PD-0575-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/15/2019 10:25 PM
Accepted 7/16/2019 8:24 AM
DEANA WILLIAMSON
CLERK

No. PD-0575-19

In The

Court of Criminal Appeals

Austin, Texas

FILED
COURT OF CRIMINAL APPEALS
7/16/2019
DEANA WILLIAMSON, CLERK

ANTHONY CARTER, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

On Discretionary Review from 07-18-00043-CR
Seventh Court of Appeals

On Appeal from 2017-413,558
In the 137th Judicial Court of Lubbock County, Texas

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT REQUESTED
IF THE PETITION IS GRANTED

Allison Clayton
State Bar No. 24059587
The Law Office of Allison Clayton
P.O. Box 64752
Lubbock, Texas 79464
P: (806) 773–6889
F: (806) 329–3361
Allison@AllisonClaytonLaw.com

Attorney for Appellant

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) the following is a complete list of the names of the parties and their counsel.

PARTIES	COUNSEL
Appellate Panel	Chief Justice Brian Quinn (opinion author) Justice Patrick Pirtle Justice Judy Parker
Trial Judge	The Honorable Billy Eichman, III 364th Judicial District, Lubbock County
Earl Washington Defendant / Appellant	***Trial Counsel*** Nick Olguin, Attorney at Law 808½ Main Street Lubbock, Texas 79401 ***Appellate & PDR Counsel*** Allison Clayton The Law Office of B. Allison Clayton P.O. Box 64752 Lubbock, Texas 79464-4752
The State of Texas Prosecution / Appellee	***Trial Counsel*** Sunshine Stanek Assistant District Attorneys ***Appellate Counsel*** Lauren Murphree Assistant District Attorney P.O. Box 10536 Lubbock, Texas 79408-3536

Table of Contents

~ continued on the next page ~

INDEX OF AUTHORITIES

CASES

STATUTES

STATEMENT REGARDING ORAL ARGUMENT

Should the Court grant this petition, Appellant requests oral argument. *See* TEX. R. APP. P. 68.4(c). This case involves a statute that was revised in 2015 for which there is a dearth of caselaw from this Court. Oral arguments would (in a more expeditious fashion that briefing) develop aspects of the amended law not yet addressed by the Court. The case also involves the well-known *Jackson v. Virginia* standard of reviewing legal sufficiency, but in a way that is different to the run-of-the-mill sufficiency cases commonly raised in appellate courts. Oral arguments would aid the Court in addressing any angles or hypothetical applications implicated by the rule created by the court below.

JUSTIFICATION FOR REVIEW

In 2018, the number of felony drug possession cases in Texas courts hit an all-time high. Office of Court Administration, Annual Statistical Review for the Texas Judiciary: Fiscal Year 2018, pg. 19. This case implicates how courts of appeals will review sufficiency claims in drug possession cases. Given the common nature of sufficiency claims, and the fact of the Legislature's sweeping revisions of the drug possession statutes in 2015, the Court ought to grant review in the case so as to give the intermediate appellate courts guidance on how to handle what will likely be a common issue.

STATEMENT OF THE CASE

A jury convicted Appellant of possession of a controlled substance in Penalty Group 2-A weighing 400 grams or more. (9RR65). Later that day, the jury sentenced Appellant to 90 years' incarceration and a $100,000 fine. (CR44; 9RR156-57).

On direct appeal, following supplemental briefing ordered by the court and oral arguments, the Seventh Court of Appeals affirmed Appellant's conviction. *Carter v. State*, No. 07-18-00043-CR, 2019 wl 2121049, ___ S.W.3d ___ (Tex. App.—Amarillo May 14, 2019, pet. filed) (Appendix A).

Appellant did not file a motion for rehearing. The instant petition for discretionary review follows.

GROUND FOR REVIEW

Background

In 2015, the Texas Legislature made sweeping revisions to how "controlled substances" are defined in the drug possession statutes. Before the revisions, the statute implicated in this case—Section 481.1031, which defines a Penalty Group 2-A substance—was a list of prohibited substances. The problem, however, was that chemists would slightly alter one of the listed substances, making it technically no longer the prohibited substance but nevertheless a dangerous one. With the legislature only meeting every two years, Texas law was simply not able to keep up with clandestine chemists. The 2015 revisions were the legislature's response. They did away with the list of drugs, choosing instead to list several chemicals and detailing which molecular structures of the various listed chemicals (as they relate to one another) are prohibited. Consequently, Section 481.1031, is now, by necessary design, extremely complicated. In a published opinion, the court below inferred a substance met the molecular structural requirements of Section 481.1031 even though (by the court's admission), there was no direct evidence of that molecular structure in the record.

