Opinion issued January 31, 2011

The
Court of Appeals
For The
First District of Texas

NOS. 01-08-00828-CR
01-08-01015-CR
01-08-01016-CR

RIO SHAREESE JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Cause Nos. 07CR3567, 07CR3568 & 07CR3569

O P I N I O N

Appellant Rio Sharesse Jones was convicted by a jury of the offenses of (1) possession of a firearm by a felon,[1] (2) possession with intent to deliver cocaine weighing more than four grams but less than 200 grams,[2] and (3) possession with intent to deliver methylenedioxy methamphetamine (ecstasy) weighing more than four grams but less than 400 grams.[3] Jones pleaded true in each offense to prior felony convictions for aggravated assault and arson. Finding Jones to be a habitual offender, the jury assessed punishment for each offense at 99 years in prison, all three sentences to run concurrently. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2010). Jones brings six issues on appeal. He claims the trial court erred in

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[1] *See* TEX. PENAL CODE ANN. § 46.04(a)(1), (e) (West Supp. 2010) (third-degree felony) (trial court case number 07CR3567, appellate case number 01-08-00828-CR).

[2] Texas Controlled Substances Act, TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(a)(3)(D), 481.112(a), (d) (West 2010) (first-degree felony) (trial court case number 07CR3568, appellate case number 01-08-01015-CR).

[3] Texas Controlled Substances Act, TEX. HEALTH & SAFETY CODE ANN. §§ 481.103(a)(1), 481.113(a), (d) (West 2010) (first-degree felony) (trial court case number 07CR3569, appellate case number 01-08-01016-CR).

denying his motions to suppress evidence collected pursuant to a search warrant, based on his allegations that the supporting affidavit failed to demonstrate probable cause and contained false statements. He also appeals from the trial court's denial of his requests for a jury instruction concerning the legality of the search and for disclosure of an informant's identity. Finally, he challenges the legal and factual insufficiency of the evidence supporting his conviction for possession of a firearm by a felon. We affirm.

Background

In September 2007, Officer Allen Bjerke of the Texas City Police Department Special Crimes Unit met a confidential informant from whom he received information about "crack cocaine being sold" at a home located at 219 North Pine Road in Texas City, a residence occupied by appellant Rio Sharesse Jones. The informant had been to the house numerous times, the latest time being about two nights prior to the meeting. Bjerke began a narcotics investigation and learned from another Texas City officer that a City of Dickenson police officer had information from a second confidential informant about crack cocaine being sold at that address. On November 5, 2007, Bjerke arranged a meeting with the second confidential informant and, that same night, set up a

"controlled buy" at the home, using the second informant. Bjerke witnessed the controlled buy and saw Jones come to the door to make the sale. The informant returned with a rock of crack cocaine weighing 0.8 grams. Just after midnight, Bjerke swore out an affidavit in support of a search warrant for 219 North Pine Road. The affidavit described the initial contact with the first informant and the subsequent controlled buy, but it did not specify the dates of the described events. The affidavit also requested authorization for a no-knock entry into the home on the basis that Bjerke had received information from a confidential informant that Jones kept handguns and long guns in the house and because he had past arrests for evading and resisting arrest. That same day, the magistrate issued a no-knock-entry search warrant, and Texas City police executed the warrant.

When the police arrived at 219 North Pine, there were two men and one woman in the driveway. One of the men was Jones. The woman, later identified as Tamisha Thomas, remained in the driveway as the police approached, but the two men ran into the house. One team of police followed the men into the house and found them in one of the bedrooms along with a third man. A .22 caliber rifle was seen in plain view, leaning against a dresser. In the closet, the police found women's clothing and shoes, men's and women's toiletries, a bag containing

powder cocaine, a large bottle of cough syrup containing codeine, and a woman's bag, containing a letter to "Misha Thomas" at a Dickinson, Texas address. In that same room, police also found a shirt with a crack pipe in the pocket, a letter from the Social Security Administration addressed to Jones at a La Marque, Texas address, and a receipt for transmission service from a Texas City business, made out to Jones, dated October 24, 2007, and listing an address for Jones of "219 Pine, TC, Texas."

Jones was captured in the bedroom containing the rifle and the letter addressed to him. Police found $199 in his pocket. According to Texas Workforce Commission records checked by police, he was not employed and had not been employed for some time. The others present were also arrested, and police found a small amount of crack cocaine in one man's pocket and a small amount of powder cocaine in Ms. Thomas's pocket.

