No. 01-24-00424-CR

In the Court of Appeals
for the
First District of Texas

JASON DUMONT HENSLEY,
Appellant

v.

THE STATE OF TEXAS,
Appellee

No. 22-CR-0261 in the 122nd District Court
Galveston County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

Identity of Parties and Counsel

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TRIAL JUDGE:	Hon. Jeth Jones

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Statement of the Case

Appellant Jason Dumont Hensley was charged by indictment with the first degree felony offense of possession with intent to deliver a controlled substance, namely, MDMB-en-PINACA, a compound with Indazole core, methoxy dimethyl oxybutanoate, Group A, and a carboxamide link, in an amount of 400 grams or more. CR6. Hensley pleaded not guilty and a jury convicted him. CR99. Hensley elected for sentencing by the trial court and pleaded true to two prior consecutive felony convictions. 5RR7. The trial court assessed a sentence of 40 years in the Texas Department of Criminal Justice. 5RR25. Hensley filed timely written notice of appeal. CR110.

Statement of Facts

While on routine patrol, Sgt. Louis Garcia saw Hensley run a red light. 3RR15. Garcia conducted a traffic stop. After Hensley pulled over, Garcia noticed him leaning toward the passenger side. 3RR18, 27, 57. There were no other occupants in the vehicle. 3RR58. When Garcia approached and made contact, Hensley informed him that he did not have his driver's license and did not have insurance. 3RR21. Garcia ran Hensley's information in his computer and learned that Hensley's license was not valid. 3RR23. Garcia arrested Hensley for driving with an invalid license. 3RR24.

Sgt. Garcia conducted a pat-down and found a small amount of cash in Hensley's right pocket; in his left pocket he found a bag containing $812 in small denominations. 3RR24-26. Hensley explained that the cash was from work. 3RR43. Garcia believed that the separated cash in the left pocket was consistent with selling drugs. 3RR24-26.

Sgt. Garcia conducted an inventory search of Hensley's vehicle and saw clothing on the floorboard in the passenger side. Under the clothing Garcia found a large amount of a substance that looked and smelled like marijuana. 3RR27-28, 31. The substance field-tested positive for synthetic marijuana. 3RR29. Some of the substance was broken down into multiple small baggies. 3RR34. Garcia testified that the substance had no commercial label, like legal hemp products sold in shops would have. 3RR37-38. Garcia believed that Hensley was selling the substance based on the quantity, the packaging, the large amount of small-denomination cash in a bag in Hensley's pocket, and Hensley's attempt to hide the substance under clothing. 3RR35-38.

After transport to the police station, Hensley waived his right to remain silent and agreed to submit to questioning by Sgt. Garcia and two additional officers. 3RR102. Hensley said the cash was from cutting grass. 3RR111. Hensley said the substance was purchased at a store and marketed as an aphrodisiac. 3RR102-03. He acknowledged that he had broken the product down into the smaller baggies.

3RR111. Hensley could not recall the full name of the store but he provided a street location and a contact number. 3RR103. Sgt. Garcia testified that he declined to follow up on this information because he thought Hensley was lying. 3RR103, 112. Garcia acknowledged that recent changes in the law had legalized smokeable hemp products containing certain forms of THC. 3RR105-06.

Yen-Jun Ho, a supervisor from the Seized Drug section of the DPS Crime Lab in Houston, testified that the substance was tested by an analyst who was unavailable to testify. 3RR66-67. Ho reviewed the data generated by the analyst, consisting of a microscopic examination and a gas chromatograph mass spectrometer (GCMS) analysis. 3RR67-68. Ho compared the data from the GCMS test with a known standard to identify the substance as MDMB-en-PINACA, with a weight of 722.44 grams. 3RR72. Ho testified that this compound is a controlled substance in Penalty Group 2-A, which defines controlled substances based on chemical structure rather than the name of the compound. 3RR72-76, 82. Ho testified that MDMB-en-PINACA does not appear in the Texas Controlled Substances Act by name and that a person would have to know its chemical structure to identify it as a controlled substance. 3RR100.