Grounds for Review

In a sufficiency analysis, may a reviewing court uphold a conviction where the offense is defined by technical elements beyond the understanding of an ordinary factfinder if no evidence on the elements was presented at trial?

ARGUMENT

A Court of Appeals Errs in Affirming a Conviction for an Offense Based on Technical Elements Not Proven by the Evidence and Outside the Scope of Knowledge of an Ordinary Factfinder

I. The Elements of Section 481.1031(b)(5)

A. The Complex Language of Section 481.1031(b)(5)

Appellant was found guilty of possessing a significant amount of synthetic marijuana. The synthetic marijuana in the instant case is outlawed as a Penalty Group 2-A substance in Section 481.1031(b)(5) of the Texas Health and Safety Code:

> (b) Penalty Group 2-A consists of any material, compound, mixture, or preparation that contains any quantity of a natural or synthetic chemical substance . . . listed by name in this subsection or contained within one of the structural classes defined in this subsection:
> . . .
> (5) any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component, whether or not the core component or group A component are further substituted to any extent, including:
> Naphthoylindane;
> Naphthoylindazole (THJ-018);
> Naphthyl methyl indene (JWH-171);
> Naphthoylindole (JWH-018);
> Quinolinoyl pyrazole carboxylate (Quinolinyl fluoropentyl fluorophenyl pyrazole carboxylate);
> Naphthoyl pyrazolopyridine; and
> Naphthoylpyrrole (JWH-030)

TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5).

B. Not Even the Legislators Who Drafted and Passed Section 481.1031(b)(5) Understand What it Prohibits—Only a Chemist Can Understand the Substance of the Statute

Most people reading the language of Section 481.1031 quoted above will quickly pass over the words as their eyes glaze over. The law was not always so complicated. Before 2015, the statute simply listed out prohibited substances. Act of May 22, 2015, 84th Leg., R.S., ch.65, S.B. 173 (amended 2015) (current version at TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5)).

The problem, however, was that clandestine chemists would tweak the molecular structure of a listed substance. The changed structure resulted in a new substance, which was not on the list of prohibited substances but was still just as dangerous. The legislature would meet and revise the penalty group list. But with the legislature only meeting every two years, the chemists were always able to stay one step ahead of the law. Debate on Tex. S.B. 173 Before the Senate Crim. Justice Comm., 84th R.S. at 1:32:20 (Mar. 10, 2015) (recording available from online Tex. Senate Archives).

By 2015, the legislature was tired of playing games. It amended the statute to where clandestine chemists could no longer evade the law simply by moving a molecule here or there. *Id.* But those necessary amendments were beyond the skill of any non-chemist. Even the legislators who passed the bill did not know what the

statute's language meant. They just knew, from working with the Senate's resource chemist, that this was the language they needed to pass for the safety of Texans. *Id.* at 51:56-52:20 (recording the author of the bill saying "[r]eally, to me, it's the chemist who we relied on on these bills more than even the lawyers because that was what - - the code we've been trying to crack.").

II. The Evidence Did Not Directly Address Each Element of Section 481.1031(b)(5)—A Failing No One Disputes

An ordinary person can safely say that a substance is illegal if it:

1) contains a core component
2) that is substituted at the 1-position
3) to any extent
   and
4) substituted at the 3-position
5) with a link component
6) which is attached
7) to a group A component

TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(5)). Whatever those words mean, those are the elements of a substance prohibited under Section 481.1031(b)(5).

A. The Evidence Presented at Trial

Appellant was found guilty of possessing a substance called fluoro-ADB. At trial, the State's expert testified about fluoro-ADB and the three components of Section 481.1031(b)(5). He talked about the core component, the link component, and the group A component he found in the fluoro-ADB. (7RR19). He testified

fluoro-ADB's core component is indazole; its group A component is methoxy dimethyl oxobutane; and its link component is carboxamide. 7RR19. He reasoned as long as one of each of the components is present, the drug is illegal. 7RR19 ("[B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written.").

B. The Evidence Not Presented at Trial

The State's expert never talked about the position of each component relative to one another. He said fluoro-ADB's core component is indazole, but he never said whether that indazole had any substitutions at the 1-position. He said fluoro-ADB's link component is carboxamide, but he never said whether the carboxamide is "substituted at the 3-position" to the indazole (the core component). He said fluoro-ADB's group A component was methoxy dimethyl oxobutane, but he again failed to discuss whether that group A component was attached to the link component.

No one disputes these failings. At the court below, both sides were asked to find the testimony discussing how the components related to each other. Both sides reached the same answer: there is no such testimony. *See* State's Supplemental Brief, pg. 7 (Feb. 19, 2019). In its opinion, the court below acknowledged,

> The prosecutor asked the forensic chemist, "So if we put all of those together . . . . We see the portions of fluoro-ADB that are relevant to

> this; is that correct?" The chemist answered, "Correct. . . . [B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." Sadly, the chemist was not asked to clarify the latter statement. This is of import because § 481.1031(b)(5) speaks in terms of certain chemicals having a specific placement within the molecular structure of an illegal compound.