The second bedroom in the two-bedroom home had no beds, only a counter with drawers, a television, a computer, a small coffee table, and a reclining chair. Police found ecstasy tablets in a bag in the closet and a notebook ledger on the coffee table listing names and amounts. On the counter and in drawers under the counter, police found "three to four" digital scales, a "cookie" of crack cocaine,

crack cocaine in a plastic bag, powder cocaine, a bottle of codeine cough syrup, various kinds of pills, and some currency taped together in stacks of one hundred dollars. On the counter also was Jones's wallet, containing his driver's license. The license had an expiration date of July 28, 2012 and a La Marque, Texas address. In a box on the counter near the wallet were some prescription medicines in Jones's name, filled at a clinic in Texas City. Police also found some insulin for Jones and a glucometer used to measure blood sugar. In a small black cabinet full of movie DVDs and video games, located on the same counter and near Jones's wallet and medicine, were two digital scales and a loaded .38 Special handgun. Also found in the house were numerous baby bottles, razor blades, many measuring cups, a bag containing bullets, a bag containing $1,150, and a videocamera by the front door, pointing toward the roadway. Nothing other than the baby bottles suggested the presence of a child in the house, and officers testified that codeine is often found, stored, and transported in baby bottles. Police also found a baby bottle with a spoon with what was thought to be codeine in it.

Analysis

I. Probable cause to support search warrant

Jones's first issue challenges the trial court's denial of his motion to suppress evidence from the search of his home based on an alleged lack of probable cause. He filed a motion in each case to suppress the evidence seized as a result of the search warrant. He alleged that his federal constitutional rights and his state constitutional and statutory rights were violated because the supporting affidavit did not reflect sufficient probable cause in that it: (1) failed to show that the act or event upon which probable cause was based occurred within a reasonable time period prior to making the affidavit; (2) failed to state sufficient underlying circumstances to establish the credibility and reliability of the confidential informants; and (3) lacked sufficient underlying circumstances which would permit the conclusion that the alleged contraband was at the location claimed.

At the hearing on the motions to suppress, no evidence other than the search warrant was offered by either the State or Jones. Both sides tendered argument on the issues raised in Jones's motions. The trial court denied the motions to suppress, and, on the request of Jones, entered findings of fact, including, in relevant part, the following:

1. Affiant Officer Allen Bjerke submitted a Search Warrant with Affidavit for Search Warrant to Judge Darrell Apfell on November 6, 2007.

2. Judge Apffel signed the Search Warrant and Affidavit at 12:24 am on said date, indicating that probable cause had been satisfied.

3. Officer Bjerke and other police officers executed the search warrant on November 6, 2007 and seized 17 items including illegal narcotics, guns, and U.S. currency.

4. Officer Bjerke and other police officers arrested Rio Shareese Jones for the offense of Possession of Firearm by Felon, POCS: Cocaine With Intent to Deliver; POCS: Codeine with Intent to Deliver, and POCS: MDMA with Intent to Deliver.

The trial court also entered the following conclusions of law:

1. The Affidavit for Search Warrant does reflect sufficient probable cause to justify the issuance of the Search Warrant.

2. The Affidavit for Search Warrant contains sufficient underlying circumstances to establish the credibility and reliability of the confidential informant.

3. The Affidavit for Search Warrant contains sufficient underlying circumstances which would permit the conclusion that the alleged contraband was at the location in which it was claimed.

4. The Affidavit for Search Warrant contains sufficient information to show that the act or event upon which probable cause was based occurred within a reasonable time prior to making the affidavit.

5. The Affidavit for Search Warrant contains sufficient information to establish probable cause that the alleged contraband would be at the location at the time the search warrant was signed and executed.

> 6. Therefore, since Probable Cause was found by Judge Apffel and sustained by this Court, the results of the Search Warrant are admissible as a matter of law and fact in trial and were not obtained in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, or Article 38.23 of the Texas Code of Criminal Procedure. Thus, Rio Shareese Jones was arrested with probable cause and not in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10, or 19 of the Texas Constitution.

Prior to the commencement of voir dire, Jones's trial counsel objected to the admission at trial of any evidence obtained as a result of the search warrant. The trial court granted Jones a running objection to this evidence.

a. Standard of review

We review a trial court's decision to deny a motion to suppress under a bifurcated standard of review, giving almost total deference to the trial court's determination of historical facts that depend on credibility, and reviewing de novo the trial court's application of the law to those facts. *Hubert v. State*, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010); *see Carmouche v. State*, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000). When a trial court makes explicit findings of fact, we determine whether the evidence, viewed in the light most favorable to trial court's ruling, supports those fact findings. *See State v. Iduarte*, 268 S.W.3d 544, 548

(Tex. Crim. App. 2008); *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). The trial court's legal conclusions, on the other hand, are subject to de novo review, not deference. *See Hubert*, 312 S.W.3d at 559; *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008).

