AFFIRMED and Opinion Filed November 29, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00090-CR

CARLON LEE LACY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-2058719-H

MEMORANDUM OPINION

Before Justices Myers, Carlyle, and Goldstein
Opinion by Justice Goldstein

After a bench trial, appellant Carlon Lee Lacy was convicted of unlawful possession of a firearm by a felon. *See* TEX. PENAL CODE ANN. § 46.04(a)(1). The trial court found appellant guilty and sentenced him to two years' confinement. In one issue, appellant asserts that the evidence was legally insufficient to support the judgment. We affirm.

BACKGROUND

On October 1, 2020, Patricia Jackson called 911 to report an altercation with appellant. When asked what happened by the 911 operator, Jackson stated: "My boyfriend, he threatened me. He had a gun in his pocket. I had to pepper spray him."

When asked if appellant pulled the gun out of his pocket, Jackson replied, "yes, he did." Officers from the Dallas Police Department, including Officer Christopher Slone, were dispatched to Jackson's apartment in Dallas County, Texas. Footage from Officer Slone's body camera was introduced in evidence. The footage shows officers knocking on the front door and identifying themselves. Jackson opened the door and told officers, "he's in there," pointing to a closed door to a side room just inside the entrance. Jackson continued: "He came in here drunk, charged at me. He got a gun, I don't know if he still got it. So I pepper sprayed him."

Officers knocked on the door to the side room and again identified themselves. They opened the door and encountered appellant sitting on a sofa. Officers placed appellant in handcuffs and conducted a pat-down search. An officer asked "where's the gun?" and appellant responded "I ain't got no gun on me." Officers escorted appellant out of the apartment and detained him in a squad car. Officer Slone went back into the apartment to question Jackson. The two went into the side room, and Jackson began searching the room for the gun. Officer Slone asked if he could help search, and Jackson consented. The two searched the room for a few minutes, with Jackson stating, "He had it; I know he did." After a few minutes of searching, Officer Slone asked Jackson to step out of the room so he could "get some info" from her. She asked if he needed to see her identification, and he said yes.

Jackson retrieved her identification and her gun license and handed them to Officer Slone. Jackson went back into the side room to continue the search while Officer Slone took down information from her cards. While he was writing, Jackson called out from the side room, "Here you go!" Officer Slone went back into the room, and Jackson pointed him to the closet floor, stating "I didn't touch it, I just moved the shoes." Officer Slone turned toward the closet, and his camera captured footage of a handgun partially hidden inside a shoe.

Appellant was indicted on felony possession of a firearm. He waived his right to a jury trial, and a bench trial commenced on January 21, 2021. At the beginning of trial, the State offered the video from Officer Slone's body camera, a photograph of the gun, and records from appellant's 2012 felony conviction for possession of a controlled substance with intent to deliver. These items were admitted in evidence without objection. The State called Officer Slone as its only witness, and he testified to the above facts. The State Officer Slone the photograph of the gun, and he confirmed it was the gun Jackson found in the shoe. On cross-examination, Officer Slone conceded that he did not know whether the gun had been tested for fingerprints. The State rested.

Appellant called Jackson as his sole witness. On direct examination, Jackson stated that appellant moved into her apartment upon his release from prison in September 2019. When asked about the incident on October 1, 2020, Jackson

recanted her story that appellant had a gun. She conceded that she told officers that appellant pointed the gun at her but said she made up that story because she was angry at him. On cross-examination, the State asked Jackson about the search she conducted with Officer Slone. Jackson responded that she was just "acting" and that she put the gun in the shoe so she could pretend to find it. Jackson acknowledged being aware of the penalty for filing a false police report. She nevertheless maintained that she had never seen appellant in possession of a firearm.

The trial court found appellant guilty and entered its judgment of conviction. This appeal followed.

DISCUSSION

I. STANDARD OF REVIEW

In his sole issue, appellant contends that the evidence was legally insufficient to support that he "possessed" a firearm. When reviewing a criminal conviction for sufficiency of the evidence, we apply the *Jackson v. Virginia* legal-sufficiency standard. *See Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, we consider whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original) (quoting *Jackson*, 443 U.S. at 319). This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts. *Murray v. State*,

457 S.W.3d 446, 448 (Tex. Crim. App. 2015). In a bench trial, the judge is the trier of fact and "the sole judge of the weight and credibility of the witnesses and may believe or disbelieve all or any part of any witness's testimony." *Garza v. State*, 841 S.W.2d 19, 21 (Tex. App.—Dallas 1992, no pet.). As an appellate court, we may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

II. APPLICABLE LAW

To establish unlawful possession of a firearm by a felon, the State was required to show that appellant was previously convicted of a felony offense and possessed a firearm after the conviction but before the fifth anniversary of his release from confinement, community supervision, parole, or mandatory supervision. *See* TEX. PENAL CODE ANN. § 46.04(a)(1); *see also Smith v. State*, 176 S.W.3d 907, 915 (Tex. App.—Dallas 2005, pet. ref'd). "Possession" means "actual care, custody, control, or management." TEX. PENAL CODE ANN. § 1.07(a)(39). A person commits a possession offense only if he voluntarily possesses the prohibited item. *See Smith*, 176 S.W.3d at 915 (citing TEX. PENAL CODE ANN. § 6.01(a)). "Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control." *See* TEX. PENAL CODE ANN. § 6.01(b).

