Reversed and Remanded in part; Affirmed in part; and Opinion Filed October 31, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00827-CR

JOSE MERLAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1460351-P

MEMORANDUM OPINION

Before Justices Francis, Stoddart, and Schenck
Opinion by Justice Francis

Jose Merlan appeals his conviction following a jury trial for unlawful possession of a firearm by a felon. In four issues, appellant generally contends the evidence is legally insufficient to support his conviction, the trial court erred in allowing the prosecutor to question a witness about appellant's truthfulness, and the trial court arbitrarily refused to consider the full range of punishment. The State brings a single cross point asserting the trial court erred in failing to grant appellant pre-sentence jail time credit. We reverse and remand the trial court's judgment for a determination of the amount of back time credit required and to reform the judgment accordingly. In all other respects the trial court's judgment is affirmed.

In November 2014, Dallas police officer Joseph Meno was working as an undercover deployment officer. In that capacity, Meno responded to reports of suspected criminal activity

and directed uniformed police officers who would arrive at the scene later. On November 19, Meno received a call that two males in an apartment complex appeared to be preparing to commit a burglary. Meno drove to the complex and saw appellant and another man standing by a pickup truck in the parking lot. Two people were sitting inside the truck, including a woman in the passenger's seat later identified as Jasmine Bustamante. Meno called for uniformed police officers who were waiting close by.

When the uniformed officers arrived, Meno saw Bustamante hand appellant a multicolored bag. Appellant ducked down towards the ground so the truck blocked him from view of the approaching officers, crawled toward the back, and placed the bag on the rear tire. Appellant then stood up and began to walk away quickly. Based on what he saw, Meno told the uniformed officers to detain appellant.

Meno spoke with appellant who denied putting anything by the truck's tire. Meno recovered the bag from the wheel well and found an unloaded handgun inside along with four rounds of ammunition. Meno stated the bag was not open when he retrieved it. Appellant and Bustamante were arrested.

Dallas police detective Loeb testified about his recorded interview with appellant. As the jury watched the recording, Loeb explained that appellant initially denied having a gun, then blamed the other men at the scene for the presence of the gun. Loeb said appellant changed his story several times and lied many times. Appellant eventually told Loeb he bought the gun a week earlier along with three or four bullets that were not loaded into the gun. Court documents showed appellant had been released from jail for a felony offense approximately one month before he purchased the gun.

Appellant told the jury he called Bustamante for a ride but "felt something was wrong" when she showed up in the pickup truck with other people. When the police arrived, appellant

stated Bustamante "chunked me her makeup bag" and he immediately threw it away. He said he never opened the bag, did not know what was in it, and had no idea why she threw it at him. Appellant denied ducking down behind the truck or running away. He said he told officers he threw the bag away but did not know what was in the bag.

Appellant admitted that he bought the gun but claimed he bought it for Bustamante because she was an escort and needed it for protection. Bustamante told him she was going to plead guilty to possessing the gun unlawfully, so he did not understand why he was being prosecuted. He said he pleaded guilty to several previous offenses because the allegations in those cases were true, but in this case he was innocent.

After hearing the evidence, the jury found appellant guilty as charged in the indictment. Appellant contends the evidence was legally insufficient to support the verdict. Specifically, appellant argues no evidence shows he had care, custody, control, or management of the gun on the date in question or that his possession of the gun, if any, was voluntary.

When reviewing a challenge to the legal sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). We do not resolve conflicts of fact, weigh evidence, or evaluate the credibility of the witnesses as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead we determine whether both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in the light most favorable to the adjudication. *Adelman v. State*, 828 S.W.2d 418, 422 (Tex. Crim. App. 1992). The factfinder is the sole judge of the witnesses' credibility and their testimony's weight. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984). The

factfinder may choose to disbelieve all or any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Each fact need not point directly and independently to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is enough to warrant conviction. *See Kennemur*, 280 S.W.3d at 313. Circumstantial evidence is as probative as direct evidence and can be sufficient alone to establish an accused's guilt. *Id*.

