TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00720-CR
NO. 03-17-00721-CR

Frank Alonzo Jones, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT
NOS. 76659 & 76660, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

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

Frank Alonzo Jones, Jr., was charged with possession of more than one gram but less than four grams of cocaine and with unlawful possession of a firearm by a felon. *See* Tex. Penal Code § 46.04(a), (e) (setting out elements of offense of unlawful possession of firearm and stating that offense is third-degree felony); Tex. Health & Safety Code §§ 481.102(3), .115(a), (c) (governing offense of possession of cocaine and specifying that offense is third-degree felony if amount of controlled substance is between one and four grams). In addition, the indictment for the unlawful-possession-of-a-firearm charge contained three enhancement paragraphs asserting that Jones had previously been convicted of the felony offense of delivery of a controlled substance and been twice convicted of the felony offense of possession of a controlled substance, and the indictment for the possession-of-a-controlled-substance charge contained the same three enhancement allegations plus an additional allegation that Jones had previously been convicted of delivery of a

controlled substance. *See* Tex. Penal Code § 12.42(d) (enhancing punishment range for felony conviction if defendant was previously convicted of two or more felony offenses). At the end of the guilt-or-innocence phase, the jury found Jones guilty of both charged offenses. At the end of the punishment phase, the jury found all of the enhancement allegations to be true and sentenced Jones to 99 years' imprisonment for both charges, and the district court rendered its judgments of conviction in accordance with the jury's verdicts. In two issues on appeal, Jones contends that the evidence presented at trial is legally insufficient to support his convictions and that the district court erred by allowing the State to introduce evidence pertaining to his prior felony convictions. We will affirm the district court's judgments of conviction.

BACKGROUND

As set out above, Jones was charged with possession of a controlled substance and with unlawful possession of a firearm by a felon. *See* Tex. Penal Code § 46.04(a); Tex. Health & Safety Code § 481.115(a), (c). At the start of the trial, the State introduced an agreed stipulation regarding the possession-of-a-firearm offense specifying that Jones was previously convicted of a felony and that the date of the alleged misconduct at issue in this case "is a date and time that is before the fifth anniversary of [Jones]'s release from confinement or supervision under parole following the conviction of the [prior] felony offense." During the trial, the State called a community-supervision officer and various investigating law-enforcement personnel to testify regarding the events leading up to and following Jones's arrest as well as to testify about testing performed on items collected during the investigation. During his case-in-chief, Jones elected to testify.

Following the parties' opening statements, the State called Tracey Ellis to the stand, and she testified that she was Jones's community-supervision officer, that Jones was previously convicted of a felony offense in 2012, that Jones was released from prison in 2014, and that he was on community supervision on the day in question.

After Ellis finished testifying, the State called United States Marshal Michael May as a witness. In his testimony, Marshal May related that he was searching for Jones because he had an active warrant for his arrest and that he was informed that Jones was present at a residence but was about to drive away. Further, Marshal May stated that when he arrived on the scene, he saw that "the backup lights on [a] vehicle . . . were engaged," and Marshal May explained that he parked behind the vehicle to keep "the vehicle from leaving." Moreover, Marshal May recalled that Jones was the only person in the car, that Jones opened the door to the vehicle after noticing Marshal May, that Jones attempted to run from the police, and that other officers on the scene caught Jones and placed him into custody.

Next, Marshal May testified that he and other officers went to the car to investigate, that the car was still running, that there were "numerous denominations of US currency scattered throughout . . . the front cabin of the vehicle," that there "appeared to be a crack rock in a clear plastic bag" as well as a "marijuana cigarette" "in the center console," that there appeared to be "cocaine in a plastic bag in [the] cup holder," that there was "a firearm right by the driver's seat," and that there was a receipt from a fast-food restaurant with Jones's first name (Frank) printed on it and with a time stamp indicating that food had been purchased from the restaurant on the day before Jones's arrest. When discussing events that happened right before Jones allegedly attempted

to flee, Marshal May recalled that he heard "what sounded like metal on metal contact" coming from the area near the driver's seat and explained that he thought that the noise that he heard was caused by the firearm hitting the metal "frame of the driver's seat." During his cross-examination, Marshal May admitted that although he testified that he heard a metallic sound and that Jones made eye contact with him before running, he did not include that information in his initial report. During Marshal May's testimony, photographs taken from the inside of the car were admitted into evidence and showed hundreds of dollars in various denominations scattered on and near the front passenger seat, a white crystal powder inside the cup holder next to the driver's seat, clear bags with a white crystalline substance located inside the center console, and a receipt with the name Frank appearing on it.