Issue Presented

The trial court erred in admitting expert opinion testimony on the credibility of the defendant's statements.

Summary of the Argument

The trial court erred in overruling an objection to opinion testimony from the arresting officer that Hensley's statement to the police was not credible. This testimony invaded the province of the jury by opining directly on the credibility of the defendant's statement in an investigation. The error harmed Hensley's substantial rights because the inadmissible opinion testimony (1) directly addressed the sole contested issue, whether Hensley had the required knowledge, and (2) was elicited from an expert, to whom the jurors were likely to defer.

Arguments

A. Standard of Review

A trial court's admission or exclusion of evidence is reviewed for an abuse of discretion. *Osbourn v. State*, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to guiding rules and principles. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993).

B. Facts

The defense elicited testimony from Sgt. Garcia that he failed to follow up on Hensley's information providing a location and contact number for the store where he claimed he purchased the product. On cross-examination, the State asked Garcia what he concluded when Hensley provided the information. The defense objected that Garcia's opinion was irrelevant and invaded the purview of the jury. The trial court overruled the objection. 3RR112.

Garcia testified that he did not follow up on the information because he thought Hensley was lying. 3RR113.

C. The opinion testimony concerning the defendant's credibility was inadmissible.

To be admissible, expert testimony must "assist" the trier of fact. Tex. R. Evid. 702; *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Expert testimony assists the trier of fact when the jury is not qualified to "the best possible degree" to determine intelligently the particular issue without the help of the testimony. *Schutz*, 957 S.W.2d at 59. But the expert testimony must aid, not supplant, the jury's decision. *Id*. Expert testimony does not assist the jury if it constitutes "a direct opinion on the truthfulness" of a statement. *Id*.

A direct opinion on the truthfulness of a witness, from either a lay witness or an expert witness, is inadmissible. *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011); *Schutz*, 957 S.W.2d at 59; *Yount v. State*, 872 S.W.2d 706, 708 (Tex.

Crim. App.1993). This is because a direct opinion as to the truthfulness of a witness "crosses the line" and does more than "assist the trier of fact to understand the evidence or to determine a fact in issue;" it decides an issue for the jury. *Yount*, 872 S.W.2d at 709 (quoting *Duckett v. State*, 797 S.W.2d 906, 914–915 (Tex. Crim. App. 1990)). A question about a witness's truthfulness "is designed to elicit testimony in the form of one witness' opinion as to the credibility or veracity of another witness, a determination which lies solely within the province of the jury." *Schutz*, 957 S.W.2d at 67–68 (quoting *State v. Walden*, 69 Wash. App. 183, 847 P.2d 956, 959 (1993)).

Similarly, a witness's expert opinion on the truthfulness of a criminal defendant during an investigation is also inadmissible. *Gonzalez v. State*, 301 S.W.3d 393, 398 (Tex. App.—El Paso 2009, pet. ref'd) (concluding that testimony of expert was impermissible opinion on truthfulness of defendant's statement).

Sgt. Garcia's testimony that Hensley was lying was a direct comment on the credibility of Hensley's statement. This testimony did not aid the jury; it supplanted the jury's determination. The trial court abused its discretion in overruling the objection.

Error regarding improperly admitted evidence is waived if that same evidence is brought in later without objection—unless the evidence is brought in later to meet, rebut, destroy, deny, or explain the improperly admitted evidence. *Rogers v. State*,

853 S.W.2d 29, 35 (Tex. Crim. App. 1993). Hensley's examination of Sgt. Garcia about his opinion was necessary to meet, rebut, and explain the improperly admitted testimony, specifically, to show that the opinion was hastily made and not reasonable. 3RR113-119, 122. Such testimony does not act as a waiver of the right to challenge the admissibility of the evidence originally admitted. *Maynard v. State*, 685 S.W.2d 60, 65 (Tex. Crim. App. 1985).

