Opinion issued July 14, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00315-CR

FRAZIER PORTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1243911

MEMORANDUM OPINION ON REHEARING

The State of Texas has moved for rehearing. We grant rehearing, withdraw our opinion and judgment of March 10, 2011, and issue the following in their stead.

A jury found appellant, Frazier Porter, guilty of the offense of possession with intent to deliver a controlled substance, namely, hydrocodone, weighing at least 400 grams by aggregate weight, including adulterants and dilutants.[1] The trial court assessed punishment, enhanced by two previous felony convictions, at 30 years in prison. The trial court did not assess a fine as statutorily required.[2] On appeal, appellant challenges the sufficiency of the evidence to support his conviction in one issue.

We affirm the trial court's judgment, as modified.

Background

Officers M. Lopez and C. Cantu, who were assigned to the Houston Police Department's Special Investigations Narcotics Division, set up a surveillance of a motel, the Red Carpet Inn, located at 6161 Gulf Freeway in Harris, County. As part of the investigation, the officers learned that appellant, Frazier Porter, was staying in Room 117. Eventually, the officers saw a man leave the room and drive away in car with Alabama license plates. The officers checked the plate numbers and determined that the vehicle had been reported stolen.

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1 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3), 481.112(a), (f) (Vernon 2010).

2 *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (requiring both confinement and fine be assessed in cases involving possession with intent to deliver at least 400 grams of Penalty Group 1 controlled substance, which include hydrocodone).

The officers called for a marked patrol car to stop the vehicle. During the stop, the driver was identified as Derick Rhone. It was also determined that the vehicle belonged to appellant and had been reported stolen by him. Officers Lopez and Cantu went to Room 117 and spoke to appellant. They learned that appellant had forgotten to report that his vehicle had been recovered.

When the officers asked to search Room 117, appellant consented to the search. Appellant told the officers that he was the sole occupant of the room. Scattered on the bed, the officers found 25 prescription bottles containing medication and two empty prescription medicine bottles. Fifteen of the bottles indicated that the medication had been prescribed to appellant; the remaining ten indicated that they had been prescribed to Rhone or to other individuals. Appellant told the officers that he was very ill and had traveled from his native Alabama to fill his prescriptions because they were cheaper to fill in Houston.

The officers took appellant to the police station to interview him. The officers considered appellant to be under arrest. Before the interview, appellant was given the required statutory warnings.

Appellant signed a written statement in which he disclosed the true purpose of his trip to Houston. Appellant stated that a person named Chris Mann had paid him and Rhone to travel from Alabama to Houston to recruit homeless people to go to the doctor, obtain prescriptions for certain medications, and fill them.

Appellant would then mail the medication to himself or to Mann in Alabama. Mann paid appellant $600 to $700 per trip. Appellant stated that he had made 15–20 trips that year to Houston and, during that time he had mailed 50 packages of medications to his address or Mann's address in Alabama.

Appellant also stated that he had sent one package to his address and one to Mann's address the day before through the United States Postal Service. He said that each package contained about 1,500 pills. Appellant also gave his permission to the authorities to intercept and open the packages. Because they did not have enough evidence to charge him with an offense at that time, the officers released appellant after he gave his written statement.

Officer Lopez contacted Special Agent M. McClaid, with the United States Postal Inspection Service, regarding the packages mailed to Alabama. Agent McClaid contacted fellow agents in Alabama, who intercepted the package addressed to appellant's Alabama address. The return address on the package included appellant's name with the Houston address for the Red Carpet Inn.

The package was transferred to Agent McClaid. When he opened the package, Agent McClaid found five smaller packages containing pills. In total, Agent McClaid recovered 860 pills from the intercepted package. Agent McClaid then transferred the pills to Officer Lopez.

The pills were turned over to a criminalist with the Houston Police Department, who conducted tests on the substances. The combined weight of the pills the criminologist received was 488.4 grams. The tests concluded that the pills contained dihydrocodeinone, which the criminologist testified is hydrocodone and acetaminophen. Based on the narcotics recovered by the postal inspector's office, appellant was charged with possession with intent to deliver a controlled substance, namely, hydrocodone, weighing at least 400 grams. The indictment also contained two felony enhancement allegations.

