Affirmed and Memorandum Opinion filed June 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00196-CR

TIMOTHY LEE RICHARDSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1157087

MEMORANDUM OPINION

Appellant, Timothy Lee Richardson, appeals from his conviction for possession of a controlled substance with intent to deliver. A jury found him guilty and assessed punishment at thirty-five years' confinement. In two issues, appellant challenges the legal and factual sufficiency of the evidence. We affirm.

I. Background

On December 3, 2007, Houston Police Department ("HPD") Officer B.K. Gill began an investigation at an apartment complex. He testified that a confidential informant's tip on drug dealing in several identified apartments within the complex triggered the investigation. While on surveillance, Officer Gill observed heavy visitor traffic at the targeted apartments, which he designated "apartments 1, 12, 4 and 9." A week later, he returned to the apartment complex. At this time, he arranged a controlled buy of crack cocaine through the confidential informant at apartment 1. He also observed appellant answer the door to apartment 4 on a couple of occasions.

On January 8, 2008, the investigation resumed. Officer Gill testified that he observed appellant meet several different visitors at the door to apartment 4. Appellant also walked from that apartment to the parking lot where he made discreet exchanges for money with people sitting inside a vehicle. A week later, Gill again observed appellant answer the door to apartment 4 numerous times in a short period, letting some visitors in and turning others away.

Officer Gill and his partner, HPD Officer P.T. Esquibel, both testified that, on March 4, 2008, they managed a controlled buy of crack cocaine at apartment 4 through the informant as their agent. Officer Gill testified that he observed an unknown man answer the door to apartment 4 after the informant knocked. After the controlled buy, Officer Gill debriefed the informant. The informant identified the man who answered the door as Cameron Kelley; he also stated he observed a man who went by the nickname of "Lil' Tim" sitting at the table "cutting up" about 3 ounces of crack cocaine. Officer Gill further testified that the physical description of Lil' Tim provided by the informant closely matched that of appellant.

On March 6, 2008, Officer Gill obtained a no-knock search-and-arrest warrant for apartment 4 with Cameron Kelley listed as the primary suspect. According to Gill, appellant's name did not appear on the warrant because he was known only by an alias.

Gill and Esquibel both testified that, upon forced entry into apartment 4, they observed four people, one of whom was appellant, standing around the dining room table. No one was holding drugs or cash. A search of the apartment uncovered crack cocaine and marijuana. Most of the drugs were concealed: 3.9 grams of crack cocaine in a medicine bottle stuffed inside a package of dry noodles, nine packets of crack cocaine in a cereal box, five small bags of marijuana in a kitchen cabinet, and 102 grams of marijuana in a washing machine in one of the two bedrooms. On top of the stove hood, were an additional thirty-nine packets of powder cocaine in clear plastic bags, weighing fourteen grams total. A set of scales was sitting on the stove hood next to the drugs. When the police entered, appellant was standing by the dining table, about six to eight feet from the stove hood.

Officer Gill further testified that he smelled marijuana as he approached the unlocked bedroom in the apartment. The second bedroom was locked and contained items belonging to the primary suspect, Cameron Kelley, who was not present during the search. Mail addressed to Kelley was found in the room, although the mail contained an address different from that of the apartment. In addition, the officers found clothes matching the description of clothing worn by Kelley during prior surveillance.

Other items found in the apartment linked the appellant to the premises. Officer Gill testified that on the living room wall were at least ten pictures, each depicting appellant. On a side table in the living room area, a letter was found addressed to "Lil' Tim" at the apartment 4 address, postmarked March 1, 2008. Officer Gill questioned appellant's wife, who was one of the four people standing around the table, about whether they lived in the apartment. She denied that they had ever lived in the apartment, but when confronted with the letter, she stated that her husband just had his mail sent to the apartment. Appellant did not have keys to the apartment on his person during the search, and the apartment was not leased in his name.

The officers concluded the search with the arrest of appellant and his co-defendant, Marcus Smith. Smith had stated during the police search that he was the sole possessor of all the narcotics in the apartment.

At trial, HPD Officer R.P. Johnson provided additional testimony linking appellant to the apartment. Johnson had responded to a 911 call of criminal mischief in the late afternoon of October 13, 2007. Appellant's wife had reportedly broken the windows of his car in the parking lot of the apartment complex. In response to questioning, appellant told Officer Johnson that his home address was apartment 4.

