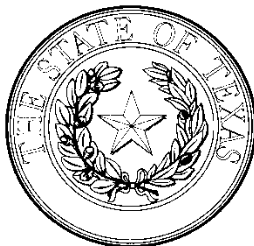
**Opinion issued February 3, 2011**



**In The**

**Court of Appeals**

**For The**

**First District of Texas**

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**NO. 01-09-00864-CR**

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**JOHN PAUL WALDON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 262nd Judicial District Court**
**Harris County, Texas**
**Trial Court Case No. 1199792**

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## MEMORANDUM OPINION

The trial court found appellant, John Paul Waldon, guilty of the offense of unlawful possession of a firearm by a felon[1] and, after finding true the allegations

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1 *See* TEX. PENAL CODE ANN. § 46.04(a) (Vernon Supp. 2010).

in two enhancement paragraphs that appellant had two prior felony convictions, assessed his punishment at confinement for twenty-five years. In two points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction.

We modify the judgment and affirm as modified.

**Background**

Harris County Sherriff's Office ("HCSO") Deputy D. Pacifico testified that shortly after midnight on January 20, 2009, he was dispatched to a disturbance at a gas station involving two black males, one of which "had a weapon," in a tan-colored Jaguar and another black male in a white sports-utility vehicle ("SUV"). Because Pacifico was only "400 yards" from the gas station, he was able to respond "[w]ithin a few seconds." As Pacifico responded, he saw appellant driving the Jaguar. Pacifico initiated a traffic stop, and when he approached the Jaguar, he saw appellant and Gerald Freeman, who was sitting in the Jaguar's front passenger seat. After appellant consented to a search of the Jaguar, Pacifico discovered that the back seat of the Jaguar "had been set up so that you [could] just lift it up." Underneath the backseat, Pacifico found a large plastic bag containing $15,000 in counterfeit United States currency. Freeman initially stated that "the money was his," but then disclaimed ownership of it after he was informed that it

was counterfeit. Appellant and Freeman "started talking amongst each other," saying "you need to own up to this" and "you need to own up to that."

Deputy Pacifico noted that another HCSO Deputy, J. Curry, participated in the traffic stop of the Jaguar, and Curry found a loaded handgun underneath the Jaguar's hood. Although he did not see Curry recover the handgun, Pacifico explained that the Jaguar's hood opened "pretty much opposite of other vehicles" and Curry had found the handgun "in the front on the driver's side underneath the hood" and "somewhere in the engine compartment." Pacifico noted that "[n]either person in the vehicle would take responsibility for what was theirs," and, after appellant and Freeman argued about who owned the gun, Pacifico could not get a "clear response," and both appellant and Freeman "clammed up." Pacifico reported that the Jaguar was registered to appellant, and the State introduced the vehicle registration into evidence.

On cross-examination, Pacifico stated that the person who had reported the disturbance had indicated that one of the men at the gas station had a handgun. After being dispatched, Pacifico saw appellant "speeding past" him in the Jaguar, but he never saw the SUV. Pacifico agreed that it was "a short amount of time" from the moment he received the dispatch to the time he stopped the Jaguar. After appellant introduced into evidence an audiotape of the disturbance call and Pacifico listened to the recording, Pacifico agreed that the person who had reported

the disturbance saw an individual pulling a handgun "out of his back" and loading it with bullets. Pacifio also agreed that he did not find a handgun on either appellant or Freeman's person and the person who had reported the disturbance had not mentioned anything about the hood of the Jaguar being opened.

Deputy Pacifico further testified that appellant and Freeman had told him they were going to see a friend, but he did not believe their "story." Appellant was "extremely friendly," and, based upon Pacifico's experience, he believed that appellant was trying to "distract" him. Pacifico noted that the counterfeit money was found in the "middle" of the Jaguar underneath the back seat. After conducting a background check on both appellant and the passenger during the stop, Pacifico learned that both appellant and Freeman had "very extensive criminal histories."