Carter, No. 07-18-00043-CR, pg. 6.

No one really understands what the words of Section 481.1031(b)(5) mean, but everyone agrees that the elements of the provision require both the presence of certain chemicals and that those chemicals are structured in a certain way relative to one another. And everyone agrees that the latter set of elements was never directly established by the evidence.

III. The Court Below, Acting Without Precedence, Expanded the Assumptions Permitted by *Jackson v. Virginia* into the Realm of a Highly Technical Areas of Evidence (Molecular Chemistry) Outside the Understanding of an Ordinary Juror

A. The *Jackson v. Virginia* Jurisprudence Does Not Permit a Reviewing Court to Impart Specialized, Technical Knowledge on Ordinary Factfinders

At its heart, this case involves a sufficiency-of-the-evidence issue. What makes this kind of case unique is that the revised statutory language establishing the elements of drug possession offenses is now highly technical.

> When reviewing a legal sufficiency challenge, we view all of the evidence in the light most favorable to the verdict to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Ross v. State, 543 S.W.3d 227, 234 (Tex. Crim. App. 2018) (*quoting Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (quoting *Jackson v Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Most cases will pass this sufficiency review even if there is no direct evidence as to every element. Jurors are ordinary people capable of drawing reasonable inferences. So, for example, if the evidence establishes defendant shot the victim in the torso and the charge is murder, then a rational factfinder could infer that the defendant murdered the victim even without direct evidence connecting every dot. If the evidence establishes defendant broke into a car, and a phone that was on the front seat of the car before the break-in was not there after the break-in, then a rational factfinder could conclude that defendant stole the phone. That deduction is reasonable and well-within an ordinary person's experiences and common sense. In most criminal cases, a rational juror can connect the dots, and the court of appeals should assume that is what the jury did in reaching their verdict.

But what about cases where the offense is outside the scope of an ordinary person's intelligence, experience, and understanding? The "rational trier of fact" envisioned in the *Jackson* jurisprudence has no specialized training. *See Jackson*, 443 U.S. at 316; *Ross*, 543 S.W.3d at 234; *Laster*, 275 S.W.3d at 517. Therefore, a

court of appeals errs in imparting onto the factfinder a specialized understanding of the evidence necessary to support the verdict.

B. The Court Below Stretched the *Jackson* Jurisprudence Too Far When It Applied the *Jackson* Presumptions to Jurors Evaluating the Elements of the Highly Technical Drug Possession Statute

After the 2015 revisions, a rational juror's common sense will be of little help in understanding whether a defendant committed a drug possession offense. The State cannot say "defendant possessed fluoro-ADB" and expect an ordinary juror to understand what that means. More to the point, a discussion about molecular structure in general does not equip a jury to make any conclusions about the molecular structure of the specific compounds in a case. An ordinary factfinder cannot rely on his own common sense to make the leap from the general to the specific in the highly technical area of molecular chemistry.

And yet, as the court below observes, the only evidence in the case was very general in nature. For example, as relied upon by the court below, the State's expert said things like:

- "we are looking at the structural class, now we are actually looking at the structure itself and seeing if that falls within a particular combination of groups."
- the "law classifies three different parts of the molecule"
- "based off of those three combinations [of indazole, methoxy dimethyl oxobutane, and carboxamide], that's why it is able to be controlled under the structural class and how the law is currently written"

- "I can at least tell you that [fluoro-ADB is] the indazole ring group"

Opinion, pgs. 7-8. No ordinary juror will hear a statement like "I can at least tell you that [fluoro-ADB is] the indazole ring group" and be able to deduce that that means fluoro-ADB has indazole substituted at either the 1-position or the 3-position with carboxamide which is attached to methoxy dimethyl oxobutane.

And it does not matter how many general statements one piles on. Adding "that's where the fluorine is actually attached to a particular carbon" or "we now classify a synthetic compound by the structure" or "there are a whole bunch of different combinations of structures" or a thousand more general comments is *still* not going to get the jury to the conclusion that fluoro-ADB has indazole substituted at either the 1-position or the 3-position with carboxamide which is attached to methoxy dimethyl oxobutane. *See id.*, pgs. 7-8. Ten thousand spoons do no good for someone who needs a knife. It does not matter how many general comments about chemistry an expert makes when what the jury really needs is specific testimony about molecular structure required by the statute it is applying to the defendant.

