Affirmed and Memorandum Opinion filed November 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00742-CR

BILLY HOLMES, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 1045939

MEMORANDUM OPINION

Appellant Billy Holmes was convicted of a state jail felony, possession of less than a gram of cocaine. Tex. Health & Safety Code §§ 481.115(a)–(b). After the trial, this court reversed the conviction due to an incomplete jury charge. The Court of Criminal Appeals upheld our decision. Appellant was retried and convicted by a new jury. The trial court sentenced appellant to six months in state jail with credit for time served pending the first appeal. Appellant raises three issues regarding his conviction in his second trial on appeal. In his first issue, appellant contends the trial court erred in failing to suppress

evidence. In his second and third issues, he argues the evidence is legally and factually insufficient to support the jury verdict. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. State's Contentions

At approximately 3:30 a.m. on May 16, 2005, police were dispatched to a home in Harris County. The dispatcher reported either a "weapons disturbance" or an "assault in progress." Testimony differs on the exact nature of the call. Officer Steven Frank and Officer David Carter testified they arrived at the scene before any other police officers. They drove a marked patrol car and both men wore uniforms. They saw appellant and a female, Alice Manning, arguing outside Ms. Manning's home. Both officers testified appellant was holding a garden hoe as they approached, but he dropped it upon seeing the car. The officers exited their vehicle and approached the couple.

As the officers approached, appellant moved away from them, apparently saying at some point he wanted to "get something from the house." Officer Frank told appellant to return and talk to them. Instead, appellant walked away from the officers and, upon nearing the house, ran across some empty lots. Officer Frank chased after appellant, repeatedly ordering him to stop. At one point, Officer Frank tripped on a piece of fencing and appellant turned to look, then continued running. Meanwhile, Officer Carter moved parallel to appellant and Officer Frank and eventually tackled appellant. Officer Carter searched appellant for weapons. Officer Frank then handcuffed appellant.

When appellant and Officers Frank and Carter returned to the patrol car, Officer Carter performed a more thorough search of appellant, this time finding a "crack pipe" and wire mesh known as a "Brillo pad" in appellant's left back pocket. Officer Carter testified this was a search incident to arrest because by fleeing, appellant had committed a crime.

Officer Carter performed a field test of the pipe and the test was positive for cocaine residue. He also testified Brillo pads are frequently used to filter a crack pipe. Officer Carter turned the crack pipe and Brillo pads over to a third officer, who submitted them to the Houston Narcotics Lab for testing. . Rosa Rodriguez, an employee of the Houston Narcotics Lab, testified that she performed a chemical analysis on the residue found in the crack pipe. The tests revealed the residue was cocaine. Due to the amount present, she was unable to weigh the residue.

B. Appellant's Contentions

Appellant disputes much of the police officers' testimony. He testified that he and Ms. Manning drank beer until somewhere between midnight and 1:00 a.m. From approximately midnight until 2:00 a.m., appellant painted porch furnishings. Appellant testified that he saw Officers Frank and Carter's patrol car when it was about a block and a half away, but he believed Officer Frank intended to park away from Ms. Manning's home. On his own accord, and without seeing or hearing the officers, he then began running across the vacant lots. Appellant testified on direct that he was running to catch a bus home so that he could prepare for work. On cross examination, he added he also ran because he "didn't want no public intoxication case." He stated he did not know Officer Frank was behind him until he heard Officer Frank's radio crackle. At that point, appellant heard Officer Frank's command to stop and complied, putting down his bag. The officers then forced him to the ground and handcuffed him.

C. Motion to Suppress

Before the second trial, appellant filed a written motion to suppress the crack pipe and Brillo pad found by the officers on the grounds that the arrest was illegal, and therefore the search incident to arrest was illegal. Prior to voir dire, appellant stated he would object to the introduction of the evidence. During the trial, when the State presented the crack pipe and Brillo pad, the appellant objected based upon the grounds in his written motion to suppress. The trial court overruled the objections and admitted the items into evidence.

