Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00085-CR

CARL ROGERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Case No. 53921

MEMORANDUM OPINION

A jury convicted appellant Carl Rogers of unlawful possession of a prohibited substance, namely marijuana, in a correctional facility. *See* TEX. PENAL CODE § 38.11 (Vernon Supp. 2010). The court assessed punishment at 25 years'

confinement in prison pursuant to the habitual offender statute. *See* TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2010). Rogers appealed, arguing that the evidence was legally and factually insufficient to support the conclusion that he intentionally and knowingly possessed marijuana. We modify the trial court's judgment and affirm as modified.

Factual Background

Rogers was incarcerated at the Trusty Camp, a dormitory for offenders who pose minimal security risks, at the Darrington Unit in Brazoria County, Texas. On the morning of September 25, 2006, Rogers was returning to the Trusty Camp from his work assignment at the bachelor officer quarters. Rogers walked into the turnout shed, where offenders are strip searched before entering and leaving the Trusty Camp. Sergeant R. Mays ordered Rogers to strip. Rogers stated, "I can't do that," and then stepped out of the turnout shed. Rogers testified that he had not expected to be strip searched because he had only returned to obtain more cleaning supplies. He claimed that when Sgt. Mays ordered him to strip, he panicked and walked out of the shed because he did not want to be caught with and punished for the small amount of chewing tobacco he had in his shirt pocket.

When Rogers could not get the chewing tobacco out of his shirt pocket, he fled, and a foot-chase ensued. Sgt. Mays, Officer D. Foster, and several other corrections officers pursued Rogers into a dayroom. Wanting to avoid further

punishment, Rogers stopped running near the barbershop, which is located inside the dayroom, near the television-watching area and the weight room. Sgt. Mays testified that during the chase she saw Rogers trying to pull a blue bag out of his shirt. Officer Foster testified that she saw Rogers throw two bags onto the floor in the barbershop, as well as something into the trash can. After searching the area of the barbershop, Officer Foster recovered a blue plastic shopping bag, a white plastic shopping bag, a potato chip bag, and a latex glove, and she gave those items to Sgt. Mays. Sgt. Mays handed this evidence to Major Tucker who secured the items in his office until they were collected by C. Cegielski, the criminal investigator.

The other inmates in the dayroom and barbershop area were ordered to leave. Rogers was strip-searched by Officer T. Yracheta, who found a thumbnail-sized piece of chewing tobacco in Rogers's shirt pocket. No other contraband was found on his person.

C. Cegielski, an investigator with the Office of the Inspector General, took the evidence collected at the barbershop from Major Tucker and delivered it to the Brazoria County crime laboratory. Among the contents delivered were six plastic bags containing a green, leafy substance. The director of the crime lab, P. VanDorn, tested the contents and confirmed that they included 96.7 grams of marijuana.

Rogers was later charged with and convicted of unlawful possession of a prohibited substance in a correctional facility. The court assessed punishment at 25 years' imprisonment. Rogers timely filed a notice of appeal, and he argues on appeal that the State failed to present legally and factually sufficient evidence to support the conclusion that he intentionally and knowingly possessed marijuana.

Analysis

It is unlawful for a person to possess a controlled substance or dangerous drug while in a correctional facility or on property owned, used, or controlled by a correctional facility. TEX. PENAL CODE ANN. § 38.11(d)(1). Rogers argues that the evidence supporting his conviction is legally and factually insufficient to establish "possession," which requires proof that the defendant exercised actual care, custody, control, or management of the substance and knew the matter possessed was contraband. *See* TEX. PENAL CODE ANN. § 1.07(39) (Vernon Supp. 2010).

I. Legal sufficiency

Rogers contends that the evidence is legally insufficient to establish that he possessed marijuana. Specifically, Rogers argues that he did not have exclusive possession of the place where the marijuana was found, and that the State failed to establish independent facts and circumstances connecting him to the marijuana.

