



COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

JOHN BENJAMIN CONLEY,	§	No. 08-22-00014-CR
Appellant,	§	Appeal from the
v.	§	413th Judicial District Court
THE STATE OF TEXAS,	§	of Johnson County, Texas
Appellee.	§	(TC# DC-F201801016)

**OPINION**

A jury convicted Appellant, John Benjamin Conley, of one count of engaging in organized criminal activity (money laundering), one count of money laundering in an amount greater than \$30,000 but less than \$150,000, and one count of possession of marihuana in an amount greater than five pounds but less than fifty pounds. The trial court issued separate judgments on each of the convictions. Appellant raises three issues challenging his convictions: (1) the trial court erred by denying his motion to suppress because the search-warrant affidavit did not provide the correct address of the property; (2) the trial court erred by refusing his request for a jury instruction under TEX. CODE CRIM. PROC. ANN. art. 38.23; and (3) the evidence is legally insufficient to establish

that at least five pounds of the substances seized from his property met the legal definition of marihuana. For the following reasons, we affirm Appellant's convictions.<sup>1</sup>

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Factual Background**

Prior to investigating Appellant, Deputy Tim Cortez of the Johnson County Sheriff's Office communicated with Jennifer Malispina, who had previously been arrested for possession and distribution of narcotics. To "work off" her criminal charges, Malispina, acting as a confidential informant, told law enforcement of a large marihuana trafficking operation occurring at a residence located at "5225 County Road 1205." Malispina also directed Cortez's attention to Melissa Peters, who was engaged in narcotics trafficking stemming from that property. While working in an undercover capacity, Cortez contacted Peters to solicit the purchase of marihuana from her, and on several occasions, Peters sold Cortez marihuana in the parking lot of a store in Cleburne.

After these transactions took place, officers followed Peters as she drove away from the buys to the residence located at 5225 County Road 1205, which listed Appellant as the owner. In the course of their repeated surveillance of the property, officers also observed a vehicle at the property that was registered to Appellant. At this time, Ken Bartlett, another deputy assigned to the investigation, acquired a search warrant for the 5225 County Road 1205 property. After Cortez arranged a third purchase with Peters, Bartlett and other officers conducting surveillance on the property observed Appellant arrive in his vehicle and meet with Peters and her husband. Once Cortez finalized the details of the transaction through text messages, Peters, her husband, and Appellant left soon afterward, heading in the direction of the buy location. Officers stopped Peters,

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<sup>1</sup> This case was transferred from our sister court in Waco, and we decide it in accordance with the precedent of that court to the extent required by TEX. R. APP. P. 41.3.

Brandon, and Appellant before they reached the buy location and found marihuana in the vehicle Peters was driving. After conducting the traffic stops, the officers executed the search warrant on the property.

The only person present in the house on the property was Appellant's son, who was asleep in one of the bedrooms. A search of the house yielded numerous items associated with marihuana trafficking, including multiple plastic bags containing marihuana with THC-level markings or nicknames of different types of marihuana. The officers also searched a series of six interconnected "Conex" boxes (i.e., shipping containers) also located on the property, where they discovered a large, sophisticated marihuana-growing operation that included (1) a room for drying marihuana that contained twenty-two drying marihuana plants; (2) air-conditioning, watering, and plant-lighting systems installed in the structure; (3) scales; and (4) 244 live marihuana plants in various stages of development. In total, officers seized 34.08 pounds of usable marihuana from the property. Appellant, his son, Peters, and her husband were arrested after officers found and seized the above evidence.

### **B. Procedural History**

The State of Texas charged Appellant with one count of engaging in organized criminal activity (money laundering), one count of money laundering in an amount greater than \$30,000 but less than \$150,000, and one count of possession of marihuana in an amount greater than five pounds but less than fifty pounds. Appellant filed a motion to suppress the evidence seized from the 5225 County Road 1205 property, arguing that the affidavit used to support the warrant to search the property was insufficient because the affidavit erroneously identified the property as located in Rio Vista instead of Cleburne. Following a hearing on the motion, the trial court denied the motion by written order.

At trial, Appellant requested a jury instruction under TEX. CODE CRIM. PROC. ANN. art. 38.23 to allow the jury to reject the evidence seized from Appellant's property due to the inclusion of the property's erroneous address in Bartlett's affidavit, but the trial court denied Appellant's request for the instruction. The jury found Appellant guilty of all counts and assessed four years' imprisonment and a \$10,000 fine as punishment on both Count I (engaging in organized criminal activity) and Count II (money laundering in an amount greater than \$30,000 but less than \$150,000). The jury also assessed ten years' imprisonment (probated for ten years) and a \$10,000 fine on Count III (possession of marihuana in an amount greater than five pounds but less than fifty pounds). This appeal follows.