Jackson contemplates an ordinary person as a rational trier of fact and imparts upon him the ability to make reasonable deductions from the evidence based on common experiences and sense. *Jackson* does not, however, relieve the

State of its burden in proving the elements of technical statutes beyond an ordinary person's comprehension.

The court below stretched the *Jackson* jurisprudence too far by applying it to highly technical elements of a statute. It relieved the State of its burden of proof. And there is no basis in caselaw to support the court's action. No court expects an ordinary juror to comprehend molecular chemistry. But that is the tacit assumption the court below made in affirming Appellant's conviction. Neither *Jackson* nor any other case supports extending the sufficiency doctrine so far. The Court ought to therefore grant Applicant review to correct the appellate court's error. *See* TEX. R. APP. P. 66.3(d), (f).

PRAYER

Appellant Anthony Carter prays the Court will grant discretionary review of his case.

Respectfully submitted,

Law Office of Allison Clayton
P.O. Box 64752
Lubbock, Texas 79464-4752
P. (806) 773-6889
F. (888) 688-4515

/s/ Allison Clayton
Allison Clayton
State Bar No. 24059587
Allison@AllisonClaytonLaw.com

Certificate of Service

I certify that on July 15, 2019, a copy of this brief was served on opposing counsel, Lauren Murphree of the Lubbock County District Attorney's Office, via the State e-filing service. I additionally certify that on this day service was made via State e-filing service to Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

/s/ Allison Clayton
Allison Clayton

Certificate of Compliance

I certify the foregoing Petition for Discretionary Review complies with Rule 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, is 2,316 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ Allison Clayton
Allison Clayton

Appendix

Carter v. State, No. 07-18-00043-CR, 2019 WL 2121049, __ S.W.3d __
(Tex. App.—Amarillo May 14, 2019, pet. filed)

In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-18-00043-CR

ANTHONY CARTER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2017-413-558, Honorable John J. McClendon, III, Presiding

May 14, 2019

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Anthony Carter (appellant) appeals his conviction for possessing a controlled substance with intent to deliver and his 90-year prison sentence. He operated several smoke shops from which he sold, among other products, an item called "Chilly Willy" which contained the compound fluoro-ADB. Though fluoro-ADB was not expressly named as a controlled substance by Texas statute, several components of it allegedly were within Penalty Group 2-A of § 481.1031(b) of the Texas Health and Safety Code. Four issues pend for our review. After considering each, we affirm.

Void Indictment

Though not the first issue mentioned by appellant, we address it first. He contends that the indictment was void because it did not allege an offense. It purportedly failed to allege an offense because, through it, the State accused "Anthony Carter" of "knowingly possess[ing], with intent to deliver, 'Chilly Willy; 2g Chronic Hypnotic' which contains a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the Texas Health and Safety Code, to wit: fluoro-ADB, by aggregate weight including adulterants and dilutants 400 grams or more." As previously mentioned, fluoro-ADB was not expressly named as a controlled substance in that statutory provision. Because it was not, appellant believed the indictment failed to vest the trial court with subject-matter jurisdiction, which rendered the conviction void. We overrule the issue.

The sufficiency of an indictment is a question of law. *State v. Zuniga*, 512 S.W.3d 902, 906 (Tex. Crim. App. 2017). Additionally, whether a charging instrument is sufficient and avers an offense depends on whether the statements therein "are clear enough that one can identify the offense alleged." *Teal v. State*, 230 S.W.3d 172, 180 (Tex. Crim. App. 2007). In other words, we must assess if "the trial court (and appellate courts who gives deference to the trial court's assessment) and the defendant [can] identify what penal code provision is alleged and [whether] that . . . provision [is] one that vests jurisdiction in the trial court." *Id.* If the answer is yes, then the indictment is sufficient to vest the trial court with subject-matter jurisdiction. *Id.* If not, then the conviction is void for want of jurisdiction.

Here, the indictment identified 1) the name of the accused and 2) the crime or offense of which he was accused. The former was "Anthony Carter," our appellant. The latter was "knowingly possess[ing]" 400 or more grams of a "compound controlled in

Penalty Group 2-A [of] Chapter 481.1031(b)(5) of the Texas Health and Safety Code." Furthermore, possessing a controlled substance within that penalty group in a quantity having an aggregate weight of 400 or more grams was and is a felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1161(b)(3) (West 2017) (stating that the offense is a state jail felony if the amount is, by aggregate weight, including adulterants and dilutants, five pounds or less but more than four ounces).[1] Appellant being identified as the accused and being told of the criminal statute he violated satisfied the requirements of *Zuniga*. So, the indictment was sufficient to vest the district court with subject-matter jurisdiction over the proceeding. *See Kirkpatrick v. State*, 279 S.W.3d 324, 329 (Tex. Crim. App. 2009) (finding that the indictment sufficiently alleged an offense within the district court's jurisdiction because it was returned in a felony court and on its face disclosed the name of the offense and the penal code provision assigned it). And, that the indictment failed to mention the particular compound or chemical within the litany of compounds and chemicals itemized within § 481.1031(b)(5) does not alter our decision.

