Modify in part and Affirm as Modified and Opinion Filed August 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00641-CR

No. 05-19-00642-CR

VIRGIL LAMONT JOHNSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause Nos. F-1751507-K and F-1751508-K

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Partida-Kipness

A jury convicted Virgil Lamont Johnson of possession with intent to deliver cocaine and methamphetamine. The jury found the State's allegation that the offenses occurred in a drug-free zone was true, and the trial court sentenced Johnson to twenty years' imprisonment on both charges, to run concurrently. In his first two issues, Johnson contends the evidence is legally insufficient to prove he knew of the cocaine and methamphetamine because of their hidden location. In his third issue, Johnson contends the trial court erred in assessing costs on both cases because they

were tried as a single criminal action. We modify the trial court's judgment to correct the cost assessment and affirm the judgment as modified.

BACKGROUND

The Dallas Police Department received information that "a lot of drugs" were being sold from a small, wood-frame house at 4720 Garrison Avenue in Dallas, Texas, and began surveillance on the house. Using a confidential informant, police attempted to purchase drugs from the house six times between November 15, 2016, and January 18, 2017. The confidential informant successfully purchased cocaine from the house on three of the six attempts. The purchases were made at the back door of the house, which was not visible to the detectives conducting surveillance from the front of the house.

Detective John Lising led the surveillance and noticed a particular vehicle was present at the house on each successful purchase, which he described in his warrant affidavit as a white 2001 Cadillac sedan. Each successful purchase occurred after 5:30 p.m. Lising noted that the vehicle usually arrived around 5:00 p.m. and was at the house on January 18, 2017, when the confidential informant last purchased cocaine from the house at 5:40 p.m. Based on his observations, Lising obtained a search warrant. Police executed the warrant on January 19, 2017, when the Cadillac was again present.

As officers approached the house, Keith Jones was standing in the front doorway of the house. Jones retreated into the house and closed the door when he

saw Lising approaching as the first person on the entry team. Jones left the door unlocked, and Lising entered the house, followed by detectives Terry Charles and Justin Basco. The front door of the house opened directly into the living room. Jones and co-occupant Byron Jackson ran from the living room into the kitchen as Lising entered. Lising entered the kitchen and found Jones and Jackson prone on the floor with a shotgun laying in front of them. Jones and Jackson were arrested in the kitchen. Charles searched the bedrooms upon entry and found Johnson in what police identified as bedroom number three.

Police searched the house and found cocaine powder and chunks, crack cocaine, methamphetamine, and marijuana. In the living room, police found a digital scale sitting on a coffee table. On the scale was a large chunk of cocaine. The living room also contained two sofas. Behind one sofa, police found a gift bag containing methamphetamine, marijuana, and a large "cookie" of crack cocaine.

On the floor of the kitchen, by the back door, police found a jar containing marijuana. On the kitchen table, in a pill bottle, they found twenty-two packets containing powder cocaine. There was also a plate with razor blades, and a plastic storage container with $120 in cash on the kitchen table. Disposable rubber gloves were found on and near the table. Although the kitchen contained a refrigerator, there was no food in it. The kitchen also contained a gas stove, but there was a cardboard box containing a digital scale under the burners.

The house had burglar bars on all of the windows. Each exterior door also had an external, metal screen-door with burglar bars and several locks. The back screen-door had a cut-out through which the drug deals were performed. Upon searching the house, police discovered that each exterior door was reinforced with a "barnyard barricade," consisting of two metal brackets into which a wooden beam could be placed to prevent the door from being opened into the house.

In bedroom number three, where Johnson was apprehended, police found a number of "burner phones" in the closet and another cell phone next to Johnson. An additional cell phone was found on the coffee table in the living room. A later search of that phone's contents produced several text messages sent to and received by Johnson.

Police also searched the Cadillac and found two receipts for automotive parts and service with Johnson's name on them. The vehicle was registered to Johnson's wife. Police found the following sums of money on each suspect after arrest: $4,791 on Jones, $405 on Johnson, and $115 on Jackson.