Appellant challenges his conviction in three issues, arguing that (1) the trial court erred by denying his motion to suppress because the search-warrant affidavit did not provide the correct address of the property; (2) the trial court erred by failing to issue the jury instruction under article 38.23; and (3) the evidence is legally insufficient to establish that at least five pounds of the substances seized from the 5225 County Road 1205 property met the legal definition of marihuana. Because the claim regarding the legal sufficiency of the evidence affords the greatest possible relief, we address that issue first. *See Lopez v. State*, 615 S.W.3d 238, 244 (Tex. App.—El Paso 2020, pet. ref'd).

## **II. LEGAL SUFFICIENCY**

### **A. Standard of Review and Applicable Law**

The Fourteenth Amendment guarantee of due process requires that every conviction must be supported by legally sufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). In a legal sufficiency challenge, we focus solely on whether the evidence, when viewed in the light most favorable to the verdict, would

permit *any* rational jury to find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19; *Brooks*, 323 S.W.3d at 912 (establishing legal sufficiency under *Jackson v. Virginia* as the only standard for review of the evidence).

Applying that standard, we recognize that our system designates the jury as the sole arbiter of the credibility and the weight attached to the testimony of each witness. *Metcalf v. State*, 597 S.W.3d 847, 855 (Tex. Crim. App. 2020); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Only the jury acts “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007), quoting *Jackson*, 443 U.S. at 319. In doing so, the jury may choose to believe or disbelieve any testimony. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). The jury remains at liberty to believe “all, some, or none of a witness’s testimony.” *Metcalf*, 597 S.W.3d at 855. “When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination.” *Dobbs*, 434 S.W.3d at 170, citing *Jackson*, 443 U.S. at 319. In conducting a legal-sufficiency review, “[w]e are not to sit as a thirteenth juror reweighing the evidence or deciding whether we believe the evidence established the element in contention beyond a reasonable doubt[.]” *Blankenship v. State*, 780 S.W.2d 198, 207 (Tex. Crim. App. 1988) (en banc). Instead, “we test the evidence to see if it is at least conclusive enough for a reasonable factfinder to believe based on the evidence that the element is established beyond a reasonable doubt.” *Id.*, citing *Jackson*, 443 U.S. at 318.

Appellant argues that there was legally insufficient evidence to support his conviction for possession of marihuana.<sup>2</sup> As it pertains to this case, a person commits that offense if he

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<sup>2</sup> Appellant does not challenge the legal sufficiency of the evidence supporting his convictions for engaging in organized criminal activity or money laundering.

intentionally or knowingly possesses marihuana in an amount greater than five pounds but less than fifty pounds. TEX. HEALTH & SAFETY CODE ANN. §§ 481.121(a), (b)(4). The State had the burden to prove that Appellant intentionally or knowingly possessed a usable quantity of marihuana in an amount set forth in the statute. *Henderson v. State*, No. 08-21-00174-CR, 2022 WL 3443699, at \*3 (Tex. App.—El Paso Aug. 17, 2022, no pet.) (not designated for publication) (citing *State v. Perez*, 947 S.W.2d 268, 271 n. 6 (Tex. Crim. App. 1997)) (en banc).

The Texas Health and Safety Code defines “marihuana” as:

[T]he plant *Cannabis sativa* L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term does not include:

- (A) the resin extracted from a part of the plant or a compound, manufacture, salt, derivative, mixture, or preparation of the resin;
- (B) the mature stalks of the plant or fiber produced from the stalks;
- (C) oil or cake made from the seeds of the plant;
- (D) a compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake;
- (E) the sterilized seeds of the plant that are incapable of beginning germination; or
- (F) hemp, as that term is defined by Section 121.001, Agriculture Code.

TEX. HEALTH & SAFETY CODE ANN. § 481.002(26)(A)–(F).

**B. The Record Contains Legally Sufficient Evidence to Establish that the Substances Seized from Appellant’s House Constituted Over Five Pounds of Marihuana**

Here, Appellant argues that the State failed to prove that the substances seized from his property met the legal definition of marihuana, contending that during the trial the term “marihuana” was used “in the vernacular” and that no witness testified that his or her definition of “marihuana” met the statutory definition under section 481.002(26) of the Texas Health and Safety

Code. Although Appellant concedes that a rational juror could conclude that the plants seized from the property contained at least some amount of marihuana, he contends that there was no evidence that would allow a juror to conclude without speculation that the total sum of the marihuana was at least five pounds. We disagree.

