

Affirmed and Memorandum Opinion filed July 13, 2010



In The

Fourteenth Court of Appeals

NO. 14-09-00090-CR

EUGENIO CERDA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1192345**

M E M O R A N D U M O P I N I O N

A jury convicted appellant Eugenio Cerda of possession with the intent to deliver a controlled substance. The court sentenced him to thirty-five years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice. On appeal, appellant contends the evidence is legally and factually insufficient to support his conviction. We affirm.

I. BACKGROUND

On March 19, 2007, appellant met with undercover officer Alfonso Alvarez to discuss appellant's desire to purchase cocaine. Officer Alvarez told appellant to call him when he was ready to make the purchase. Less than an hour later, appellant called Officer Alvarez indicating he wanted to purchase five kilograms of cocaine. Officer Alvarez and appellant arranged to meet at a designated parking lot.

Appellant arrived at the parking lot in a Dodge sedan driven by a friend. Appellant exited the passenger side of the Dodge and joined Officer Alvarez in his vehicle. Appellant showed Officer Alvarez a bag of money with one-hundred and twenty-dollar bills rolled up in rubber bands. Thereafter, Officer Alvarez asked appellant to return to the Dodge and follow him to his house to get the cocaine. Appellant agreed, returned to the Dodge, and re-entered the passenger side. As appellant and his friend attempted to follow Officer Alvarez, they were stopped by other police officers.

Officer Will Kelly, a K-9 handler with the Pasadena Police Department, arrived at the scene and conducted a perimeter sniff of the car. Based on the perimeter sniff, the dog alerted Officer Kelly to search the inside of the Dodge. Officer Kelly and Sergeant Greg Dalton, the supervisor of the Narcotics Division of the Pasadena Police Department, recovered two bags inside the car. The first bag was found on the floorboard of the right front-passenger seat and contained \$75,000 in cash. The second bag was located on the floorboard of the right back-passenger seat and contained a Girl Scout cookie box. A subsequent search inside the cookie box revealed a brown paper bag containing three separate plastic bags, each filled with a white powdery substance that tested positive for cocaine.

Appellant was charged with possession with the intent to deliver a controlled substance. At trial, Officers Kelly and Alvarez testified that based on their training and experience, the factual circumstances were consistent with the intent to purchase narcotics. Sergeant Dalton testified that when he removed appellant from the vehicle, appellant was closer to the bag of money and the bag of cocaine than the other passenger.

The jury convicted appellant of possession with the intent to deliver a controlled substance, and the court sentenced him to thirty-five years' imprisonment. On appeal, appellant contends the evidence is legally and factually insufficient to support his conviction.

II. DISCUSSION

A. *Standard of Review*

In a legal sufficiency review, we consider all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Reed v. State*, 158 S.W.3d 44, 46 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). We may not substitute our judgment for the jury's, and we will not engage in a reexamination of the weight and credibility of the evidence. *Id.*; *Brochu v. State*, 927 S.W.2d 745, 750 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

By contrast, we review the evidence in a neutral light when conducting a factual sufficiency review. *Reed*, 158 S.W.3d at 46. We must set aside the verdict if (1) the proof of guilt is so obviously weak that the verdict must be clearly wrong and manifestly unjust, or (2) the proof of guilt, although legally sufficient, is greatly outweighed by contrary proof. *See Vodochodsky v. State*, 158 S.W.3d 502, 510 (Tex. Crim. App. 2005). However, because the jury is in the best position to evaluate the credibility of the witnesses, we must afford appropriate deference to its conclusions. *Pena v. State*, 251 S.W.3d 601, 609 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

B. *Analysis*

Control over contraband need not be exclusive to the accused, but instead may be exercised jointly by more than one person. *Hargrove v. State*, 211 S.W.3d 379, 385 (Tex.App.—San Antonio 2006, pet. ref'd). However, when an accused does not exclusively control the place where the contraband is found, as here, the State must produce additional evidence, either direct or circumstantial, linking the accused to the

contraband.¹ *Reed*, 158 S.W.3d at 47. Thus, the accused's mere presence at the scene where drugs were found, standing alone, is insufficient to demonstrate he exercised actual care, custody, or control of those drugs. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006). However, the defendant's presence or proximity, along with other evidence linking him to the drugs, may be sufficient to establish possession beyond a reasonable doubt. *Id.*

In deciding whether the evidence links appellant to the drugs found in the car, we may consider: (1) the defendant's presence when a search was 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 an odor emitted from the 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. *Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.). There is no set formula of facts that necessitate linking the accused to the crime. *Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Additionally, the number of factors present is not as important as their significance in linking the accused to the crime. *Reed*, 158 S.W.3d at 47. Finally, the links need not be so overwhelming as to rule out every other possibility except the guilt of the accused. *Id.*

Application of those factors here leads us to conclude the evidence adequately linked appellant to the drugs found in the car. *See Olivarez*, 171 S.W.3d at 291. Appellant

¹ This rule, sometimes referred to as the “affirmative links” rule, is not a separate test for legal sufficiency, but instead represents a “shorthand catch-phrase” encompassing a variety of circumstances that may be unique to a drug-possession case. *See Evans*, 202 S.W.3d at 161 n. 9.

was at the scene when the search was conducted. He was riding in the car in which the bag containing 300 grams of cocaine was found. Appellant's seat in the vehicle placed him within arm's reach of the cocaine. In fact, at trial, Sergeant Dalton testified that prior to removing appellant from the vehicle, appellant was the closest passenger to the bag of cocaine.

The bag with \$75,000 cash, which appellant had previously shown Officer Kelly, was found on the floorboard of appellant's seat. Appellant's conduct immediately prior to his arrest—his meetings and discussions with Officer Kelly—indicated a consciousness of guilt.

Considering all of the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Reed*, 158 S.W.3d at 46. Similarly, considering all of the evidence in a neutral light, we hold that the proof of guilt is not so obviously weak that the verdict must be clearly wrong and manifestly unjust or that it is greatly outweighed by contrary proof. *See Vodochodsky*, 158 S.W.3d at 510. Accordingly, we overrule appellant's first and second issues.

III. CONCLUSION

Having overruled both of appellant's issues on appeal, we affirm the judgment of the trial court.

/s/ Kent C. Sullivan
 Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

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