Following the conclusion of Marshal May's testimony, the State called Officer Roderick Tisdale to the stand. In his testimony, Officer Tisdale explained that he was at the home before Marshal May arrived and that he watched the area before the other officers arrived. Regarding his observations, Officer Tisdale related that he saw Jones walk to the car "with a paper bag," walk back inside the house, return to the car again, get in the car, and stay in the car "for a while." Further, Officer Tisdale explained that no one else went to the vehicle during that time. In addition, Officer Tisdale described how he eventually saw the car's reverse lights turn on and believed that Jones was going to leave. Further, Officer Tisdale testified that he saw "[a] gun, money[,] and drugs" inside the car after Jones was arrested.

Next, the State called Officer Jason Petty to the stand, and he testified that Jones was the only person inside or near the car. Further, Officer Petty explained that he heard "a metal

object[] hit the ground as" Jones "was running from the vehicle"; that he found a gun "inside the vehicle, immediately on the floor board area by the driver's side front seat"; and that the gun could have produced the sound by falling on the metal portion of the frame of the car seat near the floor board. During his cross-examination, Officer Petty related that he did not think that the car was registered in Jones's name.

Once Officer Petty finished testifying, the State called Officer Odis Denton to the stand. In his testimony, Officer Denton explained that he saw Jones come out of the house and get into the car two times, and Officer Denton recalled that there was no one else inside the vehicle, that the brake lights came on while Jones was in the car, and that Jones ran after Marshal May arrived.

Next, the State called Officer David Van Valkenburg as a witness. In his testimony, Officer Van Valkenburg stated that he noticed that the car Jones was sitting in before being arrested was still running, that there was "a handgun in plain view next to the driver's seat," that he searched the car and found a "partially . . . smoked marijuana blunt in front of the center console," "a small plastic baggy with a white substance inside it" appearing to be cocaine, "money scattered on the passenger seat and . . . in the passenger floor board," "another baggy" containing what appeared to be marijuana, and bags containing what appeared to be marijuana and cocaine in the center console. In addition, Officer Van Valkenburg explained that he found a receipt from a fast-food restaurant listing a food purchase made on the day before Jones was arrested and identifying the customer as being someone with Jones's first name.

Finally, the State called Brian Kivlighn to the stand, and he testified that he is a forensic scientist, that he tested the white powder collected from the car, that presumptive and

confirmatory testing performed on the white powder revealed that the substance was cocaine, and that the substance had a mass of 1.4 grams.

During his case-in-chief, Jones elected to testify on his own behalf. In his testimony, he related that he was in the car when Marshal May arrived, that he got in the car to replace a fuse for the brake lights after his friend asked for his help, and that he was only in the car for two minutes, but he asserted that someone else was walking between the house and the car and that the car was not running when the officers arrived. In addition, Jones denied having any drugs with him or knowing that there was a weapon in the car, and Jones also denied going to the fast-food restaurant and ordering the food listed on the receipt found in the car. In fact, Jones testified that the friend that he was helping used the car last and went to the restaurant. Additionally, Jones explained that he ran when he saw the police because he was "on parole," and Jones related that he did not want to go to jail because it was Thanksgiving and because he wanted to spend time with his children. Further, Jones denied hearing the metallic sound described by the officers.

On cross-examination, Jones admitted that he knew what cocaine looks like, that he had five prior felony convictions, and that he was on community supervision for three of the prior convictions at the time of his arrest in this case. Moreover, Jones denied knowing that there was a warrant out for his arrest for a violation of his community supervision and urged that he would have turned himself in if he had known. Finally, Jones insisted that the investigating officers must have placed the money and drugs in the car when they searched the car because there was no money or drugs in the car at the time that he was trying to fix the fuse. During Jones's testimony, the State admitted into evidence the judgments for his previous felony convictions.