The State may prove that a substance is marihuana through direct or circumstantial evidence, including by introducing the seized substance into evidence. *Henderson*, 2022 WL 3443699, at \*3. And an officer's testimony that he is able to recognize marihuana through training and experience as an officer may be sufficient, by itself, to prove that a substance was marihuana. *Id.* (citations omitted); *see also Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002) ("Unlike other drugs that may require chemical analysis, marihuana has a distinct appearance and odor that are familiar and easily recognizable to anyone who has encountered it.").

Bartlett testified that the "total amount [of] all marihuana that's usable" the officers seized from Appellant's house and Conex structure was 34.08 pounds. Bartlett also testified that what he considers to be the "total weight" of the marihuana seized was "only the amount, the portion of the plant that is actually used or sold." He also described at length the process by which the officers had prepared the marihuana to be stored in evidence:

We took the plants, we pulled each plant out of the ground, loaded [them] into trailers, covered the trailers, took them back to the STOP administration office, and we have a bay in . . . the back of our office that's about half as large as this room. We have a cable system that goes back and forth across the roof. At that point, we had to get our ladders out and climb up and hang each and every plant just like they did. And then the plants hang there and dry. Once they're dry, we have to take the plants down and we spread out a big, ol' sheet so that it just doesn't go every where, and we sit out there and we strip the plants off the stalk. Once the stalk and everything is peeled, and we'll fold up the stalks as small as we can get [them], put into a box and photograph it so we can see the difference in what we've done. At that point, we take all the buds and the leaves and everything else that contains THC, and we close up the rag or the sheet type thing that we use, and we get big

buckets and pour the marihuana, the usable [amount of] marihuana into those big buckets.

Bartlett's testimony shows that the weighed portion of marihuana only contained those parts of the plants that contained THC, while the stalks were separated before weighing took place. A rational inference from this testimony is that the parts of the plant that do not meet the legal definition of marihuana, such as the stalks or sterilized seeds, were not counted as part of the 34.08-pound total weight. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(26).

In addition to Bartlett's testimony, the State also introduced the marihuana itself that had been seized from Appellant's property, which was partially contained in two large plastic tubs and weighed approximately twenty-three pounds without the weight of the tubs or packaging. The State also introduced marihuana contained in numerous sealed plastic bags. In addition, Peters recalled that at one point during her involvement in the operation, she alone trimmed "four or five" pounds of marihuana per week.

Although the record contains no laboratory reports confirming that the substances seized from Appellant's property constituted marihuana and Bartlett admitted that he had no scientific background in determining the chemical composition of marihuana, his testimony that he recognized various exhibits introduced at trial as marihuana through his training and experience is legally sufficient evidence to establish that fact. *See Henderson*, 2022 WL 3443699, at \*3 (citations omitted); *see also Osbourn*, 92 S.W.3d at 538. Viewing the above evidence in the light most favorable to the verdict, we hold that the evidence is legally sufficient to establish that Appellant possessed at least five pounds of marihuana as that term is defined under section 481.002(26) of the Texas Health and Safety Code.

Accordingly, we overrule Appellant's third issue.

### III. SUFFICIENCY OF SEARCH-WARRANT AFFIDAVIT

In the first issue he raises, Appellant argues that the trial court erred by denying his motion to suppress the evidence seized from his property because Bartlett's affidavit supporting the search warrant listed an incorrect zip code for the property and erroneously stated the property's address as being in Rio Vista instead of Cleburne.

#### A. Standard of Review and Applicable Law

An appellate court normally reviews a trial court's ruling on a motion to suppress under a bifurcated standard of review, where we give "almost total deference" to the historical facts found by the trial court and review de novo the trial court's application of the law. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). "However, when the trial court is determining probable cause to support the issuance of a search warrant, there are no credibility determinations [and] the trial court is constrained to the four corners of the affidavit." *Id.* Instead, when reviewing the sufficiency of an affidavit supporting a search warrant, we apply a "highly deferential" standard due to the constitutional preference for searches to be conducted pursuant to a warrant as opposed to a warrantless search. *Id.* "As long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable cause determination." *Id.*

