

**AFFIRM; and Opinion Filed December 18, 2014.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-14-00240-CR**

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**BOBBY SIMMONS, Appellant  
V.  
THE STATE OF TEXAS, Appellee**

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**On Appeal from the 363rd Judicial District Court  
Dallas County, Texas  
Trial Court Cause Nos. F-1252370-W and F-1252371-W**

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**MEMORANDUM OPINION**

Before Justices Bridges, Lang-Miers, and Myers  
Opinion by Justice Bridges

A jury convicted appellant Bobby Simmons of possession with intent to deliver cocaine in cause number F-1252370-W and sentenced him to sixty years' imprisonment. The jury convicted him of unlawful possession of a firearm by a felon in cause number F-1252371-W and sentenced him to five years' imprisonment and a \$5,000 fine. On appeal, Simmons challenges the sufficiency of the evidence to support his conviction for unlawful possession of a firearm. He also argues the trial court abused its discretion by permitting the State to improperly cross-examine him and that the trial court violated his constitutional rights to confrontation. We affirm the trial court's judgments.

## **Background**

Dallas Police officers in the narcotics division received an anonymous citizen complaint regarding possible drug transactions at 7353 Chaucer Place. Based on the information, officers used confidential informants to make two controlled buys two days in a row. The narcotics division confirmed the drugs purchased were cocaine.

With this information, Sergeant Anthony Martin told his supervisor a search of the location was necessary. On February 15, 2012, officers executed a search warrant. Upon entry into the home, officers found five people inside: four adults and one juvenile. Simmons was found in the master bedroom.

After officers removed the individuals from the home, they began a thorough search. In the master bedroom, officers found a razor blade, crack cocaine, plastic bowls, and marijuana in plain view. They also found the IDs of Bridget Rowewright and Simmons on the dresser. In a dresser drawer, they found a scale, packaging material, and a box of ammunition. In a drawer that pulled out from under the master bed, officers found a safe and a handgun. Under the handgun, a detective found a temporary paper copy of a small ID card with Simmons's name on it. Based on the IDs and clothing found in the room, officers believed Rowewright and Simmons both occupied the room.

Officers also found a black safe in the master bedroom closet. Inside the safe, officers found a package described by Sergeant Martin as "unknown contraband"<sup>1</sup> and another handgun. The handgun was in working condition when it was seized and had live rounds in the chamber. The weapon was "ready to go."

Based on the totality of the circumstances, which included drug paraphernalia and the amount of drugs found in close proximity to weapons, officers testified narcotics were being

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<sup>1</sup> Sergeant Martin later described the package in the safe as a white substance in a clear baggie.

distributed from the residence. They also testified it was reasonable to believe Simmons was in care, custody, and control of both the narcotics and the weapons found in the master bedroom. In fact, Sergeant Martin testified the gun under the bed was within arms' reach, and a handgun in close proximity to drugs is a "tool of the trade. You keep your protection where your drugs are."

The jury convicted Simmons of both possession with intent to deliver cocaine and unlawful possession of a firearm by a felon. This appeal followed.

### **Sufficiency of the Evidence**

In his first issue, Simmons challenges the sufficiency of the evidence to support his conviction for unlawful possession of a firearm by a felon because the State failed to prove he actually possessed the firearm. He contends his proximity to the firearm was "merely fortuitous."

The standard for determining whether the evidence is legally sufficient to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, 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); *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012). The jury is the exclusive judge of witness credibility and the weight to be given testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (en banc). It is also within the exclusive province of the jury to reconcile conflicts in the evidence. *Id.*

To establish unlawful possession of a firearm by a felon, the State must prove the appellant was previously convicted of a felony offense and possessed a firearm after the conviction and before the fifth anniversary of his release from confinement or community supervision, parole, or mandatory supervision, whichever is later. TEX. PENAL CODE ANN. §

46.04(a)(1) (West 2011). Simmons admits his status as a convicted felon is not in dispute.<sup>2</sup> Rather, he contends the State failed to establish he exercised care, custody, control, or management of the firearm.