After both sides rested and closed, the jury found Jones guilty of both offenses.

DISCUSSION

In two issues on appeal, Jones asserts that the evidence presented at trial is legally insufficient to support his two convictions and that the district court erred by allowing the State to introduce evidence of his prior felony convictions during the guilt-or-innocence phase of the trial. We will address these issues in the order briefed.

Legal Sufficiency

Under a legal-sufficiency standard of review, appellate courts view the evidence in the light most favorable to the verdict and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When performing this review, an appellate court must bear in mind that it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make "reasonable inferences from basic facts to ultimate facts." *Id.*; *see also* Tex. Code Crim. Proc. art. 36.13 (explaining that "jury is the exclusive judge of the facts"). Moreover, appellate courts must "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). Furthermore, appellate courts presume that conflicting inferences were resolved in favor of the conviction and "defer to that determination." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). In addition, courts must bear in mind that "direct and circumstantial evidence are treated equally" and that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor" and "can be sufficient" on its own "to establish guilt." *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011,

pet. ref'd). In reviewing the legal sufficiency of the evidence supporting a conviction, appellate courts consider "*all* evidence that the trier of fact was permitted to consider, regardless of whether it was rightly or wrongly admitted." *Demond v. State*, 452 S.W.3d 435, 445 (Tex. App.—Austin 2014, pet. ref'd) (emphasis added). The evidence is legally insufficient if "the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense" or if "the evidence conclusively establishes a reasonable doubt." *Kiffe*, 361 S.W.3d at 107 (quoting *Jackson*, 443 U.S. at 320). Furthermore, reviewing courts "measure the sufficiency of the evidence by the so-called hypothetically correct jury charge, one which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *See DeLay v. State*, 465 S.W.3d 232, 244 n.48 (Tex. Crim. App. 2014).

Under the Health and Safety Code, a person commits an offense if he "knowingly or intentionally possesses a controlled substance" in an amount that is between one and four grams. Tex. Health & Safety Code § 481.115(a), (c). In this context, possess means to have "actual care, custody, control, or management." *Id.* § 481.002(38). Accordingly, "[t]o prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband." *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005), *abrogated on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 & n.32 (Tex. Crim. App. 2015).

"[C]ontrol over contraband may be jointly exercised by more than one person." *Robinson v. State*, 174 S.W.3d 320, 325 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). "[W]hen

the accused . . . is not in exclusive possession of the place where the contraband is found, we cannot conclude that the accused had knowledge of and control over the contraband unless the State establishes an 'affirmative link' between the accused and the contraband—*i.e.*, independent facts and circumstances which affirmatively link the accused to the contraband so as to suggest that the accused had knowledge of the contraband and exercised control over it." *Id.* "An affirmative link may be established through either direct or circumstantial evidence." *Id.* "Regardless of whether the evidence is direct or circumstantial, it must establish, to the requisite level of confidence, that a defendant's connection to the contraband was more than fortuitous." *Trevino v. State*, Nos. 03-14-00009—00010-CR, 2016 WL 463658, at *2 (Tex. App.—Austin Feb. 5, 2016, pet. ref'd) (mem. op., not designated for publication). "Presence or proximity, when combined with other evidence, either direct or circumstantial, may be sufficient to establish the element of possession beyond a reasonable doubt." *Id.*

Regarding the offense of possession of a firearm by a felon, the Penal Code specifies that a person commits an offense if he "has been convicted of felony" and "if he possesses a firearm . . . after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later." Tex. Penal Code § 46.04(a)(1). As in the possession-of-a-controlled-substance context, "'[p]ossession' means actual care, custody, control, or management," *id.* § 1.07(a)(39), and "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," *id.* § 6.01(b). Accordingly, to establish the offense of unlawful

possession by a felon, the State is "required to prove: (1) the accused exercised actual care, control, or custody of the firearm; (2) he was conscious of his connection with it; and (3) he possessed the firearm knowingly or intentionally." *Bates v. State*, 155 S.W.3d 212, 216 (Tex. App.—Dallas 2004, no pet.). "Intent can be inferred from the acts, words, and conduct of the accused." *Reed v. State*, 769 S.W.2d 323, 330 (Tex. App.—San Antonio 1989, pet. ref'd).