"[T]he Fourth Amendment particularity requirement 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his powers to search.'" *Bonds v. State*, 403 S.W.3d 867, 874 (Tex. Crim. App. 2013) (quoting *Groh v. Ramirez*, 540 U.S. 551, 561 (2004)). "A warrant is sufficiently particular if it enables the officer to locate the property and distinguish it from other places in the community." *Id.* at 875. "The particularity requirement is related to the probable-cause requirement in that it enables the magistrate to determine whether probable cause exists for the

requested search.” *Id.* Even so, the Fourth Amendment does not require perfection in the warrant’s description of the place to be searched. *Id.* Instead, there should be a sufficiently accurate description of the property to ensure “no reasonable probability that the officers would search any place other than the intended [property].” *Id.* at 876 (citing *Bridges v. State*, 574 S.W.2d 560, 562 (Tex. Crim. App. 1978)).

To that end, we do not analyze the affidavit in a hyper-technical manner, but rather we must interpret the affidavit in a “commonsensical and realistic manner,” recognizing that the magistrate may draw reasonable inferences. *McLain*, 337 S.W.3d at 271. “When in doubt, we defer to all reasonable inferences that the magistrate could have made.” *Id.* (quoting *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007)). To that end, “[m]inor discrepancies will not invalidate a warrant if the affidavit and warrant otherwise sufficiently describe the premises to be searched,” and evidence beyond the affidavit may be presented at a suppression hearing to determine whether the description of the location to be searched was sufficient. *Bass v. State*, No. 06-01-00054-CR, 2002 WL 31260087, at \*4 (Tex. App.—Texarkana Oct. 10, 2002, pet. ref’d) (not designated for publication) (citations omitted).

**B. The Affidavit Contains Sufficient Information to Establish Appellant’s Property as the Place to be Searched**

On appeal, Appellant argues that the trial court erred by denying his motion to suppress because Bartlett’s affidavit supporting the search warrant erroneously identified the address of the Appellant’s property by listing the incorrect zip code for the property and by denoting the property’s location in Rio Vista instead of Cleburne. During the suppression hearing, Bartlett initially testified that the address of the property he surveilled was in Rio Vista, but he later clarified that he and other officers later discovered that the property was located in Cleburne and

acknowledged that the properties in Rio Vista and Cleburne with the 5225 County Road 1205 addresses were not the same. Bartlett stated that he also included in his affidavit a physical description of the property, which described the property as:

[L]ight gray in color with a gray metal roof and is a large square shaped corrugated metal building/barn and a small covered parking area which appears brown in color. The numbers 5225 [are] posted on the black mail box in front of the residence and near the roadway entrance in [the] front of the suspected place. Specifically the suspected place has multiple “connex” type shipping containers east of the residence. The containers and residence [are] accessed by a gravel driveway on the east side of County Road 1205 and leads to both the corrugated metal building and shipping containers.

While viewing several screenshots of the Cleburne property, Bartlett described its various traits, including the presence of the distinctive Conex structures. Bartlett also stated that the 5225 County Road 1205 properties in Rio Vista and Cleburne did not appear to be similar based on screenshots of the two properties because the Rio Vista property had no structures at all on it. Bartlett would have known that he had gone to the wrong property to be searched if he had gone to the Rio Vista address. Bartlett iterated that he and other agents repeatedly observed Peters travel to and from the property at the Cleburne address, which was the property that was searched.

Based on the record before us, it was unlikely that an incorrect property would be searched because of (1) the unique identifying characteristics of the Cleburne property (particularly the unusual Conex structures); (2) Bartlett’s testimony that the Rio Vista and Cleburne properties looked nothing alike and that he was personally familiar with the property and participated in the search warrant’s execution; and (3) the fact that the location intended to be searched was the place that was actually searched. Thus, the erroneous address in the affidavit was only a minor discrepancy that was not fatal to the sufficiency of probable cause in the affidavit or warrant, and we hold that the trial court did not err by denying the motion to suppress on this basis. *See Bonds*,

403 S.W.3d at 877 (officer’s familiarity with the property to be searched left “little chance” that the wrong property would be searched, notwithstanding an error in the property’s address included in the warrant); *Robertson v. State*, No. 10-18-00228-CR, 2020 WL 103950, at \*5 (Tex. App.— Waco Jan. 8, 2020, pet. ref’d) (mem. op., not designated for publication) (affidavit sufficiently established probable cause to search a property despite listing the property’s incorrect address due to the officer’s investigation of, and familiarity with, the property to be searched); *Bass*, 2002 WL 31260087, at \*5 (officer’s detailed testimony regarding the description of the property to be searched was sufficient to overcome the inclusion of the property’s incorrect address in the search-warrant affidavit).