The State does not have to prove an appellant had exclusive custody of the firearm. *Smith v. State*, 176 S.W.3d 907, 916 (Tex. App.—Dallas 2005, pet. ref'd). However, when there is no evidence the appellant was in exclusive control of the place where the firearm was found, the State must offer additional, independent facts and circumstances affirmatively linking him to the firearm. *Id.* The purpose of affirmatively linking the accused to the firearm is to protect innocent bystanders from conviction based solely on their fortuitous proximity to the firearm. *Poindexter v. State*, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005).

A nonexclusive list of factors that can be sufficient either individually or in combination, to establish possession include whether the appellant owned the residence where the firearm was found, whether he was in close proximity to the firearm and had ready access to it, whether he attempted to flee, whether his conduct indicated a consciousness of guilt, whether he had a special connection to the firearm, and whether he made incriminating statements. *Smith*, 176 S.W.3d at 916. No set formula exists to dictate a finding of affirmative links sufficient to support an inference of knowing possession of contraband. *Id.* It is the “logical force” of the factors, not the number of factors present, that determines whether the elements of the offense have been established. *Id.*

Viewing the evidence in the light most favorable to the verdict, the State introduced a government document in which Simmons listed the residence as his address. Simmons was present in the master bedroom, where the guns were found, during the search. While the guns

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<sup>2</sup> The State introduced pen packet information regarding an August 10, 2009 conviction for burglary of a habitation.

were not in plain view, Sergeant Martin testified the gun in the drawer under the bed was within arms' reach. Moreover, a temporary ID card with Simmons's name was found underneath the gun.

The jury heard testimony about drugs and drug paraphernalia found in the master bedroom. They also heard the room contained male clothing and shoes indicating Simmons occupied the room with Rowewright. When asked about finding drugs and a handgun in close proximity in the bedroom, Sergeant Martin testified, "It's absolutely a tool of the trade. You keep your protection where your drugs are." Because evidence indicated Simmons stayed in the room, his fingerprints were lifted from a scale thereby linking him to the drug paraphernalia and drugs in the room, and his temporary ID was found under the gun, the jury could logically conclude he exercised care, custody, control, or management of a firearm, which he had for protection while dealing drugs.

In reaching this conclusion, we reject Simmons's argument his conviction cannot stand because he testified he did not live in the residence, the police did not find his fingerprints on the guns, he denied possessing the guns, and he testified Rowewright placed his identification in the room when he was incarcerated for a prior burglary offense. Simmons's arguments simply challenge the jury's conclusions, as the exclusive judge of witness credibility, to weigh and determine conflicts in the evidence. We must defer to the jury's determination. *See Wesbrook*, 29 S.W.3d at 111.

We further reject his contention that the jury's failure to find he "used" or "exhibited a deadly weapon" in the drug possession case has bearing on the sufficiency of the evidence for unlawful possession of a firearm. As the State argues, the weapons were stored in a drawer attached to the master bed and in a safe, which explains the jury's reluctance in finding that a weapon was "used" or "exhibited" during the offense. The jury's conclusion, however, does not

address whether Simmons “possessed a firearm” in violation of section 46.04(a)(1). *See* TEX. PENAL CODE ANN. § 46.04(a)(1). Accordingly, the evidence is legally sufficient to support Simmons’s conviction for unlawful possession of a firearm by a felon in cause number F-1252371-W. We overrule Simmons’s first issue.

**Cross-Examination of Appellant Based on Facts Not in Evidence and Violation of the Constitutional Right to Confrontation**

Because Simmons’s second and third issues are based on the same objectionable testimony, we address them together. Simmons argues the trial court abused its discretion by allowing the State to ask him improper questions that assumed facts not in evidence and the questions concerned potential out-of-court statements by a non-testifying accomplice witness, which violated his constitutional right to confrontation. The objectionable exchange is as follows:

Q. The address on your tax return, in y’all’s room, Bridget, Walter, and Ricky say you stayed, you never seen those drugs in there?

