Affirmed and Opinion Filed November 19, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00339-CR

No. 05-20-00347-CR

No. 05-20-00348-CR

TERRY DICKERSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F18-52315-V, F18-52318-V, F20-00007-V

MEMORANDUM OPINION

Before Justices Molberg, Nowell, and Goldstein
Opinion by Justice Nowell

A jury convicted Terry Dickerson of possession with intent to deliver cocaine, possession of marijuana, and unlawful possession of a firearm by a felon. In two issues asserted in all three cause numbers, appellant argues the trial court erred by including a definition of reasonable doubt in the jury charge and the trial court lacked jurisdiction. In appellate cause number 05-20-0348-CR, appellant argues two additional issues. He asserts the evidence is insufficient to support the conviction for unlawful possession of a firearm by a felon and, because he previously was

convicted of a non-violent felony, penal code section 46.04 violates the Second Amendment as applied to him. In a single cross-issue, the State requests we modify the judgment in appellate cause number 05-20-00348-CR. We affirm the trial court's judgments in appellate cause numbers 05-20-00339-CR and 05-20-00347-CR. We modify the judgment in appellate cause number 05-20-00348-CR and affirm as modified.

A. Definition of Reasonable Doubt

Appellant argues the trial court erred by including a definition of reasonable doubt in the jury charge. The charge included an instruction that "[i]t is not required that the prosecution proves guilt beyond all possible doubt; it is required that the prosecution's proof excludes all reasonable doubt concerning the Defendant's guilt." We have considered and rejected this argument multiple times. *See, e.g., Jackson v. State*, No. 05-19-01043-CR, 2021 WL 791095, at *4 (Tex. App.—Dallas Mar. 2, 2021, pet. ref'd) (mem. op., not designated for publication) (citing *O'Canas v. State*, 140 S.W.3d 695, 701–02 (Tex. App.—Dallas 2003, pet. ref'd); *Chapin v. State*, No. 05-15-01009-CR, 2016 WL 4421570, at *6 (Tex. App.—Dallas Aug. 19, 2016, no pet.) (mem. op., not designated for publication); *Borens v. State*, No. 05-07-01516-CR, 2009 WL 998678, at *5 (Tex. App.—Dallas Apr. 15, 2009, no pet.) (mem. op., not designated for publication); *Bates v. State*, 164 S.W.3d 928, 931 (Tex. App.—Dallas 2005, no pet.)). We decline appellant's invitation to reconsider our prior opinions. We overrule appellant's first issue in appellate cause numbers 05-20-

00339-CR and 05-20-00347-CR and overrule his third issue in appellate cause number 05-20-00348-CR.

B. Trial Court's Jurisdiction

Appellant argues the trial court lacked jurisdiction over each case, rendering the judgments void. Here, for trial court cause numbers F18-52315-V and F18-52318-V, the indictments were presented to the 363rd Judicial District Court; for trial court cause number F20-00007-V, the indictment was presented to Criminal District Court Number 6. The 292nd Judicial District Court tried the cases, and appellant argues the record does not show the cases were properly transferred. We also have addressed this argument several times in the past. As we recently explained, the absence of a transfer order is not a jurisdictional problem, and it does not render the actions of the transferee court void. *Jackson*, 2021 WL 791095, at *6 (citing *Lemasurier v. State*, 91 S.W.3d 897, 899 (Tex. App.—Fort Worth 2002, pet. ref'd); *Henderson v. State*, 526 S.W.3d 818, 821 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); TEX. GOV'T CODE ANN. § 24.003(b)(2)). Instead, the absence of a transfer order is a procedural issue, which is properly addressed by a plea to the jurisdiction. *See id.* (citing *Lemasurier*, 91 S.W.3d at 897).

Appellant did not file such a plea in the court below. His failure to do so results in forfeiture of the issue on appeal. *Id.* at *7 (citing *Wilson v. State*, No. 05-18-00801-CR, 2019 WL 3491931, at *4 (Tex. App.—Dallas Aug. 1, 2019, no pet.) (mem. op. not designated for publication) (collecting cases)). We overrule appellant's second

issue in appellate cause numbers 05-20-00339-CR and 05-20-00347-CR and overrule his fourth issue in appellate cause number 05-20-00348-CR.

C. Sufficiency of the Evidence

Appellant was convicted of unlawful possession of a firearm by a felon pursuant to penal code section 46.04 (appellate cause number 05-20-0348-CR). In his first issue in this appellate cause number, appellant argues the evidence is insufficient to support the conviction.

1. Applicable Law

To evaluate the sufficiency of the evidence, we consider 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 offense beyond a reasonable doubt. *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014); *see also Jackson v. Virginia*, 443 U.S. 307 (1979); *Turner v. State*, 626 S.W.3d 88, 92 (Tex. App.—Dallas 2021, no pet.). "This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts." *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015).