"'If the firearm is not found on the defendant or is not in his exclusive possession, the evidence must affirmatively link him to the firearm.'" *Jones v. State*, 338 S.W.3d 725, 742 (Tex. App.—Houston [1st Dist.] 2011) (quoting *James v. State*, 264 S.W.3d 215, 218-19 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd)), *aff'd*, 364 S.W.3d 854 (Tex. Crim. App. 2012). "The State may establish possession by proving links which demonstrate that the defendant 'was conscious of his connection with the weapon and knew what it was.'" *Id.* (quoting *James*, 264 S.W.3d at 219).

When discussing the need for affirmative links in the controlled-substance context, the court of criminal appeals has noted that the following factors "may circumstantially establish the legal sufficiency of the evidence to provide a knowing 'possession'":

> (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.

Evans v. State, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006) (quoting *Evans v. State*, 185 S.W.3d 30, 35 (Tex. App.—San Antonio 2005), *rev'd on other grounds*, 202 S.W.3d 158). "Although several factors relevant to establishing an affirmative link may have been identified, the number of factors actually supported by the evidence is not as important as the 'logical force' they collectively create to prove that a crime has been committed." *Robinson*, 174 S.W.3d at 326 (quoting *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet ref'd)). Affirmative links similar to the ones listed above have been used for determining possession of a gun found in a car, including whether the defendant was the driver of the car and whether the gun was found on the same side of the car as where the defendant was sitting. *See James*, 264 S.W.3d at 219 (setting out twelve factors and stating that "[t]he absence of various affirmative links does not constitute evidence of innocence to be weighed against the affirmative links present").

On appeal, Jones does not challenge the stipulation that he had previously been convicted of a felony and that the offense at issue occurred before the fifth anniversary of his release from confinement for the prior offense. Similarly, Jones does not challenge the evidence establishing that a firearm was found in the car, that one of the substances recovered from the car was cocaine, or that the amount of the recovered substance was between one and four grams. Instead, Jones argues that "[t]he evidence was insufficient to prove beyond a reasonable doubt that [he] possessed a firearm or cocaine."

When presenting his arguments on appeal, Jones asserts that the evidence presented at trial indicated that he was only in the car for a brief period of time and that the State presented no

evidence indicating that he "owned or had the right to be in the car." Further, Jones contends that no witnesses testified that they observed Jones moving contraband or the weapon into the car and that no witnesses testified that they saw Jones personally handling drugs or a weapon or moving in a manner indicating that he either had those items on his person or was trying to get rid of them. Moreover, Jones argues that some of the testimony provided by the witnesses, particularly regarding the loud sound described by some of the officers, did not appear in their police reports. Along those same lines, Jones insists that the testimony from the officers regarding hearing the loud sound, which they attributed to a gun dropping, was not credible given the distance from which the officers allegedly heard the sound and given the short height from which the gun would have fallen. Additionally, Jones asserts that during his testimony, he provided an explanation for why he ran from the police that was unrelated to any desire to flee the scene due to the items that were found inside the car.[1]

During the trial, the jury was presented with testimony indicating that Jones was seen walking between a home and the car multiple times, that he was seen carrying a bag to the car,

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[1] In his brief, Jones refers to cases explaining that a defendant has standing to challenge "the search of" a car "he does not own if he shows" that he gained permission to borrow the car from the car's owner. *See Matthews v. State*, 431 S.W.3d 596, 607-08 & n.52 (Tex. Crim. App. 2014); *Rovnak v. State*, 990 S.W.2d 863, 867 (Tex. App.—Texarkana 1999, pet. ref'd). With this case law in mind, Jones argues that a logical extension of that doctrine is that "one who has no clear right to be in a car should not be charged with the possession of the items found in the vehicle." However, in resolving this issue on appeal, we need not determine whether Jones had permission to use or enter the car in question; rather, we must decide whether the evidence linking Jones to the contraband and firearm was sufficient to support his convictions. In any event, the jury could have reasonably inferred that Jones had permission to use the car from the fact that he was able to start the car and from the fact that there was a fast-food receipt with his name on it from the day before he was arrested.