When a defendant raises a complaint that a search should have been suppressed because the magistrate had no probable cause to issue a search warrant, we do not review the magistrate's determination of probable cause de novo, but instead apply a "great deference" standard of review. *Swearingen v. State*, 143 S.W.3d 808, 810–11 (Tex. Crim. App. 2004); *see also Illinois v. Gates*, 462 U.S. 213, 234–37, 103 S. Ct. 2317, 2330–31 (1983). Under Texas law, "[n]o search warrant shall issue for any purpose . . . unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance[,]" and "[a] sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested[.]" TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (West Supp. 2010). Appellate review of an affidavit in support of a search warrant is conducted under a highly deferential standard, interpreting the affidavit in a commonsensical and

realistic manner, and deferring to all reasonable inferences that a magistrate could have made. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

In *Illinois v. Gates*, the United States Supreme Court reaffirmed the traditional totality-of-the-circumstances analysis for Fourth Amendment probable-cause determinations:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, 462 U.S. at 238–39, 103 S. Ct. at 2332 (citing *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736 (1960)). The Court of Criminal Appeals has construed this "flexible and nondemanding" standard to apply to the Texas Constitution as well. *Rodriguez*, 232 S.W.3d at 60. Our inquiry, then, is whether there are sufficient facts, coupled with inferences from those facts, to establish a "fair probability" that evidence of a particular crime will likely be found at a given location at the time the warrant is issued. *See id*. at 62. Our review is limited to the four corners of the affidavit; statements made during a motion to suppress

hearing do not factor into our determination. *Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996); *McKissick v. State*, 209 S.W.3d 205, 212 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

The Supreme Court has explained how we must review determinations of probable cause:

> [A]fter-the-fact scrunity by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." "A grudging or negative attitude by reviewing courts toward warrants[]" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant[;] "[C]ourts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner."

Gates, 462 U.S. at 236, 103 S. Ct. at 2331 (citations omitted) (quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 591 (1969); *United States v. Ventresca*, 380 U.S. 102, 108, 109, 85 S. Ct. 741, 746 (1965)). The rationale for this holding is that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *Gates*, 462 U.S. at 235, 103 S. Ct. at 2330–31 (quoting *Ventresca*, 380 U.S. at 108, 85 S. Ct. at 746). The traditional standard for judicial review of a magistrate's

probable-cause determination "has been that so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331 (quoting *Jones*, 362 U.S. at 271, 80 S. Ct. at 736). "This 'substantial basis' standard of review 'does not mean the reviewing court should be a rubber stamp but does mean that the magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review.'" *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010) (quoting 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(c), at 452 (4th ed. 2004 & Supp. 2009–2010)).

b. Location

Jones's first contention is that the affidavit was insufficient because it did not adequately describe the premises to be searched. This argument was not made in Jones's written motion to suppress. The affidavit describes the residence at 219 North Pine Road in considerable detail, but at the hearing on the motion to suppress, Jones's counsel argued that the affidavit was inadequate because it made no mention of the fact that the residence consisted of a duplex and a garage apartment. Jones, however, provided no evidence of this at the hearing.

On appeal, Jones does not claim that the argument of his counsel was evidence, but instead states that this argument was "recounted without contradiction." It is axiomatic that the argument of counsel is not evidence. *See Hutch v. State*, 922 S.W.2d 166, 173 (Tex. Crim. App. 1996). Jones has therefore failed to provide an evidentiary basis to contest the adequacy of the affidavit with respect to its description of the location to be searched.

c. Credibility and reliability of informant

Jones next contends that the affidavit was insufficient to show probable cause because the affidavit's description of the initial confidential informant contains no statement about his reliability or credibility and because Bjerke had no personal knowledge about the second confidential informant's reliability or credibility.

The affidavit stated that the Dickinson Police Department had established that the second confidential informant was reliable and credible. There is no bar on the use of hearsay in determining probable cause. *See Jones v. United States*, 362 U.S. at 269–71, 80 S. Ct. at 735–36; *Brinegar v. United States*, 338 U.S. 160, 172–73, 69 S. Ct. 1302, 1309 (1949). In a post-*Gates* opinion, the Texas Court of Criminal Appeals held that hearsay may be used to show probable cause so long as

there is a substantial basis for crediting the hearsay. *Wilkerson v. State*, 726 S.W.2d 542, 545 (Tex. Crim. App. App. 1986). Here, Bjerke's affidavit went beyond a mere statement that the second confidential informant was reliable and credible. The affidavit referred to previous instances in which the informant provided correct information to the police that led to the seizure of controlled substances and arrests. Jones neither challenges this assertion on appeal, nor argues that a law enforcement officer cannot rely on information from a fellow officer to establish probable cause. The affidavit also referenced Bjerke's own investigation and establishment of the controlled buy, in which the confidential informant was utilized.