The Defense called two witnesses: appellant's wife and his cousin. Both witnesses were standing around the table with appellant upon entry by the police. Appellant's cousin, Warren Richardson, testified that appellant lived in an apartment with his [appellant's] wife in a different apartment complex. He claimed that appellant and members of his family visited apartment 4 a couple of times a week for a barbeque. On the occasion of the search, Marcus Smith had admitted Richardson to the apartment so that he could sign over a car title to appellant and his wife. Richardson further testified that appellant has never been referred to as "Lil' Tim" and that Cameron Kelley's friend Timothy Rodgers used that nickname.

Appellant's wife corroborated that appellant has never been referred to as "Lil' Tim" and has never lived at apartment 4. She denied that the police questioned her about the letter addressed to "Lil' Tim."

Appellant was charged with one felony count of possession of more than four grams and less than 200 grams of cocaine with the intent to deliver. He was tried before a jury and convicted. The jury then assessed punishment at thirty-five years' confinement. This appeal followed.

II. Possession of a Controlled Substance

In two issues, appellant challenges the legal and factual sufficiency of the evidence supporting his conviction for possession of a controlled substance. He does not challenge the separate element of intent to deliver. In Texas, an individual commits an offense if he knowingly or intentionally possesses a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.115. When an accused is charged with unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that (1) the defendant exercised actual care, custody, control or management over the substance; and (2) the accused knew the object he possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). 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). This is referred to as the "affirmative links" rule. It protects the innocent bystander, relative, roommate, or friend from conviction merely by their proximity to another's drugs. *Id.* at 162. An individual's mere presence at the location where drugs are discovered is thus insufficient, by itself, to establish actual care, custody or control of those drugs. *Id.* Therefore, "when the accused is not in exclusive possession of the place where the substance is found, it cannot be concluded that the accused had knowledge of and control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband." *Poindexter*, 153 S.W.3d at 406 (citing *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981)).

An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. *Washington v. State*, 902 S.W.2d 649, 652 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). However, the link need not be so strong that it excludes every other reasonable hypothesis except the defendant's guilt. *Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995). Further, it is not the number of links that is dispositive, but rather it is the logical force of all of the evidence, direct and

circumstantial. *Evans*, 202 S.W.3d at 162. 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 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 the 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. *Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Cuong Quoc Ly v. State*, 273 S.W.3d 778, 781 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). These factors are a non-exclusive list. *Evans*, 202 S.W.3d at 162 n.12.

A. Legal Sufficiency

In his first issue, appellant challenges the legal sufficiency of the evidence. In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether, based on the evidence and reasonable inferences, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). The reviewing court must give deference to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.

Appellant argues that there is no evidence linking him to control over the apartment where the drugs were found or to possession of and control over the contraband. First, relating to control of the apartment, appellant contends that it is mere speculation that the letter addressed to "Lil' Tim" found in the apartment was intended for appellant. Officer Gill testified that he questioned appellant's wife about the letter and that she responded that he just had his mail sent to the apartment. A rational juror could infer from this statement that appellant does in fact use the nickname "Lil' Tim." Further, the receipt of mail at an address is an indication of residence. *Evans*, 202 S.W.3d at 165

Perhaps the strongest evidence to indicate appellant's exertion of control over the apartment came from a statement made by appellant himself. Approximately five months prior to the search, as part of the investigation into his car windows' having been smashed, appellant reported to the police that the apartment was his home address. Although the statement was made five months before the search, it provides further evidence of possession of the apartment. *See Foster v. State*, No. 10-08-00170-CR, 2010 WL 965952, at *3 (Tex. App.—Waco March 10, 2010, no pet.) (mem. op., not designated for publication) (assigning weight to defendant's report to police including home address, one month before search on separate occasion, as evidence of defendant's possession of that same address).

Second, relating to the issue of possession and control of contraband, Officer Gill testified that the confidential informant reported seeing a man fitting the physical description of appellant, known as "Lil' Tim," "cutting-up" crack cocaine in the apartment. But appellant's conviction does not rest solely on the informant's observations. *See* Tex. Code Crim. Proc. art. 38.141 (providing that a defendant may not be convicted under Chapter 481 of the Health and Safety Code on the uncorroborated testimony of an informant); *Young v. State*, 95 S.W.3d 448, 450–51 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (considering confidential informant's testimony as a factor, though not the sole

factor, supporting jury's verdict).[1] Officer Gill also witnessed appellant answering the door to the apartment and monitoring visitor traffic in-and-out of the apartment on three separate occasions prior to the search. He further observed appellant exchange money with people in a car parked near the apartment. *See Foster*, 2010 WL 965952, at *3 (recognizing as an affirmative link testimony about police surveillance of defendant suggesting drug-dealing activity).