In cases involving unlawful possession of a firearm by a felon, we analyze the sufficiency of the evidence under the rules adopted for determining sufficiency of the evidence in cases of unlawful possession of a controlled substance. *See Young v. State*, 752 S.W.2d 137, 140 (Tex. App.—Dallas 1988, pet. ref'd). The term "possession" is defined in the Texas Penal Code as "actual care, custody, control, or management." TEX. PENAL CODE ANN. § 1.07(a)(39) (West Supp. 2016). A person commits a possession offense only if he voluntarily possesses the prohibited item. *Id.*§ 6.01(a). "Possession 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). The State's evidence, which may be either direct or circumstantial, must establish the accused's connection with the firearm was more than just fortuitous. *Greer v. State*, 436 S.W.3d 1, 5 (Tex. App.—Waco 2014, no pet.). The State need not prove the accused had exclusive possession of the firearm; joint possession is sufficient to sustain a conviction. *Id*.

No set formula of facts exists that dictate a finding of affirmative links sufficient to support an inference of knowing possession of a firearm. *Smith v. State*, 176 S.W.3d 907, 916 (Tex. App.—Dallas 2005, pet. ref'd). On a case by case basis, we examine factors such as whether the firearm was in plain view, whether the accused 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, whether the firearm was found in an enclosed space, and whether the accused made incriminating statements. *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*.

Appellant contends the evidence is legally insufficient to establish his guilt because "[t]he only evidence of his possession on this date constituted Ms. Bustamante throwing it at [him], and his immediate disposal of it." This evidence is appellant's version of what occurred on the day he was arrested. Other witnesses testified differently, and the jury was free to accept their testimony and reject appellant's. *See Sharp*, 707 S.W.2d at 614.

Meno saw appellant take the bag from Bustamante, hide the bag in the rear wheel well of the truck, and walk away quickly. The bag contained a gun and several rounds of ammunition. After he was arrested, appellant blamed others at the scene before ultimately confessing he bought the gun a week earlier. The description appellant gave Loeb of the gun and separate ammunition he purchased matched what was found in the bag recovered by Meno.

Appellant's actions of hiding the bag and attempting to leave the scene together with his conflicting statements about ownership of the gun indicate a consciousness of guilt. Even if, as appellant stated, he purchased the gun for Bustamante, the jury was free to conclude he and Bustamante possessed the gun jointly at the time of the offense. *See Greer*, 436 S.W.3d at 5. We conclude the evidence was legally sufficient to show that appellant voluntarily possessed a firearm. We resolve appellant's first issue against him.

In his second issue, appellant contends the trial court erred in allowing the State to question a witness about his truthfulness. The testimony appellant complains about occurred during the State's questioning of Loeb. After Loeb testified that appellant admitted in his interview he bought the gun, the following exchange occurred:

Prosecutor: Okay. During points of the interview - let me ask you this. Did you believe he was being truthful with you?

Loeb: No. I believe he did lie quite a bit throughout the interview.

Prosecutor: Did he initially deny to you having the weapon or even possessing the weapon?

Loeb: Yes, at first he did. Yes.

Prosecutor: Okay. And did he actually blame it on another individual that was found at the scene?

Loeb: Yes.

Prosecutor: And that's not even the female, correct?

Loeb: Correct.

Prosecutor: He actually blamed it on one of the other males that was in the truck, do you understand that?

Loeb: Yes.

Prosecutor: Okay. Eventually - does he - does he break and give you truthful information?

Loeb: Yes.

Defense Counsel: Objection; characterization.

The Court: Overruled.

Appellant contends the trial court erred in allowing Loeb to express an opinion about whether he was truthful in the interview. *See Sandoval v. State*, 409 S.W.3d 259, 292 (Tex. App.—Austin 2013, no pet.). To preserve error, a party must object each time purportedly inadmissible evidence is offered, request a running objection, or request a hearing outside the presence of the jury before the category of evidence is offered. *See Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). It is well settled that error in the admission of evidence is cured where the same evidence comes in elsewhere without objection. *See Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). In this case, Loeb testified, without objection, that he believed

appellant lied "quite a bit" during his interview. It was not until several questions later that defense counsel objected to the "characterization" suggested by the prosecutor's question. Because appellant failed to object to the prosecutor's initial questioning or Loeb's testimony about appellant's truthfulness when it was first offered, appellant failed to preserve error as to this issue. *Id*. at 860.