While Bjerke testified at trial that there was no basis for the initial informant's reliability or credibility, the second informant supplied the same information to the police, i.e., that Jones was selling crack cocaine. The failure of the affidavit to establish the first informant's reliability or credibility is therefore not fatal. *See Lowery v. State*, 843 S.W.2d 136, 141 (Tex. App.—Dallas 1992, pet. ref'd).

On appeal, Jones also argues for the first time that the affidavit contains "double hearsay" regarding that second confidential informant. Because this issue

was not raised in the trial court, it has not been preserved for review and any error has been waived. *See* TEX. R. APP. P. 33.1(a)(1) (requiring party to raise specific ground in trial court as prerequisite for appellate complaint).

d. Staleness of information

Jones's third, and in his description, most critical contention is that the affidavit was insufficient to show probable cause because it did not state a specific date on which the controlled buy took place. He argues this information is the "linchpin for a finding of probable cause." This is a complaint about the "staleness" of the information, because "[p]robable cause ceases to exist when, at the time the search warrant is issued, it would be unreasonable to presume the items remain at the suspected place." *McKissick*, 209 S.W.3d at 214; *see also Flores v. State*, 287 S.W.3d 307, 310 (Tex. App.—Austin 2009), *aff'd*, 319 S.W.3d 697 (Tex. Crim. App. 2010). Jones's brief does not suggest any other relevance of the specificity of the time of the controlled buy to the determination of probable cause.

In relevant part, the affidavit provides the following temporal references related to the controlled buy:

> . . . Affiant recently received information from a confidential informant in reference to crack cocaine being sold out of the residence located at 219 North Pine Road.
>
> After obtaining the information about 219 North Pine Road Affiant began a narcotics investigation . . . .
>
> . . . .
>
> Affiant arranged to make a narcotics buy from the suspect location, 219 North Pine Road . . . [the controlled buy and field testing are then described in the past tense].
>
> . . . .
>
> Based on the information provided to Affiant by the source and other confidential informants, and my own independent investigation, Affiant believes that a violation of the Texas Controlled Substances Act is currently taking place at 219 North Pine Road, Texas City, Galveston County, Texas.

The affidavit includes several direct and indirect references to the timing of the controlled buy. First, Bjerke described his contact with the first confidential informant as having occurred "recently." After that meeting, Bjerke "began a narcotics investigation" into the suspected ongoing criminal activity of "crack cocaine being sold." The investigation culminated in the controlled buy forming the basis for probable cause, which was described as occurring "after" Bjerke "recently" met with the first confidential informant. In addition, Bjerke attested

that based on information from informants and his own independent investigation, including the controlled buy, he believed that drug offenses were "currently taking place at 219 North Pine Road."

In order to issue a warrant, a magistrate is required "to determine (1) that it is *now probable* that (2) contraband . . . *will be* on the described premises (3) when the warrant is executed." *See United States v. Grubbs*, 547 U.S. 90, 96, 126 S. Ct. 1494, 1500 (2006); *see also* TEX. CODE CRIM. PROC. ANN. art. 18.01(c) (West Supp. 2010) (providing, in relevant part, that evidentiary search warrant may not be issued unless sworn affidavit sets forth sufficient facts to establish probable cause that items constituting evidence to be searched for are located at place to be searched). A magistrate must be able to ascertain from the affidavit the closeness of time of the event that is the basis for probable cause sufficient to issue the warrant based on an independent judgment of probable cause. *See Schmidt v. State*, 659 S.W.2d 420, 421 (Tex. Crim. App. 1983) (holding that affidavit that failed to demonstrate when incident described took place was insufficient to support issuance of search warrant). The affidavit must have a sufficient "level of specificity . . . as to [the] time" of such event so that the magistrate would have a "reasonable basis to infer that [the event] occurred at a time that would substantiate

a belief that the object of the search [is] on the premises to be searched at the time the warrant [] issue[s]." *Davis v. State*, 202 S.W.3d 149, 155 (Tex. Crim. App. 2006). "The facts attested to [in the affidavit] must be so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at the time." *Peltier v. State*, 626 S.W.2d 30, 32 (Tex. Crim. App. 1981) (quoting *Heredia v. State*, 468 S.W.2d 833, 835 (Tex. Crim. App. App. 1971)). When an affidavit fails to give a time frame that would corroborate the existence of the item sought on the premises when the warrant was requested, it is insufficient to support the issuance of a warrant. *Davis*, 202 S.W.3d at 157; *see also Sherlock v. State*, 632 S.W.2d 604, 608 (Tex. Crim. App. 1982) (holding that affidavit is "inadequate if it fails to disclose facts which would enable the magistrate to ascertain from the affidavit that the event upon which the probable cause was founded was not so remote as to render it ineffective") (citations omitted).

