

Affirmed and Memorandum Opinion filed January 7, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00167-CR

MARK LYNNZIE WICKER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 56,250**

MEMORANDUM OPINION

A jury convicted appellant, Mark Lynnzie Wicker, of possession of a controlled substance. The jury assessed punishment at 35 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. In a single issue, appellant challenges the legal and factual sufficiency of the evidence to support his conviction. We affirm.

I. Background

In September, 2007, Officer Timothy Niemeyer of the Pearland Police Department received an anonymous tip that a house at 1106 Lockmore in Pearland had a high amount of traffic coming to and from the house and the individual believed the traffic was due to drug activity. On October 3, 2007, Officer Niemeyer went to the house along with a uniformed officer to conduct a “knock and talk” investigation. When the officers knocked on the door, Kenneth Evans answered the door. Officer Niemeyer identified himself and explained that he had received a report of narcotics activity. Evans identified himself as the homeowner and gave consent to search his home. Prior to searching the home, Officer Niemeyer identified the three people who were living in the house as Stacy Nichols, who slept in the bedroom with Evans, Rachel Ortiz, who had the second bedroom, and appellant, who occupied the third bedroom. Officer Niemeyer obtained consent to search the individual bedrooms from the occupants of the rooms.

The search revealed a pipe used for smoking crack cocaine in Evans’s and Nichols’s room and a crack pipe in Ortiz’s room. Before the officers searched appellant’s room, they obtained confirmation that appellant was the only occupant of the bedroom. In a box on the dresser in appellant’s bedroom, they found a crack pipe and a vial containing two rocks of cocaine. Officers also found a bottle of liquid codeine in the kitchen refrigerator. At trial, appellant stipulated that he had lived in the house for a “lengthy period of time.” Appellant was arrested and convicted of possession of cocaine.

II. Legal and Factual Sufficiency of the Evidence

In a single issue, appellant challenges the legal and factual sufficiency of the evidence to support his conviction.

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S.Ct. 2781, 2788–89, 61 L.Ed.2d 560 (1979); *Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). The jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

In evaluating the factual sufficiency of the evidence, we view all the evidence in a neutral light and will set aside the verdict only if we are able to say, with some objective basis in the record, that the conviction is clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). We do not intrude upon the fact-finder's role as the sole judge of the weight and credibility of witness testimony. *See id.*; *Fuentes*, 991 S.W.2d at 271.

A person commits an offense if that person knowingly or intentionally possesses a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.115(b) (Vernon Supp. 2009). When an accused is charged with unlawful possession of cocaine, the State must prove: (1) the defendant exercised actual care, custody, control, or management over the contraband and (2) the accused knew the object he possessed was contraband. *See Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Regardless of whether the evidence is direct or circumstantial, it must establish that the defendant's connection with the drug was more than fortuitous. *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006). The evidence must affirmatively link the defendant to the offense so that one may reasonably infer the defendant knew of the

contraband's existence and exercised control over it. *Hyett*, 58 S.W.3d at 830. Mere presence at the location where drugs are found is insufficient, by itself, to establish actual care, custody or control of the drugs. *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1985). However, presence or proximity, when combined with other evidence, may be sufficient to establish that element beyond a reasonable doubt. *Evans*, 202 S.W.3d at 162.

When the accused is not in exclusive possession of the place where the drugs are found, the State must show additional affirmative links between the accused and the drugs. *Cedano v. State*, 24 S.W.3d 406, 411 (Tex. App.—Houston [1st Dist.] 2000, no pet.). An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. *Johnson v. State*, 658 S.W.2d 623, 627 (Tex. Crim. App. 1983). Some relevant factors that may affirmatively link an accused to contraband include: (1) the defendant's presence when a search is conducted; (2) whether the drugs were in plain view; (3) the defendant's proximity to and the accessibility of the drugs; (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 drugs; (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.). The number of links is not dispositive, but rather, the logical force of all of the evidence. *Evans*, 202 S.W.3d at 162.

In this case, appellant was present when the search was conducted and gave consent to the search of his bedroom. The drugs were not found in plain view, but in a box on top of appellant's dresser. The drugs were in appellant's bedroom, so he had access to them. Three crack pipes and a bottle of liquid codeine were also found in the house. Further, appellant admitted that he was a long-time resident of the house and that he was the sole occupant of the bedroom where the drugs were found. (this fact needs to be in here somewhere)

Appellant argues that he was cooperative and that no evidence was introduced that he attempted to flee or make any furtive gestures. He further argues that the other drug paraphernalia and the liquid codeine were not found in his bedroom and no drugs were located on his person, nor did he own the home. Appellant argues that his actions are indicative of an individual who had nothing to hide and was not guilty of committing any offense.

After reviewing the evidence under the appropriate standard of review, we conclude that the circumstantial evidence was legally sufficient to connect appellant to the actual care, custody, control or management of the cocaine found in his bedroom. Appellant seems to argue that all of the links must be present for the evidence to be found sufficient. To the contrary, it is the logical force of the circumstantial evidence, not the number of links, that supports a jury's verdict. The logical force of the combined pieces of evidence, coupled with reasonable inferences from them, is sufficient to establish beyond a reasonable doubt, that appellant exercised actual care, custody, control or management of the cocaine. Further, viewing the evidence in a neutral light, the evidence supporting the conviction is not so weak that the jury's determination is clearly wrong and manifestly unjust, nor does the conflicting evidence so greatly outweigh the evidence supporting the conviction that the jury's determination is manifestly unjust. Appellant's sole issue is overruled

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Yates, Seymore, and Brown.

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