HCSO Deputy J. Curry testified that he was also dispatched to the disturbance, and he noted that the person who had reported the disturbance believed it was "some kind of drug deal." Curry explained that the Jaguar had a hood that opened from the windshield, and he "popped the hood" and found a handgun "right inside where the fender wheel is." The handgun "was sitting in plain sight right there" on the driver's side. Although Curry noted that the handgun was in "a place where things are normally held," he conceded that he was

"not familiar enough with the inside of a Jaguar." After retrieving the handgun, Curry unloaded it and found that it contained six rounds.

On cross-examination, Deputy Curry agreed that one would have to raise the hood of the Jaguar to access the location where he found the handgun. He also agreed that it was "just a few minutes" between the time of the dispatch call and the time of the traffic stop, and he noted that the deputies stopped appellant in a Walgreens parking lot less than 150 yards from the gas station.

Secret Service Special Agent R. Hill testified that the deputies contacted his agency regarding the counterfeit currency and it was "pretty obvious" to the "average person" that it was counterfeit. Hill spoke with appellant to inquire about how he obtained the money, but appellant, who Hill described as being very "verbal," only responded that "he was not a rat."

Toni Waldon, appellant's ex-wife, testified that she owned the Jaguar, she regularly drove the Jaguar, and she was not aware of any secret compartments in the Jaguar. She explained that when she bought the Jaguar, its backseat "would move" and "would keep sliding up." On cross-examination, Waldon noted that she "co-owned" the Jaguar with appellant and denied placing the counterfeit money or the handgun into the car.

Appellant testified that he did not consent to Deputy Pacifico's request to search the Jaguar, but the deputies searched the car three or four times until they

found the plastic bag containing the money. Freeman immediately claimed that the bag was his, but when a deputy told them that the money was counterfeit, Freeman denied that the money was his. Freeman then told appellant, "You need to take that," and appellant told Freeman to stop talking to him. One of the deputies then went to check on a white suburban while the other deputy continued the search. When the other deputy returned, he continued the search of the Jaguar and "all of the sudden" found the handgun. When the deputy asked appellant if the handgun was his, appellant responded, "I don't know what you are talking about." When the Secret Service Agent asked appellant about the money, appellant told him that he did not know anything about the money.

On cross-examination, appellant agreed that he was driving the Jaguar, which he co-owned, but explained that he did not like to drive the Jaguar because its rims made it an attractive target for crime. He admitted that he had exited the Jaguar at the gas station and entered a friend's car to speak with him for approximately three or four minutes while Freeman remained in the Jaguar. Appellant denied participating in a narcotics deal or owning the handgun, and he explained that he does not "even go under the hood of [his] car half the time." Appellant stated that, contrary to the information provided by the person who reported the disturbance, no one had taken a handgun out from behind their back and loaded it with bullets while at the gas station.

## Standard of Review

We review the legal sufficiency of the evidence by considering all of "the evidence in the light most favorable to the prosecution" to determine whether "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979). Evidence is legally insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

We now review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet. h.).

## Sufficiency of the Evidence

In his first and second points of error, appellant argues that the evidence is legally and factually insufficient to support his conviction because "there is not adequate evidence linking him" to the handgun and, even if there is legally sufficient evidence, "the proof of his guilt is so weak as to undermine the confidence in the jury's verdict."

To prove unlawful possession of a firearm, the State had to present evidence that appellant "possessed" a firearm. *See* TEX. PENAL CODE ANN. § 46.04 (Vernon Supp. 2010). "Possession" means "actual care, custody, control, or management." *Id.* § 1.07(a)(39) (Vernon Supp. 2010). 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) (Vernon 2003).