We begin our analysis by noting that the failure to include specific dates and times of relevant events described in the affidavit in this case is not a model to be followed, something the State conceded during oral argument. The question before us, however, is whether the lack of a specific date or time is fatal in this case, or

whether the totality of the affidavit nonetheless justified the magistrate's finding of probable cause.

Bjerke's affidavit recited facts that indicated a continuing drug operation was occurring: (1) the first confidential informant told Bjerke that crack cocaine was being sold at 219 North Pine; (2) after speaking to the first confidential informant, Bjerke then began his own investigation; (3) he arranged a controlled narcotics buy at the house using the second confidential informant, who told Bjerke he purchased what he believed to be a rock of crack cocaine; and (4) the rock tested positive for cocaine in a field test. The affidavit also indicated that the information from the two informants and Bjerke's field test was closely related in time to the request for the issuance of the warrant. Bjerke stated that he "recently" received information from the first confidential informant. He then initiated an investigation and arranged a controlled buy. The controlled buy occurred even more "recently" because it happened after Bjerke received that initial tip and conducted an independent investigation. As a result of the original tip and his own independent investigation, Bjerke believed that a violation of the Texas Controlled Substances Act was "currently" taking place at 219 North Pine.

"The amount of delay which will make information stale depends upon the particular facts of the case, including the nature of the criminal activity and the type of evidence sought." *United States v. Allen*, 625 F.3d 830, 842 (5th Cir. 2010). Facts indicating ongoing criminal activity have long been recognized as diminishing the importance of establishing a specific and immediate time period in the affidavit: "Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972), *quoted in* 2 LAFAVE, *supra*, § 3.7(a), at 374; *see also Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir. 1973); *Bernard v. State*, 807 S.W.2d 359, 365 (Tex. App.—Houston [14th Dist.] 1991, no pet.). Since *Gates* was decided, three state supreme courts have held that probable cause existed for issuance of a search warrant in situations in which there was a continuing drug operation and the search-warrant affidavit referred to a recent event. *See State v. Walston*, 768 P.2d 1387, 1390 (Mont. 1989) (holding that continuing criminal activity such as drug dealing coupled with confidential informant's statement that he had "recently"

heard defendant state he was growing and selling marijuana was not so stale as to negate probable cause); *Commonwealth v. Jones*, 668 A.2d 114, 118 (Pa. 1995) (affidavit's evidence of continuing drug operation coupled with confidential informant's statement that the informant "has just" observed contraband was not insufficient merely because affidavit did not contain a specific date); *Huff v. Commonwealth*, 194 S.E.2d 690, 716 (Va. 1993) (quoting *Reynolds v. State*, 238 So. 2d 557, 558 (Ala. Crim. App. 1970)) (affidavit's reference to repeated drug distribution coupled with statement that events occurred "in recent weeks" and "on a recent date" was not insufficient; "A statement in an affidavit for a search warrant that an informant had 'recently' seen or purchased narcotic drugs, when connected with other language that would lead to the conclusion that the unlawful condition continued to exist on those premises at the time of the application for the warrant, has been held sufficient to show the time when the alleged violation took place."). Professor LaFave has observed that reliance upon the word "recently" can be problematic in some cases, particularly in circumstances in which "the relevant facts are nothing more than a one-time purchase or viewing of drugs, as to which only a brief period of time could pass before the information could be stale." 2 LAFAVE, *supra*, § 3.7(b), at 396 (footnotes omitted). However, his treatise also

acknowledges that when confronted with an affidavit asserting that critical events occurred "recently" or using other words to that effect, most courts have been inclined to hold that this language will suffice for a showing of probable cause. *Id.* at 395 & n.76. In this regard, we also note that the Court of Criminal Appeals in a pre-*Gates* case has held that an affidavit stating that "affiants have recently received information from a confidential informant" was a sufficient reference to time when considering the totality of the affidavit. *See Sutton v. State*, 419 S.W.2d 857, 861 (Tex. Crim. App. 1967).

Because the affidavit adequately suggested a continuing criminal operation, including "recently" obtained information from the first confidential informant, from the affiant's own investigation, and from the second confidential informant who made the controlled buy—all of which supported the affiant's belief that a violation was "currently" taking place—we hold that the temporal references within the affidavit allowed the magistrate to determine there was a substantial basis for concluding that a search would uncover evidence of wrongdoing. In so holding, we hasten to add that including specific dates and times is the preferred practice for preparing an affidavit supporting a request for a search warrant, and our opinion should not be misunderstood to countenance the use of vague terms

such as "recently." However, we are mindful that a grudging, negative attitude towards warrants would be inconsistent with the Fourth Amendment's preference for searches conducted pursuant to warrants. *See Gates*, 462 U.S. at 236, 103 S. Ct. at 2331.