that he was alone in the car for an extended period of time, that he was sitting in the driver's seat, that he started the car, that he placed the car in reverse, and that he ran from the police officers when they pulled up behind him. *See Devoe v. State*, 354 S.W.3d 457, 470 (Tex. Crim. App. 2011) (explaining that flight can support inference of guilt). Furthermore, a receipt was found in the car indicating that someone with Jones's first name had purchased food on the day before Jones was arrested. *Compare Coleman v. State*, 188 S.W.3d 708, 721 (Tex. App.—Tyler 2005, pet. ref'd) (determining that evidence was legally sufficient because evidence showed that defendant "was the sole occupant of the vehicle" and that "several of his personal possessions were found in the trunk along with the firearms"), *with Harris v. State*, 532 S.W.3d 524, 534 (Tex. App.—San Antonio 2017, no pet.) (determining that evidence was legally insufficient to support conviction of passenger for unlawful possession of firearm where evidence showed that there was weapon in closed bag near defendant in car that "was driven and owned by someone else").

Moreover, evidence was presented to the jury indicating that there were hundreds of dollars scattered inside the car in plain view, that there was cocaine and marijuana near the driver's seat in plain view, and that there was marijuana and cocaine inside the center console next to the driver's seat. *See Robinson*, 174 S.W.3d at 326-27 (determining that evidence was sufficient to support possession conviction, in part, because defendant "had control over the truck and its contents" and because contraband "was within the vicinity of and easily accessible to" defendant). Additionally, a firearm was found on the floorboard near the metal framing of the driver's seat where Jones had been sitting, and several officers testified that they heard a loud noise right before Jones ran that sounded like a gun had been dropped and hit a metal structure.

In addition, evidence was introduced establishing that Jones had previously been convicted of possessing and delivering controlled substances. *See Wingfield v. State*, 197 S.W.3d 922, 925 (Tex. App.—Dallas 2006, no pet.) (explaining that evidence that defendant "had at other times used" illegal drugs is "circumstantial evidence that" a defendant "intentionally or knowingly possessed" illegal drugs at relevant time); *see also Hung Phuoc Le v. State*, 479 S.W.3d 462, 470-71 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (noting that "evidence that the appellant had on other occasions committed similar offenses to the one he is charged with serves to reduce the possibility that the act in question was done with innocent intent" and concluding that evidence of prior possession of marijuana was relevant to whether defendant had "the requisite knowledge or intent"); *Turner v. State*, No. 01-98-00862-CR, 1999 WL 312333, at *1 (Tex. App.—Houston [1st Dist.] May 13, 1999, pet. ref'd) (not designated for publication) (explaining that evidence that defendant "had knowingly transported cocaine before was admissible to establish his knowledge and intent" in trial for "possession with intent to deliver cocaine").

Although Jones did provide testimony indicating that he ran from the police for reasons unrelated to the items in the car, that he was unaware of the illegal items in the car, that someone else could have used his name when making the food purchase on the day before he was arrested, that he did not start the car or put it in gear, and that the police placed the contraband in the car after he ran, the jury was free to decide what weight to give Jones's testimony, and the resolution of any potential conflicts in the evidence fell within the purview of the jury as the factfinder. In making those determinations, the jury was aided by the evidence regarding Jones's prior felony convictions.

Given our standard of review and in light of the record before this Court as well as the reasonable inferences that can be made from that record, we must conclude that a rational jury

could have concluded that the evidence affirmatively linked Jones to the firearm and the cocaine in the car; that Jones had "actual care, custody, control, or management" of the firearm and the cocaine; and that Jones intentionally or knowingly possessed the firearm and the cocaine. *See* Tex. Penal Code §§ 1.07(a)(39), 6.01(b), 46.04(a); Tex. Health & Safety Code §§ 481.002(38), .115(a). Accordingly, we must conclude that the evidence was legally sufficient to support Jones's convictions for unlawful possession of a firearm and for possession of a controlled substance. *See* Tex. Penal Code § 46.04(a); Tex. Health & Safety Code § 481.115(a).