DISCUSSION

I. Did the Trial Court Err in Admitting the "Crack Pipe" Found in Appellant's Possession?

Appellant contends the trial court erred in admitting the crack pipe found in appellant's possession because police officers illegally seized and searched him.

A. Standard of Review

We review motions to suppress for abuse of discretion. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We review a trial court's ruling on a motion to suppress under a bifurcated standard of review, giving almost total deference to the trial court's finding of historical facts and reviewing *de novo* the trial court's application of the law. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The deference is particularly high if the trial court's findings are based upon an evaluation of credibility and demeanor. *Id.* When a trial court does not make a specific finding of fact, we view the evidence in the light most favorable to the trial court and assume the trial court implicitly made findings of fact. *Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005). We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for its ruling. *Armendariz v. State*, 123 S.W.3d 401, 403 (Tex. Crim. App. 2003).

Legal findings of reasonable suspicion are reviewed *de novo* on appeal. *Garcia v. State*, 296 S.W.3d 180, 184 (Tex. App.—Houston [14th Dist.] 2009, no pet.) If a police officer has reasonable suspicion, he is privileged to briefly detain an individual. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000). Reasonable suspicion exists when the officer knows specific, articulable facts that when combined with rational inferences from those facts, lead him to reasonably conclude an individual is or has been engaged in criminal activity. *Ford*, 158 S.W.3d at 492. We review for reasonable suspicion based upon totality of the circumstances. *Id.* at 492-93.

B. Analysis

The trial court did not make specific findings of fact, so we imply findings of facts most favorable to the trial judge's ruling. *Id.* at 493. We determine whether the officers had reasonable suspicion by the information the officers had at the time of the detention. *See Martinez v. State*, 635 S.W.2d 629, 632 (Tex. App.—Austin 1982, pet. ref'd). A police officer may briefly detain an individual to determine his identity or maintain the status quo momentarily while obtaining more information. *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987).

Based upon the totality of the circumstances, the officers had reasonable suspicion to detain appellant. The dispatch call gave a specific address, where the officers found two individuals arguing at 3:30 in the morning. The uniformed officers drove to the residence in a marked patrol car, so both individuals knew these were police officers. The officers were called out on an assault or weapons call. Appellant held a garden hoe, which could be used as a weapon. He dropped it upon seeing the patrol car. When the officers approached and asked to speak to the parties, appellant walked away rather than engaging in a conversation with the officers. When he reached the house, appellant chose to flee instead of entering it to "get something." Under the totality of the circumstances, a reasonable officer could have a reasonable suspicion appellant was engaged in some criminal activity. *See, e.g., Hawes v. State*, 125 S.W.3d 535, 538-40 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (finding reasonable suspicion when an unknown citizen tipster saw a traffic violation that was later confirmed by the officer); *Reyes v. State*, 899 S.W.2d 319, 324-25 (Tex. App.—Houston [14th Dist.] 1995, pet. refused) (flight from scene after officer asks to speak to citizen is a factor in determining reasonable suspicion). We conclude there is sufficient evidence, viewed in the light most favorable to the trial court, to justify the trial court's denial of appellant's motion to suppress. *See Ford*, 158 S.W.3d at 493. The trial court did not abuse its discretion. *See State v. Dixon*, 206 S.W.3d at 590. We overrule appellant's first point of error.

II. Was the Evidence Legally and Factually Sufficient to Support Appellant's Conviction?

Appellant argues in his second point of error that the evidence was legally insufficient to convict him. He claims the state failed to show he knowingly possessed the crack pipe. When contraband is present in an amount too small to measure, possession alone is not sufficient to prove the defendant knowingly possessed it. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). In his third point of error, appellant claims the evidence was factually insufficient because the evidence is so weak as to make the conviction manifestly unjust.