e. Adequacy of affidavit

Having considered all of Jones's contentions that the affidavit was inadequate and applying standard of review set out in *Illinois v. Gates*, we hold that the affidavit provided the magistrate with a substantial basis for concluding that a search would uncover evidence of wrongdoing at 219 North Pine Road. We nonetheless do not wish to express any sense of approval of the routine omission of the specificity of the time at which the informant learned of probable cause to conduct a search. Rather, we agree with the following sentiments of the Supreme Court of Montana in *State v. Walston*: "We admonish law enforcement officers . . . to state with specificity the time the informant learned such information to prevent future suppression of evidence for lack of probable cause due to staleness. We do recognize that on occasion . . . an officer may deliberately obscure the specific time to protect the identity of a confidential informant's identity." *Walston*, 768 P.2d at 1391.

We overrule Jones's first issue.

II. *Franks* motion

In his second issue, Jones contends the trial court erred in denying his motion pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), whereby he sought to void the search warrant and suppress all resulting evidence based on his allegation that Bjerke's affidavit contained false statements. In order to obtain a *Franks* evidentiary hearing, a defendant must: (1) allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false; (2) accompany these allegations with an offer of proof stating the supporting reasons; and (3) show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support the issuance of the warrant. *Cates v. State*, 120 S.W.3d 352, 356 (Tex. Crim. App. 2003); *Ramsey v. State*, 579 S.W.2d 920, 922–23 (Tex. Crim. App. 1979) (citing *Franks*, 438 U.S. at 171–72, 98 S. Ct. at 2684–85).

Instead of seeking an evidentiary hearing and ruling on the *Franks* motion before trial, Jones waited until after the State rested in the guilt-innocence phase of the trial. Jones then presented his *Franks* motion to the trial court, in which he

made an offer of proof to show the affidavit was false. This argument consisted of his claim that before the search warrant was issued on November 6, 2007, (1) no one ever entered his property at 219 North Pine Road to purchase crack cocaine, (2) a person came by his property wanting to purchase crack cocaine, but he turned that person away, and (3) a few days later the same person came back and stood in the street, asking to purchase crack cocaine, but Jones again turned the person away. Jones called no witnesses and offered no affidavits or other evidence, but referred only by reference to the previous testimony of Bjerke. In this regard, Jones argued that when Bjerke testified, he was unable to recall details about the controlled buy, such as the specific date or the amount paid to the informant. There also had been no documentation that money paid to Jones during the controlled buy had been recovered from Jones's person or the search of his residence.

We review a trial court's decision on a *Franks* suppression issue under the same standard that we review a probable-cause deficiency, a mixed standard of review. *See Fenoglio v. State*, 252 S.W.3d 468, 473 (Tex. App.—Fort Worth 2008, pet. ref'd). We give almost total deference to a trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on an

evaluation of credibility and demeanor, while we review de novo application-of-law-to-fact questions that do not turn upon credibility and demeanor. *See Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). However, in deciding a *Franks* motion the trial court may consider not only the probable-cause affidavit but also the evidence offered by the party moving to suppress because this attack on the sufficiency of the affidavit arises from claims that it contains false statements. *See Franks*, 438 U.S. at 155–56, 98 S. Ct. at 2676; *Cates*, 120 S.W.3d at 355–57; *Fenoglio*, 252 S.W.3d at 473.

The only evidence offered by Jones was in the form of a reference to the previous testimony of Bjerke. Jones did not testify, so he did not offer evidence for the statements in his *Franks* motion offer of proof. Jones offered the previous testimony of Bjerke to show that he "had just made generalizations and has not been able to specifically specify when this particular transaction occurred" and "could not provide detailed specific information and specifically left out information about the source and about how he conducted this information." None of the referenced testimony is direct evidence that Bjerke's affidavit was false. In addition, the trial court had the opportunity to weigh Bjerke's credibility and

demeanor, and we defer to the trial court on that determination. *See Johnson*, 68 S.W.3d at 652–53.

We overrule issue two.

III. Article 38.23 charge

In his third issue, Jones contends that the trial court erred in failing to give an instruction to the jury, pursuant to Code of Criminal Procedure article 38.23(a). *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005). The statute provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Id. A defendant's right to the submission of an instruction under article 38.23(a) "is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible." *Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007).

Before a defendant is entitled to the submission of a jury instruction under article 38.23(a), he must meet three requirements:

> (1) the evidence heard by the jury must raise an issue of fact;
>
> (2) the evidence on that fact must be affirmatively contested; and
>
> (3) that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.