In addition, appellant fails to show how he was harmed by admission of this evidence. *See Clark v. State*, 305 S.W.3d 351, 357–58 (Tex. App.—Houston [14th Dist.] 2010), *aff'd*, 365 S.W.3d 333 (Tex. Crim. App. 2012). Loeb's testimony addressed only whether appellant was truthful during his interview. Appellant does not dispute he initially denied any connection to the gun when he was interviewed by Loeb. He later admitted, both in his interview and at trial, that he bought the gun a week before his arrest. This admission demonstrates that his earlier statements blaming the presence of the gun on one of the other men at the scene was a lie. Because appellant's own testimony showed that he lied during his interview, any error in admitting Loeb's testimony about appellant's truthfulness in his interview was harmless. *See id*. We resolve this issue against appellant.

In his third and fourth issues, appellant contends the trial court violated his right to due process under the Texas and United States Constitutions by arbitrarily refusing to consider the full range of punishment. Appellant did not raise this objection at his sentencing hearing. A defendant can waive due process complaints concerning the trial court's failure to consider the full range of punishment by failing to object at trial. *See Eddie v. State*, 100 S.W.3d 437, 441 (Tex. App.—Texarkana 2003, pet. ref'd); *Cole v. State*, 931 S.W.2d 578, 580 (Tex. App.—Dallas 1995, pet. ref'd). In his motion for new trial, appellant stated "the Court did not consider probation as being within the range of punishment." Assuming this single statement was sufficient to inform the court of appellant's complaint, to preserve an issue by motion for new

trial, a defendant cannot merely file the motion but must also ensure the trial court has actual notice of the motion. *See Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998); *Rocha v. State*, Nos. 05-12-00927-CR and 05-12-00928-CR, 2013 WL 6212161 at *1 (Tex. App.—Dallas Nov. 27, 2013, pet. ref'd) (mem. op. not designated for publication). Actual notice may be shown by such things as the judge's signature or notation on a proposed order or by a hearing date set on the docket. *See Richardson v. State*, 328 S.W.3d 61, 72 (Tex. App.—Fort Worth 2010, pet. ref'd). There is no presentment of the motion shown in this record. We resolve appellant's third and fourth issues against him.

In a single cross point, the State contends the trial court erred in failing to grant appellant credit in this case for the time he had already spent in jail. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03 (West Supp. 2016). It is mandatory under the Texas Code of Criminal Procedure for the judge of the court in which the defendant is convicted to give the defendant credit on his sentence for the time he has spent in jail on the case from the time of his arrest and confinement until his sentence by the court. *Id*. The issue of back time credit can be raised at any time and is not subject to being waived for failure to object in the trial court. *See Joseph v. State*, 3 S.W.3d 627, 643 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

During her pronouncement of appellant's sentence, the trial judge stated "Your sentence in this case will begin today. I am not giving you credit for any back time you have served. If the prison wants to give you some credit – but your sentence starts today." In addition, the judge noted on the docket sheet that no back time credit was being given and the final judgment reflects no credited time. Because the trial court was required to grant appellant pre-sentence jail time credit when sentence was pronounced, we reverse the judgment to the extent it fails to award back time credit. The record does not reflect how much time would be due to appellant. Therefore, we remand the cause to the trial court to determine the amount of back time credit

required by article 42.03 of the Texas Code of Criminal Procedure and to reform the judgment accordingly. In all other respects, we affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSE MERLAN, Appellant

No. 05-15-00827-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1460351-P.
Opinion delivered by Justice Francis.
Justices Stoddart and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED IN PART** and the cause **REMANDED** to determine the amount of back time credit required by article 42.03 of the Texas Code of Criminal Procedure and to reform the judgment accordingly. In all other respects the judgment is **AFFIRMED.**

Judgment entered October 31, 2016.