For these reasons, we must overrule Jones's first issue on appeal.

Prior Felony Offenses

In his second issue on appeal, Jones contends that the district court erred by allowing the State to introduce evidence regarding his prior convictions under Rule of Evidence 609.

During his testimony, the State questioned Jones regarding a prior conviction for evading arrest in which his community supervision was revoked in 2008 , a prior conviction in 2010 for possession of between one and four grams of cocaine, a prior conviction in 2012 for delivery of between four and 200 grams of cocaine, a prior conviction in 2012 for possession of between one and four grams of cocaine, and a prior conviction in 2012 for delivery of between one and four grams of cocaine. All of the prior convictions were felony offenses, and the judgments for each conviction were admitted into evidence. *See* Tex. Health & Safety Code §§ 481.112(a), (c), (d) (explaining that delivering between four and 200 grams of controlled substance is first-degree felony and that delivering between one and four grams of controlled substance is second-degree felony) .115(a), (c) (providing that possession of between one and four grams of controlled substance is third-degree

felony); Act of May 23, 2001, 77th Leg., R.S., ch. 1334, § 3, sec. 38.04(b), 2001 Tex. Gen. Laws 3291, 3292 (stating that evading arrest using motor vehicle is state-jail felony) (last amended 2013) (current version at Tex. Penal Code § 38.04(b)); *see also Baldez v. State*, No. 13-14-00257-CR, 2015 WL 1869435, at *2 n.1 (Tex. App.—Corpus Christi Apr. 23, 2015, no pet.) (mem. op., not designated for publication) (stating that "Texas courts treat a state jail felony as a 'felony' for purposes of Rule 609").

Appellate courts review a trial court's ruling regarding the admission or exclusion of evidence for an abuse of discretion. *See Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). Under that standard, a trial court's ruling will only be deemed an abuse of discretion if it is so clearly wrong as to lie outside "the zone of reasonable disagreement," *Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002), or is "arbitrary or unreasonable," *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005).

Rule of Evidence 609 sets out the circumstances in which evidence of a witness's prior convictions may be admitted into evidence and provides different standards for admissibility depending on whether the prior "conviction or release from confinement for it" occurred more than or less than ten years before the trial at issue. *See* Tex. R. Evid. 609(a)-(b). Because all of the prior convictions or Jones's release from confinement occurred within ten years of the underlying trial proceedings, we examine whether the admission of the evidence regarding those convictions complied with the requirements of Rule 609(a). *See id.* R. 609(a). Under that portion of Rule 609, "[e]vidence of a criminal conviction offered to attack a witness's character for truthfulness *must be admitted* if: (1) the crime was a felony or involved moral turpitude, regardless of punishment;

(2) the probative value of the evidence outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record." *Id.* (emphasis added).

When assessing the probative value of the evidence against the potential prejudicial effect in this context, courts consider the following: "(1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the charged offense and the witness'[s] subsequent history, (3) the similarity between the past crime and the offense being prosecuted, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue." *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). A trial court has "'wide discretion'" when making an admissibility determination under Rule 609. *Id.* at 881 (quoting *United States v. Oaxaca*, 569 F.2d 518, 526 (9th Cir. 1978)).