Several other factors also support finding affirmative links between appellant and the contraband. Officer Gill testified that he could smell marijuana as he approached the unlocked bedroom. Scales were found on top of the stove hood next to the cocaine. Appellant was in close proximity, six to eight feet, from the stove hood where the uncovered bags of cocaine were found during the search. Further, even though the stove hood was elevated, the drugs were reportedly in plain view from where defendant was found when the police entered. *See Allen v. State*, 249 S.W.3d 680, 695–96 (Tex. App.—Austin 2008, no pet.) (explaining that plain view must be established from perspective of appellant's position when the search occurred).

We conclude that the evidence, viewed in its entirety, is legally sufficient to link appellant to the actual care, custody, control, or management of the cocaine. The logical force of the evidence, coupled with reasonable inferences from that evidence, is legally sufficient to support the jury verdict. Accordingly, we overrule appellant's first issue.

B. Factual Sufficiency

In his second issue, appellant attacks the factual sufficiency of the evidence. When reviewing a factual sufficiency challenge, we view all the evidence neutrally. *Prible v. State*, 175 S.W.3d 724, 730–31 (Tex. Crim. App. 2005). We then ask whether (1) the

[1] It is unsettled as to whether Texas Code of Criminal Procedure article 38.141 applies to out-of-court statements by a confidential informant, as opposed to in-court informant testimony. *See Flemmings v. State*, No. 5-06-00941-CR, 2007 WL 22023670, at *2 n.4 (Tex. App.—Dallas Nov. 8, 2007, no pet.) (not designated for publication). We need not resolve the issue here as there is corroborative evidence.

evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and manifestly unjust, or (2) considering the conflicting evidence, the jury's verdict is against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414–415 (Tex. Crim. App. 2006). This evaluation must not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness testimony. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

First, appellant argues that the jury's verdict is not supported by factually sufficient evidence because of the absence of certain affirmative links to show that appellant knowingly possessed the cocaine or had the right of possession of the apartment. He notes the following as evidence discounting possession of the cocaine: no drugs or paraphernalia were found on him; he was apparently not under the influence of drugs; and he did not possess any cash. He also emphasizes that he did not attempt to flee or make furtive gestures during the search. Additionally, he notes the following evidence to discount the right of possession of the apartment: no keys to the apartment were found on him, and his name did not appear on the apartment lease. While these are factors that the jury could have considered, the absence of evidence regarding some of the affirmative link factors does not necessarily render the evidence factually insufficient to sustain the conviction. *Cuong Quoc Ly v. State*, 273 S.W.3d 778, 783 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

Second, appellant contends that, in addition to the absence of factors showing possession, because the location where the drugs were found does not constitute plain view, there can be no reasonable inference that appellant knew drugs were in the apartment. While almost all of the drugs were concealed in some fashion, there was testimony indicating that the crack cocaine and scales atop the stove hood were not concealed and would have been visible to appellant by merely looking upward from his standing position at the dining table, six to eight feet away. *See Allen*, 249 S.W.3d at 695–96. Even if all of the drugs were deemed not in plain view, there is still factually

sufficient evidence to support the verdict based upon the jury's evaluation of witness testimony.

The jury is the trier of fact and the sole judge of credibility of witnesses and may believe or disbelieve all, part, or none of any witness's testimony. *Cuong Quoc Ly*, 273 S.W.3d at 783. A verdict is not clearly wrong or manifestly unjust merely because the jury resolved conflicting testimony in favor of the prosecution or defense. *Id*.

The jury was free to believe the credibility of the witness testimony establishing that appellant lived in the apartment over other witness testimony denying that he had ever lived in the apartment. There was officer testimony that appellant reported the apartment as his home address, five months prior to the search. Additionally, officer testimony of surveillance revealed that appellant answered the door to the apartment on several occasions. Finally, Officer Gill testified that appellant's wife, in response to his inquiry about the letter, admitted that he had his mail sent to the apartment. The jury was free to reject appellant's wife's statements that she never discussed the letter with Officer Gill, her statement that appellant never lived in the apartment, and appellant's cousin's testimony that appellant never lived in the apartment.

Appellant argues, however, that even if his residence at the apartment is established, he did not possess the cocaine but was merely in the presence of the drugs while living in the apartment. Officer Gill's testimony provides ample evidence that appellant had some control over the cocaine. The jury was free to believe and give weight to Gill's testimony that his confidential informant saw the defendant "cutting-up" crack cocaine. Further, Gill's testimony regarding the suspicious activities of appellant during his surveillance, including monitoring visitor traffic in-and-out of the apartment and the exchange of money with people in the parking lot, provides additional evidence to corroborate the informant's observation. Therefore, we find the evidence factually sufficient to prove appellant knowingly possessed the cocaine. Accordingly, appellant's second issue is overruled.

We affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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