Testimony of experienced officers can be sufficient evidence from which a jury can determine beyond a reasonable doubt that a substance is marijuana. [In the Matter of Z.R.](13-5-5A)

On August 29, 2013, the Houston Court of Appeals (1st Dist.) held that because marijuana has a distinct odor and appearance, chemical testing and expert testimony is not necessary to prove that a substance is in fact marijuana; instead, the substance may be identified through the lay opinion of a police officer or other witness.

¶ 13-5-5A. **In the Matter of Z.R.**, MEMORANDUM, No. 01-11-00715-CV, 2013 WL 4680241 (Tex.App.-Houston (1st Dist.), 8/29/13).

Facts: On August 25, 2010, Raymond Aguilar, a security officer at Foster High School in Richmond received an anonymous Crime Stopper tip that Z.R. may have marijuana in his possession. Aguilar went to Z.R.'s classroom, where he asked Z.R. to step outside and bring his belongings with him to Aguilar's office. When they arrived at Aguilar's office, Aguilar asked the assistant principal, Mr. Spates, to join them. Once Mr. Spates arrived, Aguilar told Z.R. that he had learned that Z.R. may have something on him that he should not have at school. Z.R. responded by unzipping his backpack, removing a pencil bag, and taking out a plastic bag containing a leafy substance. He also admitted the substance in the bag was marijuana.

Aguilar called Richmond Police Officer Sherman Phillips, the resource officer assigned to Foster High School, and gave Phillips the plastic bag. Based on its appearance and smell, Phillips believed the substance in the plastic bag was marijuana. He took it to his office and tested a small portion of it with a marijuana field test kit, or presumptive test. Phillips testified that when he performed the presumptive test, the substance changed colors, indicating "[t]hat the substance was marijuana." Phillips then arrested Z.R. for possession of marijuana.

At a pre-trial hearing, the trial court granted Z.R.'s motion to suppress his oral admission that the confiscated substance was marijuana, but ruled that Phillips and Officer Joshua Dale of the Fort Bend Narcotics Task Force could offer their opinions as lay witnesses, under Texas Rule of Evidence 701, that the substance was marijuana. Z.R. also sought to exclude evidence concerning presumptive tests, arguing: "[N]o Texas court has ever allowed presumptive tests before a jury for any purpose." The State responded that it was not offering evidence of the presumptive test results to prove that the substance was marijuana, but for the limited purpose of rebutting Z.R.'s defensive theory that the substance was a then-legal synthetic substance commonly referred to as cush and not marijuana. According to the State, there is no presumptive test for cush, and the fact that the test changed colors rebutted the defense theory that the substance was cush. The trial court ruled that Dale would be permitted testify about "the presumptive test for ... cush ... but don't even go close to this marijuana." Once the trial began, Z.R. was granted a running objection to the officers' opinion testimony that the substance was marijuana and evidence about the results of the presumptive test.

At trial, Dale testified first. He testified that he had spent four of his sixteen years as an officer working on a narcotics task force, which investigates the sale, distribution, cultivation, and manufacture of illegal substances. Part of his job is to teach others how to recognize drugs. Dale was specially trained to identify marijuana and had substantial experience doing so in the field. He testified that he can identify marijuana by sight and smell and he described its physical appearance: budding organic green leafy material with stems and seeds, and a unique smell. He also explained that he had some field experience with cush, and that cush does not look or smell like marijuana. Rather, cush is granulated and loose and has a totally different odor.

Dale also testified that there is a presumptive test for marijuana—the liquid turns red if marijuana is placed in it—but that he is not aware of one for cush. During cross examination, Dale conceded that there are some problems with the reliability of a presumptive test. Specifically, Dale testified that results of a presumptive test for marijuana are not definitive, and that he did not know the presumptive test's rate of error. He further testified that there is a definitive lab test for marijuana, and that he did not know if State's Exhibit 2 had been tested in a lab, but that it was common practice not to send marijuana to the crime lab for testing.

Dale then physically examined State's Exhibit 2 and rendered the opinion based on its odor and appearance that it was marijuana. His testified that his opinion was based on his observation of the physical characteristics of State's Exhibit 2. In particular, Dale testified that he identified State's Exhibit 2 as marijuana because it is green and leafy with stems, it smells like marijuana, and it neither looks nor smells like cush. Dale distinguished the appearance of marijuana and cush, explaining that cush is "a very light, light brownish to green color."

Rosenberg Police Officer Jeremy Eder testified next. He had eleven years' experience as a police officer, and two of those were in the narcotics division. He had encountered cush on a few occasions but had no training on it. He testified that people try to pass off cush as marijuana, because they can resemble each other in appearance, but not odor. With respect to presumptive tests, he explained that there is a presumptive test for marijuana, there is not one for cush, and that, if one were to put cush in a presumptive test kit intended to test for marijuana, it would not come back positive (i.e., red or blue). Rather, the liquid would appear brown. Like Dale, Eder acknowledged that he did not know the rate of error for the presumptive test and that a lab test is more accurate than a presumptive test.