Madden, 242 S.W.3d at 510. On appeal, Jones claims the trial court should have given the instruction because there was a disputed fact issue concerning the number of controlled buys at 219 North Pine, i.e., two controlled buys versus one. Bjerke testified about one controlled buy, but he did not testify that there was only one controlled buy. The testimony of another witness, Officer Alcocer, about his observation of two different controlled buys involving two different informants on two different days is not necessarily inconsistent with Bjerke's testimony. Jones therefore cannot meet the second requirement for an article 38.23(a) instruction, that evidence on the number of controlled buys was affirmatively contested. He also has failed to demonstrate the materiality of this alleged fact dispute to the lawfulness of the officers' conduct.

Accordingly, there was no error in the jury charge from the absence of any article 38.23(a) instruction regarding custody because there was no conflict in the evidence. We overrule Jones's third issue.

IV. Request to identify confidential informant

In his fourth issue, Jones contends that the trial court erred in not disclosing the identity of the State's initial confidential informant under Rule 508(c)(3) of the Texas Rules of Evidence:

> *Legality of obtaining evidence.* If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court shall, on request of the public entity, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity.

TEX. R. EVID. 508(c)(3). At trial, Jones moved for disclosure of the identity of the first confidential informant, specifically arguing that Bjerke had no basis to believe

that the first informant was reliable or credible. The State objected, and the trial court sustained the objection.

On appeal, Jones contends the trial court erred for two grounds he did not preserve at trial: (1) the affidavit did not provide any meaningful details as to any controlled buys at 219 North Pine and (2) Bjerke allegedly provided misleading information concerning the first confidential informant. Those issues have been waived. *See* TEX. R. APP. P. 33.1(a)(1). The remaining issue raised on appeal, that Bjerke had no basis to believe that the first informant was reliable or credible, was preserved in the trial court.

Jones's argument about the reliability or credibility of the first informant fails for the same reason it did not support suppression of evidence from the search. The second confidential informant supplied the same information to the police, i.e., that Jones was selling crack cocaine. Because the failure of the affidavit to establish the first informant's reliability or credibility did not affect the legality of the search warrant, the trial court committed no error in refusing to direct the disclosure of the first confidential informant's identity. *See* TEX. R. EVID. 508(c)(3); *Lowery*, 843 S.W.2d at 141. We overrule Jones's fourth issue.

V. Sufficiency of the Evidence of Possession of Firearm by a Felon

Jones's fifth and sixth issues challenge the legal and factual sufficiency of the evidence to support his conviction for possession of a firearm by a felon. Jones stipulated at trial that he had been convicted of a felony less than five years before the date of the charged offense. On appeal he specifically attacks the sufficiency of the evidence to show "links" between himself and the weapons found. *See Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006).

a. Standard of review

In assessing legal sufficiency, we must consider the entire trial record to determine whether, viewing the evidence in the light most favorable to the verdict, a rational jury could have found beyond a reasonable doubt that the accused committed all essential elements of the offense. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005); *Burden v. State*, 55 S.W.3d 608, 612 (Tex. Crim. App. 2001). We must "evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible." *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Because it is the function of the trier of fact to resolve any conflict of fact, to weigh any evidence, and to evaluate the credibility

of any witnesses, we do not reevaluate the weight and credibility of the evidence, but ensure only that the jury reached a rational decision. *See id.* at 740; *Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992); *see also Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1991); *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). We therefore resolve any inconsistencies in the evidence in favor of the verdict, *Matson*, 819 S.W.2d at 843, and "defer to the jury's credibility and weight determinations." *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006).

For challenges to the factual sufficiency of the evidence, we also apply the *Jackson v. Virginia* standard of review in the light most favorable to the verdict. *See Green v. State*, No. PD-1685-10 (Tex. Crim. App. Jan. 26, 2011); *Brooks v. State*, 323 S.W.3d 893, 894–95 (plurality op.), 926 (Cochran, J., concurring) (Tex. Crim. App. 2010).

"To establish unlawful possession of a firearm by a felon, the State must show that 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 community supervision, parole, or mandatory supervision, whichever date is later." *James v. State*, 264 S.W.3d 215, 218 (Tex. App.—

Houston [1st Dist.] 2008, pet. ref'd); *see* TEX. PENAL CODE § 46.04(a)(1). "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*.; *see* TEX. PENAL CODE § 6.01(b) (West 2003).

"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." *Id*. at 218–19. 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*. at 219. This rule protects the innocent bystander—such as a relative, friend, or even stranger to the actual possessor—from conviction merely because of his fortuitous proximity to a firearm belonging to someone else. *See Evans*, 202 S.W.3d at 161–62; *Smith v. State*, 176 S.W.3d 907, 916 (Tex. App.—Dallas 2005, pet. ref'd).