Penalty Group 2-A encompasses "materials, compounds, mixtures, or preparations" containing certain specified natural or synthetic chemical substances listed within § 481.1031(b). *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b)(1)–(8) (West Supp. 2018) (naming the natural or synthetic chemical substances comprising the materials, compounds, mixtures, or preparations). If appellant were confused about or questioned whether "fluoro-ADB" or the chemicals comprising it fell within the category of prohibited materials, compounds, mixtures, or preparations, he could and should have objected to the indictment before trial. *See Kirkpatrick*, 279 S.W.3d at 329 (stating that

[1] Funny that the statute defines the weight in terms of ounces and pounds (i.e., the American way of measuring weight) while the indictment refers to grams. That is inconsequential, though, given the ability to convert grams into ounces, and 400 or more grams equals 14 or more ounces.

"if [Kirkpatrick] had confusion about whether the State did, or intended to, charge her with a felony, she could have, and should have, objected to the defective indictment before the date of trial"). Because appellant did not do so, he waived his complaint. *See Herrera v. State*, No. 06-18-00111-CR, 2019 Tex. App. LEXIS 3018, at *2–3 (Tex. App.—Texarkana Apr. 15, 2019, no pet. h.) (mem. op., not designated for publication) (so holding when addressing a similar contention also involving fluoro-ADB).

Sufficiency of the Evidence

Next, appellant questions the sufficiency of the evidence underlying his conviction. His attack is directed at whether the State proved 1) he knowingly sold a controlled substance listed in § 481.1031(b)(5) and 2) the substance he was convicted of possessing fell within that provision. We overrule both issues.

The pertinent standard of review is explained in *Johnson v. State*, 560 S.W.3d 224, 226 (Tex. Crim. App. 2018). We refer the parties to that opinion and forgo reiterating the standard here.

Again, the controlled substance appellant allegedly possessed fell within § 481.1031(b)(5) of Penalty Group 2-A of the Texas Health and Safety Code. Per § 481.113 of the same Code, a person commits an offense if he "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in . . . Penalty Group . . . 2-A." TEX. HEALTH & SAFETY CODE ANN. § 481.113(a) (West 2017). Therefore, securing a conviction under that statute obligated the State to prove not only that the substance in question was within § 481.1031(b)(5) but also that the accused (appellant) knew it was a substance within that provision. *See White v. State,* 509 S.W.3d 307, 309 (Tex. Crim. App. 2017) (involving a Penalty Group 1 controlled substance and stating that "[t]his is a nature-of-conduct offense, and the statute expressly assigns culpable mental

states to the nature of the conduct: A defendant must be aware that he is delivering a Penalty Group 1 substance to be guilty"); *Blackman v. State*, 350 S.W.3d 588, 594 (Tex. Crim. App. 2011) (stating that to prove "the unlawful-possession-of-a-controlled-substance element of the charged offense in this case, the State was required to prove that: 1) appellant exercised control, management, or care over the three kilograms of cocaine; and 2) appellant knew that this was cocaine"). We first address if the State proved that the item possessed by appellant was a controlled substance under § 481.1031(b)(5).

Proof Chilly Willy Was a Controlled Substance

Penalty Group 2-A described in § 481.1031 encapsulates materials, compounds, mixtures, and the like containing any quantity of natural or synthetic chemical substances "listed by name in this subsection or contained within one of the structural classes defined in this subsection." TEX. HEALTH & SAFETY CODE ANN. § 481.1031(b). Subparagraph (5) of (b) describes one such "structural class" as "any compound containing a core component substituted at the 1-position to any extent, and substituted at the 3-position with a link component attached to a group A component."[2] *Id.* § 481.1031(b). While neither "Chilly Willy" nor "fluoro-ADB" were alluded to in § 481.1031(b)(5), the State's expert nonetheless described fluoro-ADB as having various ingredients within its category of core, link, and group A components. That is, the core component found in "fluoro-ADB" was "indazole," according to the forensic chemist, while its link and group A components

[2] The terms "core component," "group A component," and "link component" were and are defined through a litany of various chemicals. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.1031(a)(1)–(3) (specifying the respective chemicals within each component).

were "carboxamide" and "methoxy dimethyl oxobutane," respectively.[3] These chemicals were found per "gas chromatography mass spectrometry," he continued. The prosecutor asked the forensic chemist, "So if we put all of those together . . . . We see the portions of fluoro-ADB that are relevant to this; is that correct?" The chemist answered, "Correct. . . . [B]ased off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." Sadly, the chemist was not asked to clarify the latter statement. This is of import because § 481.1031(b)(5) speaks in terms of certain chemicals having a specific placement within the molecular structure of an illegal compound.