When, as here, the accused is not in exclusive possession of the place where contraband is found, additional independent facts and circumstances must "link" the accused to the contraband "in such a way that it can be concluded that the accused had knowledge of the contraband and exercised control over it." *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *see Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995). The evidence used to prove possession can be direct or circumstantial, and in either case, the State

must establish that the defendant's connection with the contraband was "more than just fortuitous." *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006); *Poindexter v. State*, 153 S.W.3d 402, 405–06 (Tex. Crim. App. 2005). The links must raise a reasonable inference that the accused knew of and controlled the contraband. *Dickerson v. State*, 866 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Mere presence is insufficient to show that a person possessed contraband. *Evans*, 202 S.W.3d at 162.

Texas courts have identified "many non-exhaustive factors" that may demonstrate a link to contraband. *Roberson,* 80 S.W.3d at 735. These factors constitute "a shorthand way of expressing what must be proven to establish that" the accused knowingly possessed the contraband. *Id*. Among the many possible factors that we may consider in deciding whether there is a link between a defendant and contraband are whether (1) the contraband was in plain view; (2) the contraband was in close proximity and conveniently accessible to the accused; (3) the accused was the owner of the place where the contraband was found; (4) the accused was the driver of the automobile in which contraband was found; (5) the place where the contraband was found was enclosed; and (6) the size of the item was large enough to indicate the accused's knowledge of its existence. *Cole v. State*, 194 S.W.3d 538, 548–49 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.]

1994, pet. ref'd)); *Robles v. State*, 104 S.W.3d 649, 651 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Other factors include whether the accused possessed other contraband when arrested, the accused made incriminating statements when arrested, whether the accused attempted to flee, the accused made furtive gestures, whether other contraband was present, the accused was found with a large amount of cash, and the conduct of the accused indicated a consciousness of guilt. *Evans*, 202 S.W.3d at 162 n.12. The number of linking factors present is not as important as the "logical force" they create to prove that an offense was committed. *Roberson*, 80 S.W.3d at 735.

In support of his sufficiency challenge, appellant notes that he was not in actual possession of the handgun, it was not "readily visible from the outside" of the Jaguar and "could be seen only by looking under the hood," he made no statements indicating his ownership or awareness of the handgun, no contraband "other than the counterfeit money" was found, he did not flee, there was no evidence he made any furtive gestures, the person who reported the disturbance did not "identify which black male had" the handgun and "did not mention anything about the hood being raised, and appellant "had little time to hide the gun." Appellant also notes that that the trial court found him not guilty of possessing the counterfeit money, even though the money was "in closer proximity" to him than the handgun. Finally, appellant asserts that since Freeman initially admitted to

owning the money, "there is no reason to believe [Freeman] did not also put the firearm underneath the hood" of appellant's Jaguar.

The deputies testified that a person called for emergency assistance and reported seeing two men in a tan Jaguar and one man in a white SUV meet at a gas station and engage in suspicious activity. According to the report, as testified to by the deputies, the person observed one of these men in possession of a handgun. Specifically, the person reported that one of these men removed the handgun from behind his back and loaded it with bullets. The deputies testified that shortly after being dispatched to the gas station, the deputies saw appellant driving his tan Jaguar in the immediate vicinity of the disturbance. Deputy Pacifico specifically testified that appellant was "speeding" down the road toward him. The deputies explained that it was late at night, there was little traffic in the area, appellant's Jaguar matched the description of the Jaguar provided in the dispatch, and they initiated a traffic stop of the Jaguar in the parking lot of a Walgreens, which is across the street and less than 150 yards from the gas station.

Appellant was a co-owner and the driver of the Jaguar. The other co-owner of the Jaguar, appellant's wife, denied placing either the counterfeit money or the handgun in the Jaguar. The handgun was found by Deputy Curry underneath the hood and on the driver's side of the Jaguar, in closer proximity to appellant than Freeman. Although appellant denied possessing a handgun while at the gas station

and placing the handgun under the Jaguar's hood, appellant admitted that, while parked at the gas station, he exited the Jaguar and entered the SUV for approximately three to four minutes to talk to his friend while Freeman remained in the Jaguar. Appellant's testimony also indicates that the occupant of the SUV remained in the SUV with appellant to engage in the conversation. Finally, Deputy Curry explained that after he opened the hood of the Jaguar, he found the handgun "sitting in plain sight right there" on the driver's side.