A. No, sir. No, sir.

Q. Are you aware when Bridget tells the detective that you stay in the room? Did you - - did you know that?

A. No, sir.

Q. If I played you an interrogation interview where Bridget says that, that’s a lie?

A. I don’t stay there. I been in there before. Don’t mean I stay there. I don’t live there.

Q. Again, when Bridget tells the detective - -

[DEFENSE COUNSEL]: Judge, I object. This is presuming evidence submitted about an interview and I object on those grounds.

THE COURT: It’s cross-examination. Overruled.

In his second issue, Simmons argues this exchange resulted in the State presenting evidence to the jury regarding information Rowewright provided to police about his status as an occupant of the residence, which exceeded the bounds of proper cross-examination by assuming facts not in evidence.

Assuming without deciding that the State's questions to Simmons were improperly admitted as presuming facts not in evidence, we conclude Simmons was not harmed by the evidence. Texas Rule of Appellate Procedure 44.2(b) states that any error, other than constitutional error, that does not affect substantial rights must be disregarded. TEX. R. APP. P. 44.2(b). In other words, we disregard the erroneous admission of evidence if it did not adversely affect the jury's verdict, or had but a slight effect on the jury's verdict. *Johnson*, 84 S.W.3d at 729.

Simmons argues the admission of the evidence moved the State's case from "one of non-persuasion to one of persuasion." However, the alleged statements Rowewright made to police were not the only evidence linking Simmons to the master bedroom. For example, the jury heard he listed the residence as his address on a government document. They also heard from several detectives about men's clothing and shoes found in the bedroom. Based on the men's clothing and their knowledge that Rowewright was Simmons's girlfriend, the jury could infer he lived in the room, despite his denial. Moreover, detectives found two identification cards with Simmons's name in the master bedroom. Thus, we cannot agree with Simmons that the State's questions moved the case from "one of non-persuasion to one of persuasion." Accordingly, Simmons has failed to show the admission of the evidence adversely affected the jury's verdict. We overrule his second issue.

In his third issue, Simmons argues his constitutional right to confrontation was violated because Rowewright did not testify, the State never played any police interview of her, nor did it

admit any statements made by her. Therefore, he contends, the State offered the unproven, out-of-court testimonial statement of a non-testifying accomplice. The State responds Simmons failed to preserve his issue for review. We agree.

To preserve error, a defendant must make a timely, specific objection and obtain an adverse ruling by the trial court. TEX. R. APP. P. 33.1. Even constitutional error may be waived for failure to object at trial. *Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990) (en banc). Specifically, a defendant waives his constitutional right to confront witnesses if he does not object at trial to the denial of that right. *See Eustis v. State*, 191 S.W.3d 879, 885 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *see also Lytle v. State*, No. 05-10-01134-CR, 2012 WL 266450, at \*2 (Tex. App.—Dallas Jan. 31, 2012, no pet.) (mem. op., not designated for publication).

While Simmons argues the context of the objection provided the trial court and the State with adequate notice that he was objecting on the basis of the Confrontation Clause, we do not agree. Counsel's objection did not, in any way, reference the right to confrontation. If the record indicates an objection, besides presuming facts not in evidence, it might be that counsel was objecting on the basis of hearsay. However, courts have consistently held that a hearsay objection does not preserve error on a Confrontation Clause claim. *See Eustis*, 191 S.W.3d at 886; *see also Lytle*, 2012 WL 266450, at \*2. Accordingly, Simmons failed to preserve his third issue for our review, and it is overruled.



**Conclusion**

We affirm the trial court's judgments.

/David L. Bridges/  
DAVID L. BRIDGES  
JUSTICE

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TEX. R. APP. P. 47

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

BOBBY SIMMONS, Appellant

No. 05-14-00240-CR      V.

THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District  
Court, Dallas County, Texas  
Trial Court Cause No. F-1252370-W.  
Opinion delivered by Justice Bridges.  
Justices Lang-Miers and Myers  
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 18, 2014.



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

BOBBY SIMMONS, Appellant

No. 05-14-00241-CR      V.

THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District  
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Trial Court Cause No. F-1252371-W.  
Opinion delivered by Justice Bridges.  
Justices Lang-Miers and Myers  
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 18, 2014.