That is, criminal statutes outside the Penal Code must be strictly construed. *State v.* Cortez, 543 S.W.3d 198, 206 (Tex. Crim. App. 2018). Being within the Health and Safety Code, § 481.1031(b)(5) is one such statute outside the Penal Code necessitating strict construction. Per its terms, a compound within its scope is one "containing a core component, [i.e., indazole], substituted ***at the 1-position*** to any extent, and substituted ***at the 3-position*** with a link component [i.e., carboxamide] ***attached to*** a group A component [i.e., methoxy dimethyl oxobutane]." (Emphasis added). If one is to heed the actual wording of (b)(5), it is not enough that the chemicals are found in a compound. That is, guilt requires more than merely utilizing a bygone means of ordering from a Chinese menu, *i.e.*, one item from column A and two from column B.[4] Simply pulling "indazole" from the core component column, "methoxy dimethyl oxobutane" from the

[3] "Indazole" is named within the statutory category of "core component," *id.* § 481.1031(a)(1), while "carboxamide" is listed as a "link component," *id.* § 481.1031(a)(3), and "methoxy dimethyl oxobutane" as a "group A component." *Id.* § 481.1031(a)(2).

[4] Barry Popik, "*One from column A, one from column B" (Chinese menu ordering)*, THE BIG APPLE (Dec. 20, 2007) https://www.barrypopik.com/index.php/new_york_city/entry/one_from_column_a_one from_column_b_chinese_menu_ordering (discussing the origins of what became known as the "Chinese menu" system).

group A column, and "carboxamide" from the link column gets the State nowhere. Instead, each item must be located on the plate in a certain way for the ultimate "meal" to be 非法 (i.e., illegal). To conclude otherwise would be to ignore the legislature's wording, and that we cannot do. So, construing the statute strictly leads us to hold that the State must prove the respective components or chemicals were located or attached as expressed in the statute.

Neither the forensic chemist nor any other witness expressly said that the pivotal compounds in "fluoro-ADB" were in the "positions" or "attached" as directed by § 481.1031(b)(5). Instead, the expert opined that "based off of those three combinations, that's why [fluoro-ADB] is able to be controlled under the structural class with how the law is currently written." Whether this was his way of confirming that the chemicals indazole, carboxamide, and methoxy dimethyl oxobutane had the requisite placement or attachments is a bit unclear. Nonetheless, the standard of review obligates us to look at all the evidence and construe it in the light most favorable to the verdict or prosecution. *See Johnson*, 560 S.W.3d at 226. In abiding by that standard, we encounter where, prior to voicing his opinion, the expert described how the legislature had recently changed the law in attempting to criminalize synthetic marijuana. While doing so, he uttered several informative statements. They were as follows: 1) "[O]ne of the recent additions to the law is instead of listing each substance by name, we now actually classify a synthetic compound ***by the structure***"; 2) "[T]here are a whole bunch of different ***combinations of structures***, and depending on what kinds of groups ***create that molecule***, it's classified by different subsections in the law"; 3) Fluoro-ADB fell within structural class § 481.1031(b)(5); 4) "From a chemist's perspective, really, and as a forensic chemist, we're looking at ***how the structure relates*** to the law"; 5) "[S]o we are looking at different

parts of the compound to see if it falls within that particular subsection" of the statute; 6) "[S]ince we are ***looking at the structural class***, now we are actually looking at the structure itself and seeing if that falls ***within a particular combination*** of groups"; 7) "I do know ***structurally*** [fluoro-ADB] is under the 2-A"; 8) The law "classifies three different parts ***of the molecule***"; 8) from "a forensic aspect, I can at least tell you that [fluoro-ADB is] the indazole ring group, and then also I have tried to make it easier on all of us by showing how the indazole actually ***fits in with the structure***"; and 9) "[B]ased off of those three combinations [of indazole, methoxy dimethyl oxobutane, and carboxamide], that's why it is able to be controlled under the structural class with how ***the law is currently written***." (Emphasis added). To that we add his answer of "Correct" when asked, "And that's what makes a compound, the place where ***the molecules are stuck***, correct?" and his statement that "but it's where the fluorine is actually attached to a particular carbon" when asked whether a different form of fluoro-ADB would be a controlled substance under § 481.1031(b)(5). (Emphasis added).