The Southwestern Institute of Forensic Sciences (SWIFS) tested the material seized from the house. SWIFS identified the material as "crystalline," "white," "off-white," and "plant." SWIFS determined that the "crystalline" material was methamphetamine in an amount of 10.1121 grams. Although all of the "white," "off-white," and "plant" material was not tested, SWIFS determined that 54.64 grams of the "white" material was cocaine. The remaining 41.9654 grams of "white"

material, 46.5974 grams of "off-white" material, and 101.16 grams of "plant" material was not tested by SWIFS.

The State indicted Johnson on two counts: possession of cocaine and possession of methamphetamine, in an amount of four grams or more but less than 200 grams with intent to deliver. Each indictment included two enhancements: possession of a firearm during the commission of the offense and a prior felony conviction. The State also filed notice that the alleged offenses occurred within a drug-free zone based on an allegation that the house was less than 1,000 feet from Harry Stone Montessori Academy. A jury found Johnson guilty of both charged offenses and found the offenses occurred in a drug-free zone, but did not find the firearm enhancement true in either case. The trial court sentenced Johnson to twenty years' confinement on each charge, with the sentences to run concurrently. The trial court also ordered Johnson to pay $349 in costs on each case. This appeal followed.

ANALYSIS

In three issues, Johnson contends (1) the evidence is legally insufficient to support the jury's verdict on the methamphetamine charge because there is no evidence he knew of the gift bag containing the methamphetamine; (2) the evidence is legally insufficient to support the jury's verdict on the cocaine charge because there is no evidence he knew of the gift bag and the weight of the other cocaine attributed to him was not four grams; and (3) court costs were improperly assessed on both cases.

A. Legal Sufficiency

Johnson contends in his first two issues that the evidence is legally insufficient to support the jury's verdict that he knew of the methamphetamine and cocaine in the gift bag behind the living room sofa. Johnson also contends that the evidence is insufficient to establish that he had the intent to promote or assist in the delivery of either drug, as required to prove possession with intent to deliver under the "law of parties" theory.

In conducting a review of the legal sufficiency of evidence, we do not evaluate the weight of the evidence. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Nor do we replace the factfinder's judgment with our own. *Id*. We review Johnson's challenge by examining the evidence in the light most favorable to the verdict to determine whether any 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). We determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). We must presume that the factfinder resolved any conflicting inferences in the verdict's favor and defer to that resolution. *Id*. at 448–49.

The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt.

Dobbs v. State, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014); *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

The State did not allege that Johnson physically possessed any of the controlled substances at issue. Based on circumstances surrounding his presence in the house, the State charged him under the law of parties with two counts of possession of a controlled substance with intent to deliver. To establish possession of a controlled substance as an actor under the law of parties, the State had to show that Johnson (1) exercised care, custody, control, or management over the contraband and (2) knew that what he possessed was contraband. *See* TEX. HEALTH & SAFETY CODE §§ 481.002(38), 481.112(d); *Robinson v. State*, 174 S.W.3d 320, 324 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). To convict under the law of parties, the State must show that the defendant acted with the intent to promote or assist the offense by soliciting, encouraging, directing, aiding, or attempting to aid the other person in the commission of the offense. TEX. PENAL CODE § 7.02(a)(2). Principals and accomplices are both liable under the law of parties. *Id*. § 7.01(c).

Possession may be joint. *See Allen v. State*, 249 S.W.3d 680, 690 (Tex. App.—Austin 2008, no pet.). Although mere presence in the vicinity of the contraband is not sufficient to establish possession, presence at the scene is "a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant." *Thomas v. State*, 645 S.W.2d 798, 800 (Tex. Crim. App. 1983); *see also Burkett v. State*, No. 05-18-00154-CR, 2019 WL

3026769, at *2 (Tex. App.—Dallas July 11, 2019, no pet.) (mem. op., not designated for publication).

When the defendant was not in exclusive possession of the place in which the contraband was found, the State must present additional evidence to affirmatively link the defendant to the contraband. *Taylor v. State*, 106 S.W.3d 827, 830–31 (Tex. App.—Dallas 2003, no pet.) (citing *Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995)). Factors indicating an affirmative link 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 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.