In assessing legal sufficiency, we determine whether, based on all of the record evidence viewed in the light most favorable to the verdict, a rational jury

could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003). Under the *Jackson* standard, evidence is insufficient to support a conviction when, considering all the evidence admitted at trial in the light most favorable to the verdict, a factfinder could not have rationally found that each element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). This standard of review is established under two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence, viewed in the light most favorable to the verdict, conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2789; *Williams*, 235 S.W.3d at 750; *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). In applying the *Jackson* standard of review, an appellate court must defer to the responsibility of the factfinder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. 2789; *Williams*, 235 S.W.3d at 750. An appellate court presumes that the trier of fact resolved any conflicts in the evidence in favor of the verdict and defers to that resolution,

provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. 2793. An appellate court may not re-evaluate the weight and credibility of the record evidence and thereby substitute its own judgment for that of the factfinder. *Williams*, 235 S.W.3d at 750. If an appellate court finds the evidence insufficient under the *Jackson* standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 221, 2218 (1982).

To prove the offense of unlawful possession of a prohibited substance in a correctional facility, the State must prove that the defendant "possess[ed] a controlled substance or dangerous drug while in a correctional facility or on property owned, used, or controlled by a correctional facility." TEX. PENAL CODE § 38.11(d)(1). To establish "possession," the State was required to show that Rogers (1) exercised actual care, custody, control, or management of the substance and (2) knew the matter possessed was contraband. *See* TEX. PENAL CODE ANN. § 1.07(39); *Poindexter v. State*, 153 S.W.3d 402, 405–06 (Tex. Crim. App. 2005).

When, as in this case, the controlled substance was not discovered on the person of the defendant when it was seized, it cannot be presumed that the accused had possession of the substance unless there are independent facts and circumstances tending to show that the accused knowingly possessed the contraband. *Evans v. State*, 202 S.W.3d 158, 161–62 (Tex. Crim. App. 2006);

Roberson v. State, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Such evidence can be either direct or circumstantial, but it must establish that a defendant's connection to the contraband was more than fortuitous. The defendant's presence or proximity to a controlled substance, when combined with other evidence, may provide a "link" sufficient to establish the element of possession beyond a reasonable doubt. *Evans*, 202 S.W.3d at 162.

Though not an exhaustive list, the Court of Criminal Appeals has recognized the following factors as links to establish possession: (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 contraband; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband 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 was present; (11) whether the defendant owned or had the right to possess the place where the contraband was found; (12) whether the place where the contraband was 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. *Id.* at 162 n.12.

Rogers argues that the State failed to establish independent facts and circumstances connecting him to the marijuana found in the various containers collected in the prison barbershop. Specifically, he contends that a rational jury could not find him guilty beyond a reasonable doubt of possession of marijuana in a correctional facility because the testimony of the State's witnesses does not link the marijuana to any of the bags collected by Officer Foster.

The State argues that there are sufficient links present to sustain his conviction. Each of these links must be evaluated in accordance with the legal sufficiency standard set out in *Jackson*. *See Evans*, 202 S.W.3d at 161. When looking at the evidence in a light most favorable to the verdict, the State presented evidence for six of the above fourteen factors. These factors constitute a shorthand way of expressing what must be proven to establish that Roger's knowingly possessed marijuana. *See Roberson*, 80 S.W.3d at 735. It is not, however, the number of links that is dispositive, but rather, the logical force of all of the evidence, both direct and circumstantial. *Evans*, 202 S.W.3d at 162.

Factors 1 and 3: Rogers's presence when the search was conducted, and his proximity to and the accessibility of the contraband. Sgt. Mays testified that Rogers was concealing a blue plastic shopping bag under his shirt, and Officer Foster testified that Rogers threw a blue plastic shopping bag and a white plastic shopping bag, which were both under his shirt, onto the floor of the barbershop.

Officer Foster also testified that she saw Rogers throw "something" into the trash. A blue bag, white bag, potato chip bag, and glove were all recovered in the barbershop, and there were no other items on the floor. Rogers was also present in the room when the marijuana was discovered.

Factor 5 and 10: Possession of other contraband or drug paraphernalia at time of arrest and whether other contraband was present. Rogers possessed other contraband, including two cans of soda, a magazine, and a small piece of chewing tobacco, all of which are prohibited items in a correctional facility. Possession of tobacco in a correctional facility is prohibited by law. *See* TEX. PENAL CODE ANN. § 83.11. Chewing tobacco was also found in the glove that Officer Foster recovered from the trash can in the barbershop.