To establish unlawful possession of a firearm by a felon, the State must prove the accused 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 from supervision, whichever date is later. TEX. PENAL CODE. ANN. § 46.04(a)(1).

To establish the possession element, the State was 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. *Cude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986); *Hall v. State*, No. 05-18-00755-CR, 2019 WL 3773852, at *4 (Tex. App.—Dallas Aug. 12, 2019, no pet.) (mem. op., not designated for publication). The evidence must establish that the defendant's connection to the contraband or firearm was more than fortuitous. *Hall*, 2019 WL 3773852, at *3 (citing *Blackman v. State*, 350 S.W.3d 588, 594–95 (Tex. Crim. App. 2011)). Thus, mere presence at the location where contraband or a firearm is found is insufficient, by itself, to establish the requisite degree of control to support a conviction. *Id.* (citing *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006)). However, presence or proximity, when combined with other evidence, often referred to as "links," either direct or circumstantial, may well be sufficient to establish care, custody or control of the contraband or firearm. *Id.* (citing *Evans*, 202 S.W.3d at 162). There is no set formula to determine what links are sufficient and the number of links present is not as important as the "logical force" or degree to which the factors, alone or in combination, tend to link the accused to the contraband or weapon. *Id.* (citing *Porter v. State*, 873 S.W.2d 729, 732 (Tex. App.—Dallas 1994, pet. ref'd)). The absence of certain links does not constitute evidence of innocence to be weighed against the links present. *Id.* (citing *Satchell v. State*, 321 S.W.3d 127, 134 (Tex. App.—Houston [1st Dist.] 2010, pet.

ref'd)). The affirmative–links analysis is not a distinct rule of legal sufficiency, but a model of applying the *Jackson* standard in the context of circumstantial-evidence cases. *Id.* (citing *Villarreal v. State*, No. 05-13-00629-CR, 2014 WL 3056509, at *4 (Tex. App.—Dallas July 7, 2014, no pet.) (not designated for publication)). Accordingly, we still defer to the factfinder's credibility and weight determinations and its ability to draw reasonable inferences from basic facts to ultimate facts. *Id.*

Some factors that may establish a link to a weapon and/or contraband include the following: (1) whether weapon was in plain view; (2) the accused's proximity to and the accessibility of the weapon; (3) whether the accused owned or controlled the place where the weapon was found; (4) whether the place where the drugs and weapon were found was enclosed; (5) whether the accused was found with a large amount of cash; (6) whether the accused made incriminating statements when arrested; (7) whether the accused attempted to flee; and (8) whether the accused made furtive gestures. *Id.* (citing *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016)).

2. Factual Background

The indictment alleged appellant previously was convicted of possession of contraband by an inmate, a felony, in Oklahoma. At trial, the parties stipulated the alleged date of the offense in this case, February 20, 2018, was before the fifth anniversary of appellant's release from confinement or parole following his 2011

Oklahoma conviction. In his brief, appellant concedes he is a convicted felon. However, he argues, there were insufficient links to prove he possessed a firearm.

The Dallas Police Department received a complaint about a house located on Woodshire Drive. Several officers conducted surveillance over the course of multiple days. While conducting surveillance, Detective Neal Poynor of the Dallas Police Department's Narcotics Division noticed a pattern: cars would stop in the driveway of the house or at the curb, the occupants would go to the front door, and the persons would return to the car within one to three minutes. On February 16, 2018, Poynor observed appellant standing on the sidewalk very close to the house while talking on the phone; appellant was acting as the "good eye," which is "someone that will stay a little bit away from the residence on the phone. That way they can communicate with people inside the house if police are coming or if they see somebody that looks out of place in the neighborhood."

The police obtained a search warrant, which they executed on February 20, 2018. When the warrant was executed, there were four people inside the house and a couple of people believed to be customers outside the house. When the SWAT team made entry into the house, one officer saw appellant run into a bedroom, which is where appellant was apprehended. In the living room, the police found cell phones, one of which belonged to appellant, drugs, money, a scale, packaging materials, and a Smith & Wesson gun loaded with hollow point bullets. The gun was on a couch in plain view. In another bedroom, the police found a backpack containing drugs,

money, and a Glock pistol loaded with hollow point bullets. The kitchen was mostly empty, but the officers found a plate covered in drug residue. Later it was determined that appellant's finger print was on the plate.

Later, when appellant was searched, officers found a single bullet matching the bullets in the Glock in appellant's pocket. Sergeant Daniel Fogle, a narcotics detective and supervisor with the Dallas Police Department, testified he arrested appellant for possession of a firearm because the firearm "was located, again, inside the residence and he had the bullet in his pocket that matched the bullet that was in the Glock located in that backpack and then the additional firearm seated up on the couch by the front door, that was in plain view for anybody in that room to utilize."