Tate v. State, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016) (quoting *Evans v. State*, 202 S.W.3d 158, 162 n. 12 (Tex. Crim. App. 2006)). The number of links present is not as important as the "logical force" or degree to which the links, alone or in combination, tend to affirmatively link the accused to the contraband. *Sloan v. State*, No. 05-18-00726-CR, 2019 WL 2317106, at *2 (Tex. App.—Dallas May 31, 2019, no pet. h.) (mem. op., not designated for publication) (citing *Evans*, 202 S.W.3d at 162). The affirmative-links test is not a distinct rule of legal sufficiency but a guide

for applying the *Jackson* standard in the circumstantial evidence context. *Tate*, 500 S.W.3d at 414 n.6.

Johnson asserts that there is no evidence to support an affirmative links analysis as to the methamphetamine because it was not in plain view but hidden under other drugs in a gift bag behind a sofa in the living room. Additionally, Johnson argues there is no evidence it was being sold out of the house, and police were not surveilling the house for selling methamphetamine. As to the cocaine, Johnson asserts any affirmative link is based on speculation because all of the "white" and "off-white" substance obtained was not tested. The substance at issue was found in three locations: the kitchen, living room coffee table, and the hidden gift bag. Because all of it was not tested, Johnson argues the jury could only speculate that the amount of cocaine attributed to him was not the cocaine found in the gift bag, which Johnson contends he did not know about.

Notwithstanding Johnson's assertions, the affirmative-links analysis is particularly applicable in circumstantial evidence cases such as this. *See id*. Although Johnson did not have exclusive possession of the place where the drugs were found, the evidence shows that his connection with the drugs was more than just fortuitous. A reasonable factfinder could infer that Johnson knowingly possessed both the methamphetamine and cocaine with the intent to distribute. *See id*. at 414 (factfinder may infer knowledge or intent if there are sufficient facts and circumstances justifying such an inference).

The house in which Johnson was arrested was a suspected drug or "trap" house from which drugs were sold. Detective Lising and other Dallas Police detectives conducted surveillance for two months before obtaining and executing a warrant to search the house. During the surveillance, Lising enlisted a confidential informant to purchase drugs from the house. Three out of six attempts were successful. Johnson's vehicle was present for every successful attempt and was absent for every unsuccessful attempt.

Basco testified that co-occupant Jackson said his "cousin," in apparent reference to Johnson, brought "the bald guy," in apparent reference to co-occupant Jones, to the house. Jackson and Johnson are not actual cousins, but Basco testified that the term "cousin" is commonly used to refer to a friend. Basco further testified that Jackson said Jones brought the drugs into the house. In other words, the evidence indicated that Johnson brought Jones with the drugs to the house.

The State's expert, Tim Hilton, testified that the fortifications on the house, the amount of drugs and money in the house, the number of cell phones and "burner phones" in the house, and the lack of evidence indicating anyone lived in the house suggested the house was used solely for selling drugs. Hilton testified further that the house contained a "dealer amount" of drugs. This amount and state of drugs found in the house indicated that it was in the process of being restocked when police executed the warrant. According to Hilton, it appeared the occupants were in the process of breaking up the large pieces of cocaine into smaller quantities for retail

sale. Lising classified the house as a "poly-drug enterprise" based on the variety of drugs found in the house. Police also did not find any implements for drug use, such as methamphetamine pipes.

Evidence further reflects that the bedroom in which Johnson was found and arrested contained no bed or other furnishings to indicate that he or anyone else was staying there. Lising testified that the bedroom was only a few steps from the living room in which the methamphetamine and the majority of the cocaine were found. Thus, although not found in the same room as the drugs, Johnson was in close proximity to the drugs. Furthermore, his cell phone was found next to a large chunk of cocaine on a digital scale in the living room. All three suspects possessed a large amount of cash.

Although Lising's warrant affidavit identified the Cadillac as white, the Cadillac at the house when the warrant was executed was grey. Regardless, it had the same license number as that recorded in Lising's affidavit. Furthermore, documents obtained from the vehicle and the vehicle's registration tied it to Johnson. The same vehicle had been at the house each time the confidential informant successfully purchased drugs from the house but was absent for each unsuccessful attempt.

The cumulative force of Johnson's presence and other evidence linking him to the drugs as part of the poly-drug enterprise was sufficient to prove possession of

methamphetamine and cocaine with intent to deliver beyond a reasonable doubt. *See Thomas*, 645 S.W.2d at 800. We overrule Johnson's first and second issues.