Five judges on the Texas Court of Criminal Appeals have ruled that factual sufficiency is no longer an analysis an appellate court should undertake in criminal cases. *Brooks v. State*, No. PD-0210-09, 2010 WL 3894613, at *14 (Tex. Crim. App. Oct. 6, 2010) (plurality opinion). "[T]he *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, No. PD-0210-09, 2010 WL 3894613, at *1 (Tex. Crim. App. Oct. 6, 2010) (plurality opinion,); *id.* at *14–15 (Cochran, J., concurring). As a result, we will review appellant's case only for legal sufficiency.

A. Standard of Review

In a legal sufficiency review, we view all evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, (1979)). . The jury, as the sole judge of the credibility of the witnesses, is free to believe or disbelieve all or part of a witness' testimony. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). The jury may reasonably infer facts from the evidence presented, credit the witnesses it

chooses to, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Reconciliation of conflicts in the evidence is within the jury's discretion and such conflicts alone will not warrant reversal if there is enough credible evidence to support a conviction. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). An appellate court may not reevaluate the weight and credibility of the evidence produced at trial and in so doing substitute its judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Inconsistencies in the evidence are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd.).

B. Analysis

A person commits possession of a penalty-group-one substance if he knowingly or intentionally possesses a controlled substance without a valid prescription. Tex. Health & Safety Code § 481.115(a) (West 2010). It is a state jail felony if the amount possessed is less than one gram by weight. *Id.* § 481.115(b). Cocaine is a penalty-group-one substance. *Id.* §§ 481.102(3)(D). Possession alone of a quantity too small to be measured is not sufficient to show knowing possession. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995).

The State may use links to show the accused knowingly possessed the contraband, which include whether: (1) the contraband was in plain view; (2) the place the contraband was found was enclosed; (3) the contraband was conveniently accessible to the accused; (4) the accused was the owner of the place where the contraband was found; (5) the accused had sole access to the place where the contraband was found; (6) the accused possessed other contraband or drug paraphernalia when arrested; and (7) the conduct of the

accused upon arrest indicates knowledge. *Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006). The number of links is not dispositive, "but rather the logical force of all of the evidence, direct and circumstantial." *Id.* at 162.

Appellant testified the officers must have planted the crack pipe (and presumably the Brillo pad) because he never owned a pipe. Officer Carter testified he found the pipe in the defendant's left back pocket when he did a search incident to arrest. This is the only evidence regarding the location of the pipe prior to Officer Carter's search of appellant. We construe the evidence in the light most favorable to the verdict. *See Salinas*, 163 S.W.3d at 737; *Jones*, 984 S.W.2d at 257. Thus, the jury must have found appellant possessed the crack pipe and Brillo pad.

The crack pipe contained trace amounts of cocaine, so the State must prove that appellant knowingly possessed the cocaine. *Evans*, 202 S.W.3d at 162. Applying the factors in *Evans*, we note the following:

1. According to Officer Carter's testimony, crack pipes and Brillo pads are drug paraphernalia, so the cocaine was found with other drug items.

2. A pocket is an enclosed personal space, generally accessible only to the person wearing the item of clothing. Appellant presumably had sole control over his pockets up to the time of his arrest. *See Cuong Quoc Ly v. State*, 273 S.W.3d 778, 781-82 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (plastic bag of the sort commonly used to package narcotics that was found in defendant's pocket an element in determining knowing possession of contraband).

3. Appellant chose to run away from the police officers; those actions are consistent with someone knowingly carrying contraband. *See Figueroa v. State*, 250 S.W.3d 490, 503 (Tex. App.—Austin 2008) (stating attempts to flee police can be used to infer consciousness of guilt).

There is legally sufficient evidence for the conviction. The logical force of the direct and circumstantial evidence is sufficient to support the conviction. *See Evans*, 202 S.W.3d at 162. A reasonable jury could have inferred appellant knowingly carried cocaine in the pipe. *Sharp*, 707 S.W.2d at 614.

For the reasons above, the appellant's second and third points of error are overruled.

CONCLUSION

Having considered and overruled each of appellant's three issues on appeal, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Seymore.
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