Generally, evidence that a person voluntarily brandished or fired a firearm is sufficient to establish possession because the person has exercised custody and

control over it. *See Fountain v. State*, 604 S.W.3d 578, 584 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("Here, appellant exercised control over the AR-15 rifle when he used it to shoot at Robinson."); *Hutchings v. State*, 333 S.W.3d 917, 920–22 (Tex. App.—Texarkana 2011, pet. ref'd) (holding that evidence was sufficient to show that defendant possessed a firearm when witnesses identified defendant, said they saw him with a gun, and described the gun); *Tapps v. State*, 257 S.W.3d 438, 448 (Tex. App.—Austin 2008) (op. on reh'g), *aff'd*, 294 S.W.3d 175 (Tex. Crim. App. 2009) (holding eye-witnesses' testimony purporting to have seen defendant with firearm sufficient to prove possession).

Even if the firearm is not found on the defendant's person, the evidence is sufficient to support a conviction for felony possession if it affirmatively links the defendant to the firearm. *Bates v. State*, 155 S.W.3d 212, 216 (Tex. App.—Dallas 2004, no pet.). The evidence, whether direct or circumstantial, must establish the defendant's connection with the firearm "was more than just fortuitous." *Id.* Factors relevant to this analysis include:

> (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs

> were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.[1]

Tate v. State, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016). There is no set formula to determine what links are sufficient, and the number of links present is not as important as the "logical force" or degree to which the factors, alone or in combination, tend to link the accused to the firearm." *Porter v. State*, 873 S.W.2d 729, 732 (Tex. App.—Dallas 1994, pet. ref'd).

III. APPLICATION OF LAW TO FACTS

Appellant does not dispute that he was previously convicted of a felony or that five years had not elapsed since his release from prison on parole. Appellant's only dispute is whether the evidence was legally sufficient to support the "possession" element of unlawful possession of a firearm by a felon. Appellant acknowledges that the trial court was entitled to decide which of Jackson's stories to believe. He argues nevertheless that there was no evidence supporting many of the factors of the affirmative-links test and, as a result, his conviction was "based upon mere probability or c[a]me down to a guess." We disagree.

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[1] We note that some of these factors are specific to other types of contraband, like drugs. In cases where possession of only a firearm is at issue, courts often exclude some of the factors. *See, e.g.*, *Williams v. State*, No. 05-19-00428-CR, 2020 WL 2059916, at *6 (Tex. App.—Dallas Apr. 29, 2020, no pet.) (mem. op., not designated for publication) (omitting factors 1, 4, 5, 9, 10, and 14 and replacing narcotics with weapon). We recognize the drug-related factors are not necessarily relevant in this case. We include the entire list for completeness.

Appellant's conviction is supported by the evidence even without reference to the affirmative-links test. The State submitted evidence that appellant brandished the gun. In her call to 911, Jackson relayed that appellant "had a gun in his pocket" when he threatened her and that appellant pulled the gun out at some point during the altercation. When police arrived at Jackson's apartment, she relayed the same to them, as confirmed by video footage from Officer Slone's body camera. At trial, Jackson recanted. But on cross-examination, she conceded that she told officers that appellant "pointed the gun" at her. The trial court received the State's evidence and observed Jackson's demeanor when she recanted. As the factfinder and the sole judge of Jackson's credibility, the trial court "was entitled not only to reconcile [evidentiary] conflicts, but even to disbelieve [Jackson's] recantation." *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *see also Michael v. State*, No. 05-12-00895-CR, 2013 WL 1729280, at *2 (Tex. App.—Dallas Apr. 22, 2013, no pet.) (mem. op., not designated for publication) (where jury heard 911 tape and police interview in which wife reported that her husband assaulted her, jury was entitled to disbelieve wife when she recanted at trial). On this record, the evidence was sufficient for the trial court to conclude beyond a reasonable doubt that appellant voluntarily exercised custody and control of a firearm.

Even under the affirmative-links analysis, our conclusion would not change. Appellant lived in the apartment where the gun was found. *See Jones v. State*, 338

S.W.3d 725, 742 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 364 S.W.3d 854 (Tex. Crim. App. 2012) (fact that Jones lived in the house where a rifle was found supported ownership-or-control factor). When officers arrived at the apartment, appellant was inside a room with the door closed, where the firearm was ultimately found. *See id.* (fact that rifle was located in the room in which officers encountered Jones supported enclosed-space factor); *Watson v. State*, 861 S.W.2d 410, 415 (Tex. App.—Beaumont 1993, pet. ref'd) (fact that Watson was inside the hotel room and answered the door when officers arrived supported the enclosed-space factor). Appellant was not in the room when the search was conducted and the firearm found, having been removed from the apartment and detained in a squad car. *See generally Lipscomb v. State*, 526 S.W.3d 646, 653 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (fact that Lipscomb was "sitting on the stairs just outside the apartment" during officers' search supported presence factor). The gun was in a shoe in the closet of the room a few feet away from appellant when officers encountered him. *See Swapsy v. State*, 562 S.W.3d 161, 167 (Tex. App.—Texarkana 2018, no pet.) (fact that firearm was found in a nightstand near where Swapsy slept supported proximity-and-access factor); *Sutton v. State*, 328 S.W.3d 73, 78 (Tex. App.—Fort Worth 2010, no pet.) (same where gun was found "directly beneath" where Sutton was sitting when the officers searched the house); *Williams v. State*, 313 S.W.3d

393, 398 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (same where firearm was located near where Williams was sitting).

Appellant argues that the evidence shows the gun was not in the shoe when officers encountered him and was planted there by Jackson after the fact. But the only evidence to support this argument was Jackson's own testimony recanting her earlier statements to the police. Again, the trial court was entitled to credit the recorded statements and to disbelieve her recantation. *See Chambers*, 805 S.W.2d at 461. On this record, we conclude the evidence was sufficient to support appellant's conviction under the affirmative-links test.

CONCLUSION

We overrule appellant's sole issue and affirm the trial court's judgment.

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CARLON LEE LACY, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-21-00090-CR V.	Trial Court Cause No. F-2058719-H.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Goldstein. Justices Myers and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 29, 2022