Regarding the first *Theus* factor, we note that "[c]rimes that involve deception have a higher impeachment value than crimes involving violence, the latter having a higher potential for prejudice." *See Miller v. State*, 196 S.W.3d 256, 268 (Tex. App.—Fort Worth 2006, pet. ref'd). Possession of a controlled substance, delivery of a controlled substance, and evading arrest do not necessarily involve deception or untruthfulness. *See Smith v. State*, Nos. 01-05-01095—01096-CR, 2007 WL 79475, at *10 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (noting that delivery of controlled substance is not "a crime of deception"); *Miller*, 196 S.W.3d at 268 (observing that possession of controlled substance "does not involve untruthfulness or deception"); *Dominguez v. State*, No. 07-02-00264-CR, 2003 WL 834778, at *2 (Tex. App.—Amarillo Mar. 4, 2003, pet. ref'd) (not designated for publication) (noting that evading arrest "does not necessarily involve . . . dishonesty"). However, these crimes similarly do not

necessarily involve violence. When asserting to the district court that evidence pertaining to these prior convictions should be admitted, the State emphasized that the prior convictions occurred, but no factual background regarding the underlying convictions was provided. *See Theus*, 845 S.W.2d at 881-82 (explaining that trial court may consider facts of prior conviction to determine if evidence of prior conviction should be admitted).

In light of the preceding, we believe that the first factor is either neutral regarding the admission of the prior-conviction evidence or weighs against the admission of the evidence. *See Smith*, 2007 WL 79475, at *10 (concluding that factor was "neutral in regard to appellant's delivery of marijuana conviction" because crime does not involve deception or violence); *Spears v. State*, No. 14-02-00412-CR, 2003 WL 1922603, at *3 (Tex. App.—Houston [14th Dist.] Apr. 24, 2003, pet. ref'd) (mem. op., not designated for publication) (observing that prior convictions were for possession of controlled substance, "which neither favor nor disfavor admission"); *see also Flores v. State*, Nos. 01-10-00531—00532-CR, -00534-CR, 2013 WL 709100, at *12 (Tex. App.—Houston [1st Dist.] Feb. 26, 2013, pet. ref'd) (mem. op., not designated for publication) (stating "that narcotics-related crimes tend to have a lower impeachment value because they do not involve deception, moral turpitude, or violence" and concluding that first factor weighed against admission of "prior conviction for possession"); *Smith v. State*, No. 10-01-00331-CR, 2003 WL 21780776, at *2 (Tex. App.—Waco Aug. 1, 2003, no pet.) (mem. op., not designated for publication) (determining on

limited record that first factor weighed against admissibility of evidence regarding prior "conviction for possession of methamphetamine").[2]

Turning to the second factor, this factor weighs in favor of admitting evidence regarding a prior conviction when the evidence shows that the prior conviction was recent and when the evidence shows that the defendant "has demonstrated a propensity for running afoul of the law." *Theus*, 845 S.W.2d at 881. The record before this Court indicates that the offenses at issue were alleged to have occurred in 2016. Moreover, the record demonstrates that in 2012 Jones was convicted twice of delivery of a controlled substance and convicted of possession of a controlled substance, and testimony was presented indicating that Jones had been placed on community supervision for those offenses in 2014. Further, the record shows that in 2010 Jones was convicted of possession of a controlled substance and that Jones's community supervision for evading arrest

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[2] When asserting that the first factor weighs in favor of excluding the evidence of the prior crimes, Jones assets that evading arrest "is not a crime of [moral] turpitude[] and may not be used to impeach a witness." As support for this proposition, Jones points to an opinion by one of our sister courts of appeals. *See Dominguez v. State*, No. 07-02-00264-CR, 2003 WL 834778, at *2 (Tex. App.—Amarillo Mar. 4, 2003, pet. ref'd) (not designated for publication). In that case, our sister court explained that evading arrest is not a crime of moral turpitude and that the trial court did not abuse its discretion by refusing to allow the defendant to impeach a witness with a prior conviction for evading arrest. *Id.* However, Rule 609 allows for the admission of prior convictions for crimes involving moral turpitude *or* prior felonies, Tex. R. Evid. 609, and evading arrest can constitute a misdemeanor, a state-jail felony, a third-degree felony, or a second-degree felony depending on the manner in which the offense is committed, *see* Tex. Penal Code § 38.04. Nothing in the opinion by our sister court indicates what the offense level was for the prior conviction, and our sister court made no specific determination regarding whether the witness could have been impeached by evidence of a prior felony conviction for evading arrest. *See Dominguez*, 2003 WL 834778, at *2; *see also Kneeland v. State*, Nos. 09-15-00198—00199-CR, 2017 WL 1535103, at *4 (Tex. App.—Beaumont Apr. 26, 2017, no pet.) (mem. op., not designated for publication) (noting that although some courts have determined that misdemeanor conviction for evading arrest may not be admitted under Rule 609 as crime of moral turpitude, "a felony conviction for evading arrest could be used to impeach a witness because it is a felony").

