concealed because it landed in plain view. *Id*.

The State suggests that the critical determination in this case is whether the single Alprazolam pill remained in the constant view of the officer. It argues that even if Officer Armstrong saw where appellant threw the pills, "a rational trier of fact could have inferred that Officer Armstrong did not observe [a]ppellant discard the alprazolam pill[6] that was the subject of the indictment underneath him and thus, it was at least temporarily hidden or out of his sight."[7] Further, the State argues the

[6] There was no evidence that the pill was, in fact, Alprazolam.

[7] The video shows that Officer Armstrong saw where appellant threw the pills and, while appellant was on the ground, found a few within twenty seconds of looking. Once the officers stood appellant up from

factfinder could have inferred that appellant "intended to hide, and indeed did hide, the small, loose pills that he threw into the darkness of night, including the alprazolam pill," because the officer had to use his flashlight to locate them.

We disagree with both points. To the extent that the State argues that the pill was out of the officer's sight temporarily while it was under appellant's body, the only reasonable inference from the evidence is that it was out of sight because the officers placed appellant on top of it when securing him; thus, if anything, the pill was unintentionally concealed by the officers. Certainly, the evidence does not support an inference that appellant placed the pill there while face down on the ground with his hands cuffed behind his back. As for the second argument, the darkness of night did nothing more than disguise the object being thrown. The officer observed appellant toss pills onto the roadway, although he believed at the time that the substance was marijuana. Once the officers got appellant up from the ground, Armstrong found the pill on the roadway where it was left exposed, just as the other pills were.

Viewing the evidence in the light most favorable to the verdict, we conclude it is insufficient for a rational trier of fact to find beyond a reasonable doubt that appellant concealed the single pill that is the subject of this case. Having so concluded, we consider the State's argument that we should reform the judgment to

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the ground, it took Officer Armstrong fifteen seconds to find the alprazolam pill that was underneath appellant.

convict him of the lesser-included offense of attempted tampering with evidence. *See Thornton*, 425 S.W.3d at 299–300.

C. Attempted Tampering With Evidence

Reformation of a judgment is required if two prongs are satisfied: (1) in the course of convicting the appellant of the greater offense, the factfinder must have necessarily found every element necessary to convict the appellant for the lesser included offense; and (2) conducting an evidentiary sufficiency analysis as though appellant had been convicted of the lesser included offense at trial, there is sufficient evidence to support a conviction for the lesser included offense at trial. *Id*.

A person commits criminal attempt if, with the specific intent to commit an offense, he does an act which amounts to more than mere preparation, but he fails to commit the offense he intended. TEX. PENAL CODE ANN. § 15.01(a). A person may be guilty of criminal attempt even if the offense intended was actually committed. *Id*. § 15.01(c) ("It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.")

Considering the attempt statute with the tampering statute (and the specific allegations in the indictment), the first prong of the reformation analysis is satisfied if the factfinder necessarily found that (1) knowing an investigation was pending or in progress, and with (2) specific intent to conceal the pill believed to be alprazolam, and (3) the specific intent to impair the availability of the pill as evidence in the

investigation, appellant (4) did an act amounting to more than mere preparation that (5) tended but failed to result in concealment of the pill. *See Thornton*, 425 S.W.3d at 300–01. Here, consistent with the analysis in *Thornton*, all five elements are met. *See id*. at 301–02 (concluding that with respect to first three elements, jury explicitly found these proven when finding Thornton guilty of actual concealment; likewise, jury found fourth element since it found Thornton's "intentional conduct succeeded in concealing the pipe" and, as to fifth element, jury's finding of actual commission subsumes finding that conduct "tend[ed] but fail[ed] to effect the commission of tampering with evidence.")

The dispositive question is whether there is sufficient evidence of a specific intent to conceal the pill. In anticipation of the State's argument, appellant contends the evidence showed only that he intended to dispossess himself of the evidence and not the specific intent to conceal the pill. We review the evidence under the *Jackson* standard set out above and view the evidence in the light most favorable to a finding of attempted tampering.