Finally, the tenor of the defense counsel's own argument and questions shed some light. During his cross-examination of the expert, he was attempting to point out that lay people would be unable to know if a compound he had was controlled under § 481.1031(b)(5). In doing so, he uttered, "Well, if I don't know that I'm charged with 5-fluoro ADB-PINACA, I can't go and look and see in the statute and go, 'Wait a minute, that NH2 component,' and I guess it's ***the first position***, or whatever . . . ." (Emphasis added). Admittedly, his comments were and are not competent evidence. Yet, they, along with the expert's testimony we cited, illustrate context. That context describes ongoing discussion about molecular structures of compounds within § 481.1031(b)(5) and the positioning of particular chemicals within that structure. In the expert so

describing about molecules, structural classes, structures, the structural class described in § 481.1031(b)(5), and the core, link, and group A components of fluoro-ADB, a rational fact-finder could reasonably interpret his ultimate opinion about why fluoro-ADB "is able to be controlled under the structural class with how the law is currently written" as meaning the core, link, and group A components at bar were in the positions and had the attachments required by § 481.1031(b)(5).

Simply put, we reached the end despite the length of the route taken and the fog covering its path. The State presented sufficient evidence to permit the jury to rationally conclude, beyond reasonable doubt, that fluoro-ADB was a controlled substance within the scope of § 481.103(b)(5).

Proof of Mens Rea

Next, we turn to the sufficiency of the evidence purporting to establish that appellant knowingly sold the substance controlled under § 481.1031(b)(5). In questioning the tenor of the State's proof here, appellant alludes to the United States Supreme Court opinion in *McFadden v. United States*, __ U.S.__, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015), and its discussion of how to prove culpability under a comparable federal statute. The court observed that the "knowledge requirement" may be satisfied in either of two ways. *McFadden*, 135 S. Ct. at 2304. The prosecutor may show "the defendant" 1) knew "he possessed a substance listed on the schedules, even if he did not know which substance it was" or 2) knew "the identity of the substance he possessed." *Id.* An example of the former would include, according to the Court, "a defendant whose role in a larger drug organization is to distribute a white powder to customers. The defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is." *Id*. We apply this mode here, at appellant's invitation.

The seizure culminating in appellant's prosecution occurred around May 1, 2017. About four months earlier, in January of 2017, law enforcement officers had executed a search warrant upon one of appellant's stores. Packets being sold there and having names such as "Chilly Willy," "Ripped," "Mary Jane," and "Brain Freeze" were confiscated. More importantly, an officer assisting in the search and seizure informed appellant at that time that "the synthetic that he was selling was illegal to sell." Yet, he continued to sell them over the ensuing months.

Additionally, on the face of some packets were images depicting what one could interpret as the potential effects of ingesting their contents. For instance, the "Chilly Willy" packet carried a person with long hair, sunglasses, and medallions sitting crossed-legged, with two fingers up in the form of a peace sign and smoking a self-rolled cigarette.[5] The

[5]

words “chronic hypnotic” could be read next to the sitting gentleman. Much like a picture painting 1000 words, the visage could be viewed as suggesting that one who consumed the product would be “chilled-out” in a manner purportedly resulting from smoking marijuana.

Another packet, “Ripped,” had an image of a banana with legs, hands, face, a wide-opened, smiling mouth, and bulging eyes.[6] Those eyes just happened to be bloodshot. So too were the banana’s hands raised upward. Viewing the depiction as a whole evinces an object engaged in a highly animated state of being. And, of course, there was the packet labelled “Mary Jane.” The Spanish translation for that name happened to be “Maria Juana” or, in its abbreviated version, “marijuana.”[7]

---

[6]

[7] Along with these packets, the officers also found actual marijuana.

In short, appellant was told of the illegal nature of the substances. Furthermore, those substances were packaged in a way that suggested their purposes and effects. That data was more than some evidence allowing a rational jury to conclude, beyond reasonable doubt, that appellant knew "Chilly Willy" was a synthetic substance the legislature intended to outlaw under Penalty Group 2-A. He may not have known the specific compounds it contained and which were within Penalty Group 2-A, but per *McFadden*, that knowledge is unnecessary. The evidence was enough to prove he possessed a substance listed on the schedules, even if he did not know which substance it was. We overrule appellant's issue.

Expert Witness

Next, we address appellant's issue regarding whether the trial court erred in allowing the State's forensic chemist to testify about the fluoro-ADB being a controlled substance. Allegedly, he "was not qualified to testify about synthetic substances" since he "had virtually no formal education, experience, or training on synthetic substances." So, allegedly, the "trial court abused its discretion when it certified him as an expert." We overrule the issue.