The final officer to testify, Phillips, had fourteen years' experience as a police officer and was assigned to Foster High School for the 2010–2011 school year. He testified that he has encountered marijuana many times during his training and experience as an officer, and can identify marijuana by sight—"[by its] stems, seeds, [and by] how it's bunched up"—and by its distinct odor. Phillips also testified that, upon receiving State's Exhibit 2 from Aguilar, Phillips looked at it and formed the opinion based on its appearance and smell that it was marijuana.

Regarding presumptive tests, Phillips testified that there was one for marijuana, but that he was unaware of a presumptive test for cush. He further testified about the procedure for

performing a presumptive test, the results of the test performed on State's Exhibit 2, and the significance of those results. Specifically, he testified that, after receiving it from Aguilar and identifying the substance as marijuana based on its odor and appearance, he performed a presumptive test on State's Exhibit 2, and that the test turned red or blue, indicating the substance was marijuana. On cross-examination, Phillips, like Dale, admitted that he was not a chemist, that he did not know the rate of error of the presumptive test, that the presumptive test was not always accurate, and that no laboratory test was performed on State's Exhibit 2 to confirm that it was marijuana. Phillips also admitted that the jury was unable to view the presumptive test that he performed on State's Exhibit 2 in the field because he threw it away.1 On re-direct, the State sought to have Phillips perform an in-court demonstration of the presumptive test on State's Exhibit 2, and, over defense counsel's objections, the trial court ruled that defense counsel had opened the door to it during cross-examination. Phillips then performed, before the jury, a presumptive test for marijuana on a sample from State's Exhibit 2 and the liquid turned blue.

The jury found that Z.R. had engaged in delinquent conduct, and the trial court ordered that Z.R. be placed on probation for twelve months. Z.R. appealed.

Held: Affirmed

Memorandum Opinion: The State bore the burden to prove beyond a reasonable doubt that Z.R. knowingly or intentionally possessed two ounces or less of marijuana. TEX. HEALTH & SAFETY CODE ANN. § 481.121(a), (b)(1). This, in turn, required proof that: (1) Z.R. exercised actual care, control, and management over the contraband; and (2) Z.R. had knowledge that the substance in his possession was contraband. Brown v. State, 911 S.W.2d 744, 747 (Tex.Crim.App.1995).

Z.R. contends an officer's identification of State's Exhibit 2 was insufficient to prove it was marijuana because a definitive lab test was required. But the Court of Criminal Appeals has held otherwise: because marijuana has a distinct odor and appearance, chemical testing and expert testimony is not necessary to prove that a substance is in fact marijuana; instead, the substance may be identified through the lay opinion of a police officer or other witness. See Osbourn v. State, 92 S.W.3d 531, 537 (Tex.Crim.App .2002) ("It does not take an expert to identify the smell of marijuana[;] ... [rather,] a witness who is familiar with the odor of marijuana ... through past experiences can testify as a lay witness that he or she was able to recognize the odor."). Moreover, the testimony of experienced officers can be sufficient evidence from which a jury can determine beyond a reasonable doubt that a substance is marijuana. See Boothe v. State, 474 S.W.2d 219, 221 (Tex.Crim.App.1971) ("The testimony from these experienced officers in the narcotics division that the substance found in the building and in the automobile appeared to them to be marihuana was sufficient for the jury to determine that it was marihuana.").

Here, two police officers testified that they identified State's Exhibit 2 as marijuana based on its appearance and smell. Phillips testified that, with his training and experience as a police

officer, he is able to identify marijuana by sight and by its distinct smell. He testified that when he received State's Exhibit 2 from Aguilar, he formed the opinion based on its appearance and smell that it was marijuana. Dale likewise testified that, through his training and experience as a police officer, he can identify marijuana by sight and smell. He, like Phillips, examined State's Exhibit 2 and rendered the opinion based on its odor and appearance that it was marijuana.2

Considering this evidence in the light most favorable to the verdict, we hold that a fact finder could have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt, and, therefore, the evidence is legally sufficient to support the judgment. See Osbourn, 92 S.W.3d at 537 (permitting police officer who is familiar with odor and appearance of marijuana through past experiences to testify as lay witness that he was able to recognize substance as marijuana); Boothe, 474 S.W.2d at 221 ("The testimony of these experienced officers in the narcotics division that the substance found in the building and in the automobile appeared to them to be marihuana was sufficient for the jury to determine that it was marihuana."); see also Williams v. State, No. 01–08–00936–CR, 2010 WL 2220586, at *9–10 (Tex.App.-Houston [1st Dist.] June 3, 2010, pet. ref'd) (mem. op., not designated for publication) (holding evidence sufficient to support conviction for possession of marijuana because two officers testified, under Rule 701, that, based on their training, experience, and personal observations, the substance was marijuana); In re J.H., No. 04–02–00464–CV, 2003 WL 21157245, at *1–2 (Tex.App.-San Antonio May 21, 2003, no pet.) (mem. op., not designated for publication) (finding sufficient evidence of possession of marijuana when juvenile, who was asked by school resource officer if he had anything he should not have, pulled foil-wrapped package from his shoe, officer testified he believed substance to be marijuana, took substance to his office, and its contents tested positive for marijuana).

Conclusion: We affirm the judgment of the trial court.