Under the *Jackson* standard, a factfinder is permitted to draw multiple reasonable inferences as long as each inference is supported by evidence at trial. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). But, the factfinder is not permitted to come to conclusions based on mere speculation or factually unsupported inferences. *Id*. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. *Id*. at 16. Speculation is

mere theorizing or guessing about the possible meaning of facts and evidence presented. *Id*. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Id*.

In cases of tampering with evidence, not every act of discarding an object evinces an intent to impair the availability of that object as evidence in the investigation. *Thornton*, 425 S.W.3d at 304. There may be cases in which the most inculpating inference the evidence would support is that the accused simply intended to dispossess himself of the object to more plausibly disclaim any connection to it. *Id*. Certainly, evidence of a person throwing down contraband during a police pursuit or detention is insufficient, by itself, to constitute either concealment or attempted concealment. *Id*. at 304 n.77. Although it is within the province of the factfinder to choose which inference is most reasonable, any inference made by the factfinder must be supported by sufficient evidence. *Id*.

In cases such as this, our analysis is informed in part by whether the factfinder could have reasonably inferred that the accused believed the object was concealable. As the court noted in *Thornton*, "it would be unreasonable for the jury to conclude that, if the circumstances were such that the appellant stood absolutely no chance of concealing the pipe from the officers, it is less likely that he would have formulated the intent to conceal the pipe from the officers. In other words, it is less likely

(though not impossible) that the appellant would harbor a 'conscious objective' to cause a result he knew to be impossible." *Id*. at 304–05.

Here, it would be unreasonable for a factfinder to conclude that appellant believed the pills were concealable because the evidence showed he "stood absolutely no chance" of concealing them from Armstrong. Right before Armstrong was to pat him down, appellant put his left hand in his jacket pocket. Armstrong, standing only inches away, demanded to know what appellant was doing. While Armstrong was focused on appellant and what he was doing, appellant tossed the pills. Although the officer was standing to the right of appellant, and appellant tossed the pills off to the left, the video shows that Armstrong was peering around the front of appellant at the time. The officer immediately observed appellant's act, called him on it, and told him he had committed "tampering." Additionally, appellant tossed the pills less than two feet away from where he was standing onto the open roadway, where the officer retrieved them within seconds of shining his flashlight on the area. From these specific circumstances, the most inculpating inference the evidence supports is that appellant simply intended to dispossess himself of the evidence to more plausibly disclaim any connection to it, and in fact, appellant did disclaim any connection to the pills.

In reaching this conclusion, we are unpersuaded that *Thornton* compels a different result. Although *Thornton's* analysis of this issue relied in part on the object itself (a small, translucent object dropped on a sidewalk at sunrise), the

opinion does not restrict the review to the size and composition of the object itself. *Thornton*, 425 S.W.3d at 304–05. More importantly, unlike here, the defendant in *Thornton* was twenty feet away when he dropped the object, making any inference that he believed the item was concealable more than simple speculation. In addition, the officer testified Thornton had "stealthily reached" in his pocket and had "palmed" the glass pipe as he removed it, but the officer here did not testify that appellant made any stealthy move.

Viewing the evidence presented at trial, we conclude it was insufficient for a reasonable factfinder to determine that appellant harbored the specific intent to conceal evidence and therefore the evidence is insufficient to support a conviction for attempted tampering with evidence. Because the evidence is insufficient to support a conviction for either tampering with evidence or attempted tampering, we sustain appellant's second issue. Our disposition of this issue makes it unnecessary to address appellant's remaining issues. *See* TEX. R. APP. P. 47.1.

We reverse the trial court's judgment and render a judgment of acquittal.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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TEX. R. APP. P. 47.2(b)

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARCUS WAYNE HARPER, Appellant No. 05-19-00323-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 296th Judicial District Court, Collin County, Texas Trial Court Cause No. 296-81699-2018. Opinion delivered by Justice Reichek. Justices Schenck and Osborne participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the appellant is hereby **ACQUITTED**.

Judgment entered July 16, 2020