A trial court's decision concerning whether a witness is qualified to voice an expert opinion is reviewed under the standard of abused discretion. *Wolfe v. State*, 509 S.W.3d 325, 335 (Tex. Crim. App. 2017). That standard bars us from interfering with the decision if it falls within the zone of reasonable disagreement. *Id.*

Next, qualifying a witness as an expert normally implicates a two-step procedure. *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006). First, it must be shown that the witness has a sufficient background in a particular field, which background encompasses the matter on which the witness is to give an opinion. *Id.* (quoting *Broders*

v. Heise, 924 S.W.2d 148 (Tex. 1996)). The second step gauges the relationship between the subject matter at issue and the expert's familiarity with it; that is, it must be shown that the expert's background is "tailored to the specific area of expertise in which the expert desires to testify." *Id.* at 133.

Here, appellant attacked the expert's qualification due to a lack of "formal academic instruction, on-the-job training, or experience with synthetic substances" and the witness's unfamiliarity with how to "create" or make the fluoro-ADB or other synthetic controlled substances. Yet, the topic on which the chemist was asked to speak was not how those who engaged in the drug trade made their drugs. How synthetic drugs were made actually had little to do with the burden being addressed by the State. Indeed, the manner by which appellant attempts to attack the expert brings to mind a scene from "The Big Bang Theory."

Leonard's car is about to break down. He asks his highly educated scientist friends riding with him if "anybody [knew] anything about the internal combustion engine." Having doctorates in physics and astrophysics or master's in engineering, they responded with, "Of course," "Very basic," and "[It's] 19th-century technology." When asked whether "anybody [knew] how to *fix* an internal combustion engine," the replies were "No" and "No, not a clue."[8] The relevant topic there was how to fix a car engine, not the physics behind or design of an internal combustion engine.

Here, we do not deal with a car motor but, rather, § 481.1031(b)(5). To meet its requirements, the State was obligated to prove that the synthetic drug in question consisted of certain chemicals and those chemicals held certain molecular positions

[8] *The Big Bang Theory - Combustion Engine*, YOUTUBE, https://youtu.be/i9en6AcVkBo (last visited May 7, 2019).

within the compound they composed. In other words, the pertinent subject matter concerned the molecular structure of the synthetic, the chemicals comprising that structure, and their locations within the molecule in relation to each other. So, whether the witness knew how to make the drug in question was really unimportant. Instead, the witness had to be skilled or trained in the fields of identifying the chemical composition of substances and the molecular structures of the chemicals identified therein. The witness utilized by the State to do that had a bachelor's degree in forensic chemistry and criminalistics, a master's degree in forensic science, and four months of intensive training with the Department of Public Safety in "controlled substance analysis." In short, he was a forensic chemist who conducted controlled substance and blood alcohol analysis. As such, one of his primary duties was "tak[ing] unknown substances and figur[ing] out what they [were]," that is, identifying the chemical composition of substances. He apparently worked in that field with the Department of Public Safety for about four years and testified on the topics of blood and controlled substance analysis about 20 times. So too had he conducted "thousands of testing[s] for all sorts of different drugs." Whether the substances undergoing analysis were synthetically created mattered little because the manner in which they were tested differed little from the analysis of non-synthetic controlled substances. As he testified, "it's just like any other drug": "[W]hen it comes to detecting a drug, it's the same whether it's meth, cocaine, heroin, any other drug." More importantly, appellant has cited us to nothing that suggests the analysis is different.

Just as Leonard may have needed someone who knew how to take apart and fix a carburetor, the State needed someone who could take apart a drug and determine its chemical composition, irrespective of whether the drug was naturally occurring or cooked up by a human being. And, the foregoing evidence about the education, training, and

experience of the forensic chemist under attack illustrated that he had the requisite capability to undertake the job assigned him. At the very least, the trial court's determination that he had such training and skill in the relevant topic was not outside the zone of reasonable disagreement.

Excessive Sentence

Through his final issue, appellant asserts that "[s]entencing [him] to ninety years in prison for this offense [was] excessive, cruel, and unusual, in violation of the Eighth Amendment of the United States Constitution." As we recently reiterated in *Anderson v. State*, No. 07-17-00421-CR, 2019 Tex. App. LEXIS 2261, at *10 (Tex. App.—Amarillo Mar. 22, 2019, pet. filed) (mem. op., not designated for publication), a complaint about punishment being excessive or cruel and unusual must be preserved for review. That is normally done by a defendant complaining of the sentence when pronounced at trial or, if there was no opportunity to object, complaining through a motion for new trial. *Id.* at *10–11. The record before us discloses that appellant did neither. Consequently, whether his sentence was unconstitutionally excessive or cruel and unusual was not preserved for review, and the issue is overruled.

We affirm the trial court's judgment. So too do we deny, as moot, appellant's motion to strike from the appellate record a molecular diagram of fluoro-ADB used as demonstrative evidence at trial; whether it could or could not be considered in assessing the sufficiency of the evidence was a matter that we found irrelevant to the disposition of the appeal.

Brian Quinn
Chief Justice

Publish.