Although the record does not contain pictures of the Jaguar or the location in which the handgun was found, the deputies' testimony establishes that the handgun, located in a compartment on the driver's side of the car and underneath its hood, was in close proximity to appellant. And, although the handgun was found underneath the hood, the record also supports the inference that the handgun was conveniently accessible to appellant. Deputy Curry explained that, as soon as he "popped" the hood, the handgun was in plain sight. Moreover, the fact that the handgun was found hidden in an enclosed space may provide another link to appellant. Deputy Pacifico's testimony that appellant and Freeman "started talking amongst each other" and saying "you need to own up to this" and "you need to own up to that" provide evidence supporting an inference that both men made incriminating statements during the traffic stop, or at least statements that might support an inference of consciousness of guilt. Pacifico also testified that, based

upon his experience, appellant was acting in an overly friendly way and he believed that he was trying to distract him with his behavior, further supporting an inference of consciousness of guilt.

Appellant did deny owning the handgun and having knowledge of its existence. Appellant also denied displaying a gun at the gas station, and he stated that no one in the group at the station had exhibited or loaded a gun. However, as the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given their testimony, the trial court was free to believe or disbelieve all or any part of appellant's testimony. *McKinny v. State*, 76 S.W.3d 463, 468–69 (Tex. App.—Houston [1st Dist.] 2002, no pet.). From this evidence, a rational trier of fact could have found, beyond a reasonable doubt, that appellant, as the owner and driver of the Jaguar at the time the handgun was found underneath the Jaguar's hood, possessed the handgun.[2] Accordingly, we hold that the evidence is sufficient

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[2] Appellant attempts to contrast the facts in his case with those present in *Bollinger v. State*, 224 S.W.3d 768 (Tex. App.—Eastland 2007, pet. ref'd) and *Powell v. State*, 112 S.W.3d 642 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Appellant asserts that, unlike the facts in these cases, he "made no statements indicating his ownership, or awareness of the firearm." As appellant notes, in *Bollinger*, the defendant's "statements to the deputies support no conclusion other than the fact that he knew [the firearms] were there" and, in *Powell*, the defendant "volunteered information about the shotgun, rather than expressing surprise that the officers had found a shotgun in the trunk in the first place." *Bollinger*, 224 S.W.3d at 775; *Powell*, 112 S.W.3d at 645. Certainly, statements like those in *Bollinger* and *Powell* provide more direct evidence of a defendant's unlawful possession of contraband. But, we are not compelled to find the evidence insufficient in this case simply because appellant did not make any statements suggesting knowledge of the handgun. Rather, as set forth above, the links in this

to support appellant's conviction for the offense of unlawful possession of a firearm. *See Ervin*, 2010 WL 4619329, at *2–4.

We overrule appellant's first and second points of error.

**Correction of the Judgment**

The State contends that the written judgment should be corrected because it fails to properly reflect that appellant entered pleas of not true to the allegations in the enhancement paragraphs and the trial court found the allegations in the enhancement paragraphs to be true. An appellate court may correct and reform a trial court's judgment when it has the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Appellant does not challenge the State's request.

The record reflects that appellant entered pleas of not true to the allegations in both enhancement paragraphs and the trial count found the allegations in both enhancement paragraphs true. Nevertheless, the written judgment entered by the trial court incorrectly states that appellant entered a plea of true to the second enhancement paragraph and the trial count found the allegation in the first enhancement paragraph not true.

Accordingly, we reform the written judgment to reflect that appellant pleaded not true to the allegation in the second enhancement paragraph and the

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case support the reasonable inference that appellant had knowledge of the handgun and exercised control over it.

trial court entered a finding that the allegation in the first enhancement paragraph is true.

## Conclusion

We modify the judgment of the trial court and affirm the judgment as modified.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).