At trial, the State presented the testimony of Officers Lopez and Cantu, Agent McClaid, and the criminologist. The State also admitted into evidence appellant's written statement in which he admitted that he was paid by Mann to travel to Texas to recruit homeless people to obtain prescription medication, which he then shipped back to Alabama.

The jury found appellant guilty of the primary offense charged in the indictment. Appellant agreed to be sentenced by the trial court. During the sentencing phase, appellant stipulated to evidence supporting the enhancement allegations. At the end of the punishment hearing, the trial court sentenced appellant to 30 years in prison, but did not assess a monetary fine.

This appeal followed. In one issue, appellant contends that the evidence is insufficient to support his conviction. Specifically, appellant contends that the

State presented no evidence regarding the appellant's intent to deliver the hydrocodone, an element of the charged offense. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3), 481.112(a), (f) (Vernon 2010).

A. Standard of Review

This Court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant presents the challenge as a legal or a factual sufficiency challenge. *See Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). *See id*. Pursuant to this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential 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); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We can hold evidence to be insufficient under the *Jackson* standard in 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 conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n. 11, 320, 99 S. Ct. at 2786, 2789 n. 11, 2789; *see also Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder 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. at 2793. In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. Finally, the "cumulative force" of all the circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

B. Elements of the Offense and Pertinent Legal Principles

Here, the State was required to show that appellant possessed a controlled substance, namely, hydrocodone, weighing at least 400 grams by aggregate weight,

including adulterants and dilutants, with the intent to deliver it. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3), 481.112(a), (f). "To prove possession, the State must show the accused (1) exercised control, management, or care over the contraband and (2) knew the substance possessed was contraband. *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006); *Roberts v. State*, 321 S.W.3d 545, 548 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Possession may be proved through either direct or circumstantial evidence. *Poindexter v. State*, 153 S.W.3d 402, 405–406 (Tex. Crim. App. 2005); *see also Rice v. State*, 195 S.W.3d 876, 881 (Tex. App.—Dallas 2006, pet. ref'd) (stating jury could infer knowing or intentional possession of contraband).

The term "deliver" means to transfer, actually or constructively, a controlled substance to another. TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon 2010). Intent to deliver a controlled substance can be proven by circumstantial evidence, including evidence that an accused possessed the contraband. *Moreno v. State*, 195 S.W.3d 321, 325 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); (citing *Patterson v. State*, 138 S.W.3d 643, 649 (Tex. App.—Dallas 2004, no pet.); *Mack v. State*, 859 S.W.2d 526, 528 (Tex. App.—Houston [1st Dist.] 1993, no pet)). Other factors courts have considered include the following: (1) the nature of the location at which the accused was arrested; (2) the quantity of contraband in the accused's possession; (3) the manner of packaging; (4) the presence or lack

thereof of drug paraphernalia (for either use or sale); (5) the accused's possession of large amounts of cash; and (6) the accused's status as a drug user. *Id.* at 325–26 (citing *Lewis v. State*, 664 S.W.2d 345, 349 (Tex. Crim. App. 1984); *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)). An oral expression of intent is not required. *Moreno*, 195 S.W.3d at 326. "Intent can be inferred from the acts, words, and conduct of the accused." *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995).

With these principles in mind, we turn to appellant's arguments and the evidence in the record.

C. Analysis

Appellant does not dispute that he "possessed" the hydrocodone; rather, he contends that no evidence showed that he had the intent to deliver it. To support his sufficiency challenge, appellant points out that the State presented no evidence regarding a number of the factors listed above.