Factors 6 and 14: Incriminating statements at time of arrest, and conduct indicating consciousness of guilt. Rogers fled the turn-out shed and stated "I can't do it," when Sgt. Mays told him to strip. He did not stop running until the officers cornered him in the barbershop area. Officer Foster testified that he repeatedly said "I didn't do it," as she conducted a search of the area around Rogers. Rogers testified that when he stopped, he pulled off his shirt, held up the chewing tobacco in his hand, and said, "I've just got Skoal. I've got some dip."

Viewing this evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found the essential elements of the offense,

including the element of possession, beyond a reasonable doubt. Accordingly, we overrule Rogers's first issue.

II. Factual sufficiency

In his second issue, Rogers argues that the evidence is factually insufficient to support his conviction. Specifically he contends that: (1) Officer Foster's testimony was inconsistent with the statement she made at the time of the event and was "so weak that the verdict is clearly wrong and manifestly unjust"; (2) there is no evidence connecting Rogers to the glove and the potato chip bag; (3) the testimony of the State's witnesses fails to connect the marijuana to any particular bag collected at the scene of the incident; (4) there is strong evidence indicating that the marijuana belonged to another inmate who threw it when the Rogers was being chased through the dayroom; and (5) he established a rational and more likely reason for avoiding the strip search.

We must consider all of the evidence highlighted by Rogers in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks v. State*, 323 S.W.3d 893, 894–95 (plurality op.), 926 (Cochran, J., concurring) (Tex. Crim. App. 2010). We afford almost complete deference to a factfinder's decision when that decision is based upon an evaluation of credibility. *Lancon v. State*, 253 S.W.3d 699, 705

(Tex. Crim. App. 2008). The jury is in the best position to judge the credibility of a witness because it is present to hear the testimony and assess the demeanor of each witness, as opposed to an appellate court, which relies only on the cold record. *Id.*; *see Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. 1978). The jury is the sole judge of the credibility of the witnesses and may accept or reject any part or all of the testimony given by the State or defense witnesses. *Johnson*, 571 S.W.2d at 173. Accordingly, the factfinder may choose to believe some testimony and disbelieve other testimony. *Lancon*, 253 S.W.3d at 707.

Officer Foster's testimony was somewhat inconsistent with a statement she made in 2006. The evidence card that she completed immediately after the incident indicated that contraband was recovered from the trash can and in the dayroom. The evidence card did not reflect that anything was recovered from the floor of the barbershop. At trial she testified that she was right behind Rogers when he stopped running and that she saw him throw two bags, a white bag, which landed under the sink, and a blue bag, which landed against the wall. She also testified that she saw him throw something in the trash can. When she looked in the trash, she saw a latex glove, which was later found to contain chewing tobacco. On cross-examination, Officer Foster reiterated that she saw Rogers throw something in the trash can, but she admitted that there was other trash in the trash can that was not recovered.

Although Officer Foster's testimony at trial was not exactly the same as the information she provided on the evidence card, the resolution of any inconsistency in her testimony goes to her credibility, and the jury could have reasonably believed that she recovered the blue and white bags from the floor of the barbershop rather than from the dayroom as she indicated on the evidence card. *See Lancon*, 253 S.W.3d at 705; *see also Washington v. State*, 127 S.W.3d 197, 204 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (discussing jury's role in resolving inconsistent testimony of a witness).

Rogers contends that there is strong evidence indicating that another inmate threw the bag containing marijuana and that the reasons he articulated for running away from Sgt. Mays reasonably explain his behavior. He also argues that there is no evidence connecting him to the glove or to the potato chip bag and that the testimony of the State's witnesses fails to connect the marijuana to any particular bag collected at the scene of the incident.

Sgt. Mays, however, testified that she saw Rogers attempt to remove a blue bag from under his shirt. Officer Pickett testified that she entered the dayroom behind Sgt. Mays and Officer Foster. She did not see Rogers throw anything, but she arrived after he stopped running. Officer Yracheta also arrived after Sgt. Mays and Officers Foster and Pickett had cornered Rogers. He testified that he saw

Officer Foster searching the area around the trash can and that she was holding "something blue" in her hand.