was revoked in 2008. Accordingly, the second factor weighs in favor of admission of the evidence because it shows Jones's propensity for breaking the law within a few years of the offenses at issue. *See Davis v. State*, 259 S.W.3d 778, 782 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (observing that "the law favors admission of past offenses if they are recent and the witness has demonstrated a pattern of running afoul of the law").

Regarding the third factor, it weighs against the admission of evidence of a prior offense if the prior offense is similar to the one at issue because the evidence might allow the jury to improperly convict based on a perceived pattern of past conduct instead of on the facts of the case. *Theus*, 845 S.W.2d at 881. Although the prior convictions did not involve conduct similar to the conduct alleged in the charge for unlawful possession of a firearm, Jones was jointly tried for that offense as well as for the charge of possession of a controlled substance. Further, four of the prior convictions involved possessing or delivering a controlled substance and are, therefore, similar to the charge in this case for possession of a controlled substance. Accordingly, this factor weighs against admission of the evidence regarding the prior convictions for possession of and delivery of a controlled substance but weighs in favor of the admission of the evidence regarding the prior conviction for evading arrest because that offense is dissimilar from the charged offenses at issue in this case.

Turning to the remaining factors, those are related and depend on the nature of the defense's theory and the available means to prove that defense. *Id.* If the defendant could call other witnesses to the stand, then his credibility may not be a critical issue, and because other witnesses could testify regarding the defense, the defendant may not need to testify. *Id.* On the other hand,

if the case only involves the testimony of the defendant and the State's witnesses, the importance of the defendant's testimony as well as his credibility rises. *Id.* Accordingly, because the importance of the defendant's credibility increases, the State's need to be able to impeach the defendant's credibility also rises. *Id.*

Although Jones briefly recalled Officer Van Valkenburg to discuss whether statements were taken from the individuals present in the house when Jones was arrested and whether sunlight can make it appear as if a car's brake lights are on even when they have not been activated, this case essentially involved testimony from the State's witnesses and from Jones. In his testimony, Jones asserted that he did not start the car or place it in gear, that he did not possess the drugs or the firearm, that he did not know that they were in the car, and that someone else planted those items in the car. Based on the record presented here, it does not appear that there were any witnesses other than the State's witnesses and Jones who could have provided testimony regarding some, if not all, of Jones's assertions. In fact, Jones's attorney suggested during closing arguments that evaluating the testimony presented at trial will involve "a character credibility call" about "who do[es the jury] believe." Accordingly, the fourth and fifth factors weigh in favor of admission because of the State's need to impeach Jones's testimony and refute his claims.[3]

[3] In his brief, Jones contends that his "testimony was not significant to his defense, which primarily addressed the State's failure to meet its burden of proof." For that reason, Jones contends that "the fourth and fifth factors weigh against admission of the convictions." Although Jones's attorney's strategy may have focused on the State's burden prior to Jones testifying, Jones elected to testify and asserted during his testimony that he was innocent of the charges for reasons summarized above. Accordingly, for the reasons previously stated, we believe that the final two factors weigh in favor of admission of the evidence.

In light of our resolution of the *Theus* factors above, we must conclude that the district court did not abuse its discretion by overruling Jones's objection and allowing the State to introduce evidence regarding Jones's prior felony convictions. *See Smith*, 2003 WL 21780776, at *3 (noting large amount of discretion afforded to trial court's making determination under Rule 609 and concluding that trial court did not abuse its discretion where three factors weighed in favor of admission of evidence).

For these reasons, we overrule Jones's second issue on appeal.

CONCLUSION

Having overruled Jones's two issues on appeal, we affirm the district court's judgments of conviction.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: May 31, 2018

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