Additionally, officers found a set of keys on the coffee table in the living room. The car key belonged to a car that was parked outside of the house and had items inside belonging to appellant, including his social security card and mail addressed to him at the Woodshire Drive address. Another key in the set opened the lock on the "cage" located at the back of the house, which a detective described as a set of bars that covered the backdoor to provide additional security for the house.

When asked what linked appellant to the house, Fogle testified: "The fact that he was inside the residence when normally customers are not in there for any length of time, the keys that matched the car that had his paperwork in the front seat that also then worked the door to the cage, [and] he had been seen there previously on

surveillance dates in the past." Fogle determined appellant was one of the people running and organizing the narcotics sales at the house.

3. Analysis

Several factors link appellant to the firearms inside the house. The police determined appellant acted as a "good eye" for the house, providing intelligence about police or other suspicious persons to the people still inside the house. When police arrived, appellant was inside the house even though customers generally were not in the house for any length of time. Appellant's fingerprint was on the plate with the drug residue and his cell phone was in the living room. The Smith & Wesson firearm was in plain view on a couch cushion in the living room and appellant had a bullet in his pocket that matched the bullets in the Glock. Some evidence indicates appellant controlled the house where the drugs were being sold and the house was enclosed, including with a "cage." A key ring that had a key to the cage also had a key to a vehicle that contained appellant's paperwork, including his social security card.

Viewing the evidence in the light most favorable to the verdict, we conclude there is sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that appellant's links to the firearm were not fortuitous and that he exercised control, management, or care of the firearm, was conscious of his connection to it, and possessed the firearm knowingly or intentionally.

We overrule appellant's first issue in appellate cause number 05-20-0348-CR.

D. Constitutional Challenge

In his second issue in appellate cause number 05-20-0348-CR, appellant argues that because he previously was convicted of a non-violent felony in Oklahoma, penal code section 46.04 violates the Second Amendment as applied to him. An "as applied" challenge to the constitutionality of a statute is subject to the general requirement that a party must preserve error by a timely request, objection, or motion in the trial court. *Baker v. State*, No. 05-18-01352-CR, 2020 WL 2059914, at *5 (Tex. App.—Dallas Apr. 29, 2020, pet. ref'd) (mem. op., not designated for publication) (citing *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014); *Flores v. State*, 245 S.W.3d 432, 437 n.14 (Tex. Crim. App. 2008); TEX. R. APP. P. 33.1(a)). Appellant does not direct this Court to any place in the record, and we have found none, where he raised a challenge to the constitutionality of section 46.04 as applied to him. Nor does appellant attempt to excuse the lack of an objection or argue that preservation is unnecessary in this case. *See id.* As a result, this issue has not been preserved for our review.

E. Modification of Judgment

In a single-cross issue, the State requests we modify the judgment in appellate cause number 05-20-00348-CR to reflect the correct statute pursuant to which appellant was convicted. The judgment incorrectly reflects appellant was convicted pursuant to penal code section 46.05. We have the power to modify the trial court's judgment when we have the necessary information 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). Because the requested modification is proper, we modify the judgment as requested and replace penal code section 46.05 with section 46.04(a)(1).

F. Conclusion

We affirm the trial court's judgments in appellate cause numbers 05-20-00339-CR and 05-20-00347-CR. We modify the judgment in appellate cause number 05-20-00348-CR and affirm as modified.

/Erin A. Nowell//
ERIN A. NOWELL
JUSTICE

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TEX. R. APP. P. 47.2(b)

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TERRY DICKERSON, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas
No. 05-20-00339-CR V.	Trial Court Cause No. F-1852315-V.
	Opinion delivered by Justice Nowell.
THE STATE OF TEXAS, Appellee	Justices Molberg and Goldstein participating.

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

Judgment entered this 19th day of November, 2021.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TERRY DICKERSON, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas
No. 05-20-00347-CR V.	Trial Court Cause No. F-1852318-V.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Nowell. Justices Molberg and Goldstein participating.

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

Judgment entered this 19th day of November, 2021.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TERRY DICKERSON, Appellant	On Appeal from the 292nd Judicial District Court, Dallas County, Texas
No. 05-20-00348-CR V.	Trial Court Cause No. F-2000007-V.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Nowell. Justices Molberg and Goldstein participating.

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

Under the heading "Statute for Offense," we **DELETE** the phrase "46.05 Penal Code."

Under the heading "Statute for Offense," we **ADD** the phrase "46.04(a)(1) Penal CodeS."

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

Judgment entered this 19th day of November, 2021.