Accordingly, we overrule Appellant’s first issue.

#### **IV. ARTICLE 38.23 INSTRUCTION**

Finally, Appellant argues in his second issue that the trial court erred by refusing his request for a jury instruction under TEX. CODE CRIM. PROC. ANN. art. 38.23.

##### **A. Standard of Review and Applicable Law**

The trial court must provide the jury with a written charge that sets forth the law applicable to the case. *Celis v. State*, 416 S.W.3d 419, 423 (Tex. Crim. App. 2013); TEX. CODE CRIM. PROC. ANN. art. 36.14. We review a claim of alleged charge error by determining whether the charge was erroneous, and if it was, we conduct a harm analysis.<sup>3</sup> *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

In a criminal jury trial, the jury decides factual issues, while the trial court decides the application of the law to those facts. *Madden v. State*, 242 S.W.3d 504, 511 (Tex. Crim. App.

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<sup>3</sup> Because we hold that Appellant was not entitled to an article 38.23 instruction, no harm analysis is necessary.

2007). If a defendant raises a fact issue regarding whether a search or seizure violated the constitutions or the laws of the United States or Texas, the trial court should instruct the jury to disregard any evidence it finds was unconstitutionally or illegally obtained. *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012) (citing TEX. CRIM. PROC. ANN. art. 38.23(a)). But there must be a genuine dispute about a material fact, and the disputed fact must be essential to deciding the lawfulness of the challenged conduct. *See Madden*, 242 S.W.3d at 510–11. An article 38.23 instruction is mandatory only if there is a factual dispute regarding how the evidence was obtained. *See Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004).

Thus, “a defendant must satisfy three requirements to be entitled to an article 38.23 instruction: (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested (i.e., genuinely disputed); and (3) that contested fact issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.” *Chambers v. State*, No. PD-0424-19, 2022 WL 1021279, at \*2 (Tex. Crim. App. Apr. 6, 2022) (citing TEX. CODE CRIM. PROC. ANN. art. 38.23; *Madden*, 242 S.W.3d at 510).

#### **B. The Trial Court did not Err by Denying Appellant’s Request for the Instruction**

In his testimony before the jury, Bartlett acknowledged that the search warrant erroneously listed the 5225 County Road 1205 address as being located in Rio Vista instead of Cleburne. Bartlett explained that because the property was located in a rural area, it was sometimes difficult for officers to determine whether a certain property was located in Rio Vista or Cleburne. After Bartlett discovered the error after executing the search warrant, he learned that 5225 County Road 1205 in Rio Vista was a field with no structures on it. Following the presentation of the parties’ cases-in-chief, Appellant requested an instruction under TEX. CODE CRIM. PROC. ANN. art. 38.23(a) to allow the jury to reject the evidence seized pursuant to the search of 5225 County Road 1205

property because it incorrectly stated the location of the property. Defense counsel conceded that there was an agreement between the parties that the address of the property was incorrect. The trial court denied the request for the instruction.

On appeal, Appellant argues that he was entitled to the instruction on the issue of the incorrect address. But as the State points out, the affidavit's erroneous listing of the property's address as being in Rio Vista was not a contested fact because Bartlett acknowledged the error in his testimony. Rather, the requested instruction would have asked the jury to decide a question of law—whether the affidavit and warrant that contained the error established probable cause for the search of the property. *See Madden*, 242 S.W.3d at 511. Only if one or more of those necessary facts are disputed does the judge ask the jury to decide if probable cause supported the search warrant. *See id.*

Because there was no genuine dispute that Bartlett's affidavit contained the error or that the 5225 County Road 1205 property in Cleburne (as opposed to Rio Vista) was the correct property to be searched, no article 38.23 instruction was necessary. And because we hold that the warrant was supported by sufficient facts in the affidavit to establish probable cause to search the property (as explained above), the warrant was sufficient as a matter of law and Appellant was not entitled to an article 38.23 instruction for this additional reason. *See Robertson*, 2020 WL 103950, at \*5 (defendant was not entitled to an article 38.23 instruction regarding a clerical error in the affidavit because the warrant was sufficiently supported by the affidavit and was sufficient to support the search as a matter of law).

Accordingly, we overrule Appellant's second issue.

## V. CONCLUSION

We affirm the judgments supporting Appellant's convictions.

LISA J. SOTO, Justice

February 2, 2023

Before Rodriguez, C.J., Soto, J., Marion, C.J. (Ret.)  
Marion, C.J. (Ret.) (sitting by assignment)

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