D. Reversal is required.

Erroneous evidentiary rulings are reviewed for harm under Rule 44.2(b) of the Texas Rules of Appellate Procedure. Tex. R. App. P. 44.2(b). Non-constitutional errors that do not affect a criminal defendant's "substantial rights" must be disregarded. *Id.* A conviction must be reversed unless, after examining the record as a whole, the court has a fair assurance that the errors did not have a substantial and injurious effect or influence in determining the jury's verdict, or had but a slight effect. *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007). If the court is unsure whether the error affected the result, reversal is required. *Burnett v. State*, 88 S.W.3d 633, 637–38 (Tex. Crim. App. 2002).

Neither the State nor the appellant has the burden to show harm when an error has occurred; rather, after reviewing the record, it is the appellate court's duty to assess harm. *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001). When conducting a harm analysis, a reviewing court considers the entirety of the record,

including evidence of the defendant's guilt, as well as the jury instructions and closing arguments. *Motilla v. State,* 78 S.W.3d 352, 355–56 (Tex. Crim. App. 2002). The reviewing court should consider the nature of the evidence supporting the verdict, the character of the alleged error, and how the error might be considered in connection with other evidence in the case. *Morales v. State,* 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). Other relevant factors may include whether the State emphasized the error, whether the erroneously admitted evidence was cumulative, and whether it was elicited from an expert. *Motilla*, 78 S.W.3d at 356; *Solomon v. State,* 49 S.W.3d 356, 365 (Tex. Crim. App. 2001). Overwhelming evidence of guilt is relevant to this issue, but it is only one factor in the analysis. *Motilla* at 356–57.

Considering the entire record, Sgt. Garcia's expert testimony that Hensley's statement was not credible likely had a substantial impact on the jury.

The evidence of guilt was not overwhelming. The sole contested issue was whether the State proved the element of knowing possession beyond a reasonable doubt, *i.e.*, that Hensley knew the product he possessed was a controlled substance. 3RR126. The State's two witnesses testified that the only way to identify the substance as controlled was by determining its chemical structure through laboratory testing by an expert chemist. 3RR100, 122. There was no evidence that Hensley knew the chemical structure of the product, and Sgt. Garcia acknowledged that certain smokeable forms of hemp had been legalized recently. 3RR104-06.

Accordingly, the jury had to rely on circumstantial evidence to find the knowledge element. The evidence showed that Hensley leaned toward the passenger side of the vehicle after being pulled over, and the product was found on the passenger-side floorboard under some clothing. Sgt. Garcia speculated that Hensley might have been hiding the product. Hensley had a large amount of cash in small denominations, and some of the substance was broken down into small baggies. But none of this evidence specifically bears on the knowledge element because a person could lawfully repackage and resell a legal hemp product that mimicked marijuana, and that person might want to conceal it to avoid theft or attracting the suspicion of police.

Sgt. Garcia testified that Hensley told him that he bought the product at a retail store, for which he provided a street name and a phone number. This statement, if believed, would indicate that Hensley reasonably assumed the product was legal. But the State countered this inference by eliciting inadmissible testimony that Sgt. Garica thought Hensley was "lying." 3RR112. Garcia's assessment of Hensley's credibility was critical to the jury's determination of the knowledge element, particularly because Garcia testified as an expert with training on narcotics and several years' experience in narcotics investigations. 3RR13-14, 39. Error is more harmful when the inadmissible evidence is elicited from an expert because jurors are inclined abdicate their role and to defer to an expert with training and experience on

the subject. *Solomon v. State,* 49 S.W.3d 356, 365 (Tex. Crim. App. 2001); *Dunnington v. State*, 740 S.W.2d 896, 898 (Tex.App.—El Paso 1987, pet. ref'd). The State emphasized the error in closing argument by repeating Sgt. Garcia's testimony that Hensley was "lying" when he told police he bought the product at a shop. 3RR129. Based on the record as a whole, the error likely had a substantial impact on the verdict.

Prayer

Appellant respectfully requests that the Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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Certificate of Service

This document has been served on the following parties electronically through the electronic filing manager on August 7, 2024.

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