Testimony from several inmates suggested the possibility that the drugs recovered by the officers could have come from another inmate present in the room at the time. R. Johnson, an inmate who was in the weight room when Rogers and the officers ran into the barbershop, testified that he did not see Rogers throw anything into the trash can. R. Johnson admitted, however, that his view was somewhat obscured. T. Johnson, an inmate who was in the dayroom at the time of the incident, testified that he did not see Rogers throw anything, also but stated that he did not see Rogers run in. J. Belden, who was the barber at the time of the incident, recalled hearing the commotion. He testified that it is common for inmates to "get rid of contraband" by throwing it anywhere in the vicinity when they know officers are coming. From the window in the barbershop, Belden saw the officers running outside, he heard someone come through the door, and he felt something hit him. When he looked down, he noticed a "little bundle of something." He testified that he did not see who threw the bundle.

Most of the witnesses arrived after Rogers had stopped running, and they testified that they did not see, and were not in a position to see, Rogers throw anything. Officer Foster was the only witness who saw the Rogers throw anything, and only Rogers denied that he threw anything. None of the inmates who testified

had a clear, unobstructed view of Rogers or the barbershop. Even Belden's testimony—which Roger's argues supports his position—is equivocal because Belden felt the package hit him shortly after Rogers ran into the barbershop but did not see who threw it.

In regards to the latex glove and potato chip bag, Officer Foster testified that she saw Rogers throw something into the trash, and when she looked down, she saw the glove on top of the other trash in the trash can. She also testified that the glove was the only item recovered from the trash can. Sgt. Mays testified that she received a blue bag, a white bag, a potato chip bag, and a latex glove from Officer Foster. Officer Yracheta saw Officer Foster with a blue package, as did Officer Pickett and T. Johnson. Although no one testified specifically about where the potato chip bag was found, Sgt. Mays, when she was asked about what was found in the barbershop, stated, "Everything was in that blue [plastic shopping] bag." Additionally, Officer Foster testified that aside from the items collected and handed to Sgt. Mays, there were no other items on the floor of the barbershop. Major Tucker later testified that Sgt. Mays gave him a package containing marijuana. The contents of the collected items were later tested, and VanDorn confirmed that the package contained 96.7 grams of marijuana. Although there were a number of inmates present in the dayroom, no one testified that someone other than Rogers threw the package containing marijuana.

Rogers's challenges to the factual sufficiency of the evidence are based on the credibility of the witnesses and the weight given to their testimony—issues on which this Court must defer to the factfinder. *See Lancon*, 253 S.W.3d at 705. Although Rogers's stated reasons for avoiding the strip search—his possession of tobacco but not marijuana—are a reasonable explanation for his conduct given the potentially negative consequences of being found in possession of chewing tobacco, his behavior was equally consistent with the State's theory that he possessed marijuana, and the jury was free to believe or disbelieve his explanation. *See Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979); *McKinny v. State*, 76 S.W.3d 463, 468–69 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Considering all of the evidence adduced at trial in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks*, 323 S.W.3d at 894–95 (plurality op.), 926 (Cochran, J., concurring). We therefore hold that the evidence is factually sufficient to sustain the jury's guilty verdict.

Reformation of the Judgment

Finally, we note that the trial court's judgment does not accurately comport with the record in that it does not reflect that the trial court assessed Rogers's punishment at 25 years in prison. "[A]n appellate court has authority to reform a

judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source." *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (citing *Asberry v. State*, 813 S.W.2d 526, 531 (Tex. App.—Dallas 1991, pet. ref'd)); *accord Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("An appellate court has the power to correct and reform a trial judgment 'to make the record speak the truth when it has the necessary data and information to do so . . . .'" (quoting *Asberry*, 813 S.W.2d at 529)); *see also* TEX. R. APP. P. 43.2(b). The record supports modification of the judgment because the court reporter's record reflects that the trial court assessed Rogers's punishment at 25 years. Accordingly, the trial court's judgment is modified to reflect the punishment assessed.

Conclusion

We modify the trial court's judgment to indicate the punishment assessed, and we affirm as modified.

Michael Massengale
Justice

Panel consists of Chief Justice Radack, Justice Massengale, and Justice Nuchia.[*]

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

[*] The Honorable Sam Nuchia, Senior Justice, Court of Appeals for the First District of Texas, participating by assignment.