B. Court Costs

In his third issue, Johnson contends the trial court erred by assessing costs on both cases, instead of assessing costs only once for the two consolidated cases (i.e., the "criminal action"). Thus, Johnson asks us to modify the trial court's judgment to remove the court costs assessed on the second case and retain the costs on the lower trial court cause number. *See* TEX. CODE CRIM. PROC. art. 102.073; *Cleveland v. State*, No. 05-19-00783-CR, 2020 WL 3820906, at *1 (Tex. App.—Dallas July 8, 2020, no pet. h.) (mem. op., not designated for publication). The State does not contest Johnson's request.

"In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant." TEX. CODE CRIM. PROC. art. 102.073(a). For purposes of this rule, a person convicted of more than one offense in the same trial is convicted of those offenses in a "single criminal action." *Hurlburt v. State*, 506 S.W.3d 199, 201–04 (Tex. App.—Waco 2016, no pet.); *see also Burton v. State*, No. 05-18-00608-CR, 2019 WL 3543580, at *3 (Tex. App.—Dallas Aug. 5, 2019) (mem. op., not designated for publication). When two or more convictions arise from a single criminal action, "each court cost or fee the amount of which is determined according to the category of offense must be assessed using the highest

category of offense that is possible based on the defendant's convictions." TEX. CODE CRIM. PROC. art. 102.073(b). A claim challenging the bases of assessed court costs can be raised for the first time on appeal. *Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Burton*, 2019 WL 3543580, at *3. Moreover, when, as in this case, the convictions are for the same category of offense and the costs are the same, court costs should be based on the lowest trial court cause number. *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016), *pet. dism'd, improvidently granted*, No. PD-0947-16, 2017 WL 1493488 (Tex. Crim. App. Apr. 26, 2017) (not designated for publication); *Duchesneau v. State*, Nos. 02-18-00321-CR, 02-18-00322-CR, 2019 WL 2455619, at *7 (Tex. App.—Fort Worth June 13, 2019, pet. ref'asberrd) (mem. op., not designated for publication).

The trial court assessed court costs in its judgment on both cases at issue in this appeal. However, both indictments for possession of a controlled substance were tried in a single proceeding, and thus fall within a single criminal action. *See Burton*, 2019 WL 3543580, at *3 (citing *Hurlburt*, 506 S.W.3d at 201–04). The costs of court imposed in the two cases are identical ($349), and court costs should not be assessed in cause F-1751508-K (05-19-00642-CR) because it is the higher trial court cause number of the two cases.

This Court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information before us to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993);

Asberry v. State, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). This includes modifying a judgment to remove duplicative court costs. *See Burton*, 2019 WL 3543580, at *3; *Rubio v. State*, No. 05-17-00621-CR, 2018 WL 3424362, at *3 (Tex. App.—Dallas July 16, 2018, pet. ref'd) (mem. op, not designated for publication). We, therefore, affirm Johnson's third issue and modify the judgment in cause 05-19-00642-CR to remove the duplicative court costs.

CONCLUSION

On the record before us, the evidence was sufficient to support the jury verdict that Johnson possessed the drugs at issue with intent to distribute. Thus, we overrule Johnson's first and second issues. We agree that the trial court improperly assessed court costs on the cases at issue in this appeal. Accordingly, we sustain Johnson's third issue and modify the trial court's judgment on case F-1751508-K to remove court costs. As modified, we affirm the trial court's judgments.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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TEX. R. APP. P. 47.2(b).
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

VIRGIL LAMONT JOHNSON, Appellant No. 05-19-00641-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the Criminal District Court No. 4, Dallas County, Texas Trial Court Cause No. F-1751507-K. Opinion delivered by Justice Partida-Kipness. Justices Myers and Reichek participating.

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

Judgment entered this 17th day of August, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

VIRGIL LAMONT JOHNSON, Appellant No. 05-19-00642-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the Criminal District Court No. 4, Dallas County, Texas Trial Court Cause No. F-1751508-K. Opinion delivered by Justice Partida-Kipness. Justices Myers and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The section entitled "Court Costs" is modified to show "$ N/A."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 17th day of August, 2020.