A nonexclusive list of factors that may establish a link between a defendant and firearms found inside a house which was not in the defendant's exclusive control includes whether: (1) the defendant's presence at the time of the search; (2) the defendant was the owner of or had the right to control the location where the firearm was found; (3) the firearm was in plain view; (4) the defendant's

proximity to and the accessibility of the firearm; (5) firearms or other contraband was found on the defendant; (6) the defendant attempted to flee; (7) conduct by the defendant indicated a consciousness of guilt, including extreme nervousness or furtive gestures; (8) the defendant had a special connection or relationship to the firearm; (9) the place where the firearm was found was enclosed; and (10) affirmative statements connecting the defendant to the firearm, including incriminating statements made by the defendant when arrested. *See Williams v. State*, 313 S.W.3d 393, 397–98 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); *James*, 264 S.W.3d at 219; *see also Evans*, 202 S.W.3d at 162 & n.12. "It is not the number of links that is dispositive, but rather the logical force of all of the evidence, direct or circumstantial." *Williams*, 313 S.W.3d at 398.

b. Legal sufficiency

Jones contends that the evidence was legally insufficient to link him to the firearms found at 219 North Pine. In this regard, he emphasizes that he never admitted owning the firearms and his fingerprints were not found on them. He was not inside the house at the time of the search, and at least three other people had access to the house. Also, a woman's handbag and clothing were found in the bedroom where the rifle was found.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found beyond a reasonable doubt that Jones possessed a firearm. The undisputed evidence at trial showed that: (1) Jones was living at 219 North Pine and was paying rent there; (2) the rifle was located in plain view in the same room where he was captured by police and in the same room in which mail addressed to him and a receipt to him at that address was located; and (3) his wallet and medication prescribed for him were located in the other bedroom near the pistol. We recognize that there was also evidence of the presence of others at the time of the search and of women's clothing, shoes, and a bag in the bedroom where the rifle was located, as well as a lack of usable prints on either weapon resulting in an absence of fingerprint evidence linking the defendant to the weapons. However, in a legal-sufficiency review we are required to defer to the jury's weight determinations and resolve inconsistencies in the evidence in favor of the verdict. *See Marshall*, 210 S.W.3d at 625; *Matson*, 819 S.W.2d at 843. Viewing the evidence in the light most favorable to the verdict, we conclude that the logical force from these links is sufficient for the jury to have concluded beyond a reasonable doubt that Jones exercised care, custody, control, or management over at least the pistol. *See Sambath Nhem v. State*, 129 S.W.3d 696, 699 (Tex. App.—

Houston [1st Dist.] 2004, no pet.) (holding that defendant's driver's license and mobile phone bills in close proximity to contraband were sufficient to link him to controlled contraband).

Jones refers us to *Wynn v. State*, 847 S.W.2d 357 (Tex. App.—Houston [1st Dist.]), *aff'd on other grounds*, 864 S.W.2d 539 (Tex. Crim. App. 1993), in support of his contention that the evidence was legally insufficient. We consider *Wynn* to be factually and legally distinguishable. In *Wynn*, unlike the present cases, the defendant was not in the house when the firearm was found and the firearm was found in a room containing no links to him. *Wynn* also did not involve a possession of a firearm charge, but rather dealt with whether the defendant "used or exhibited a firearm" in the commission of an offense. It therefore was not analyzed under the "links" doctrine applicable to possession cases. *Wynn* was also decided under the no-longer-applicable "reasonable hypothesis analytical construct" and so was analyzed for sufficiency under a different standard than we are required to apply in this case. *See Geesa v. State*, 820 S.W.2d 154, 161 (Tex. (Tex. Crim. App. 1991).

Considering Jones's legal-sufficiency arguments and all of the evidence in the light most favorable to the verdict, the jury could have found the essential elements of possession of a firearm by a felon. We overrule Jones's fifth issue.

c. Factual sufficiency

In addition to the arguments made in support of his legal-sufficiency argument, Jones argues that the evidence was not factually sufficient based upon the following factors: (1) neither firearm was conveniently accessible to him at the time of his arrest; (2) he made no furtive gestures; and (3) he had no special connection to the firearms. Nevertheless, as previously noted, the undisputed evidence at trial showed that Jones was living at 219 North Pine and was paying rent there; the rifle was located in plain view in the same room where he was found by police and in the same room in which mail addressed to him and a receipt to him at that address was located; and his wallet and prescribed medication were located near the pistol.

Considering Jones's factual-sufficiency arguments and all of the evidence in the light most favorable to the verdict, the jury could have found the essential elements of possession of a firearm by a felon. Accordingly, we cannot say that the jury's verdict is against the great weight and preponderance of the evidence.

We overrule Jones's sixth issue.

Conclusion

We affirm the judgments of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Sharp, dissenting.

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