Generally, appellant accurately cites the record. Appellant's analysis, however, does not appropriately view the evidence in the light most favorable to the verdict and improperly discounts evidence showing that he had the intent to deliver the hydrocodone. Appellant also does not recognize that the number of factors present is not as important as the logical force the factors have in establishing the elements of the offense. *See Moreno*, 195 S.W.3d at 326; *see also*

Gilbert v. State, 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Appellant also relies on Officer Lopez's testimony regarding appellant's oral statements at the motel. Officer Lopez testified that appellant told him that he was ill and had traveled from Alabama to Houston because it was a cheaper place to fill his prescriptions. Appellant contends that this shows that he did not have the required intent to deliver. Again, appellant does not recognize established legal precepts, namely, that the jury was entitled to weigh and to resolve conflicts in the evidence and to draw reasonable inferences from the evidence. *See Clayton*, 235 S.W.3d at 778. Also, when faced with conflicting evidence, we "presume the trier of fact resolved any such conflict in favor of the prosecution." *See Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

Here, appellant's written statement showed that he possessed the hydrocodone with the intent to deliver it to another. In his statement, appellant indicated that he was paid by Mann to travel to Texas to recruit homeless people to obtain prescription medication, which he then shipped back to Alabama for Mann.

Appellant correctly points out that established precedent requires that a defendant's extrajudicial confession be corroborated by other evidence tending to prove that the corpus delicti of the crime occurred. *See Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002); *Williams v. State*, 958 S.W.2d 186, 190 (Tex.

Crim. App. 1997). In other words, evidence must be presented that the crime occurred independent of a defendant's confession. *See Salazar*, 86 S.W.3d at 644; *Williams*, 958 S.W.2d at 190. Importantly, the corroborating evidence need not be independently sufficient to prove the offense. *Rocha v. State*, 16 S.W.3d 1, 4–5 (Tex. Crim. App. 2000). Instead, the independent, corroborating evidence need only "render the commission of the offense more probable than it would be without the evidence." *Williams*, 958 S.W.2d 190 (quoting *Chambers v. State*, 866 S.W.2d 9, 15–16 (Tex. Crim. App. 1993); *see also Rocha*, 16 S.W.3d 1, 4–5.

Here, intent to deliver is part of the corpus delicti of the charged offense. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (f). Appellant contends that his confession indicating that he possessed the hydrocodone for the purpose of delivering it to Mann was not corroborated; therefore, the evidence is insufficient to prove beyond a reasonable doubt that he committed the charged offense.

We are mindful that the corroborating evidence need not be sufficient alone to prove that appellant harbored the requisite intent to deliver; rather, the corroborating evidence need only make this conclusion more probable than it would be without such evidence. *See Williams*, 958 S.W.2d at 190. A review of the record reveals such corroborating evidence.

At trial, the evidence showed that the police first encountered appellant in his motel room. Appellant admitted that he had traveled from Alabama to Houston

for the purpose of obtaining prescription medication. Although appellant said that he was the only occupant of the room, a number of other individuals were in the motel room. After appellant consented to a search of the motel room, the police found 25 prescription bottles containing pills scattered on the bed. Fifteen of the bottles indicated that the medication had been prescribed to appellant; the other 10 bottles bore the names of other individuals. The police also found two empty prescription bottles.

The package intercepted by the postal service indicated that it was being mailed to appellant's address in Alabama with a return address bearing appellant's name and the street address of the Houston motel. The package contained approximately 860 pills, which was later determined to contain 488.4 grams of dihydrocodeinone, which is hydrocodone and acetaminophen. Agent McClaid's testimony indicated that the pills in the package were not in prescription bottles but were loose in five smaller packages packed inside the larger package. In addition to the package that was intercepted, Agent McClaid confirmed that a package had been mailed to Chris Mann, with appellant's name on the return address. We conclude that the foregoing corroborating evidence made the determination that appellant had the intent to deliver the hydrocodone more probable than it would be without such evidence. *See Williams*, 958 S.W.2d at 190.

When viewed in a light most favorable to the verdict, given the corroborating evidence and appellant's written statement, the evidence is sufficient to support a rational jury's finding, beyond a reasonable doubt, that appellant possessed the hydrocodone with the intent to deliver. *See id.* (concluding that appellant's confession and corroborating evidence was legally sufficient to support jury's finding of guilty in murder case). Accordingly, we hold that the evidence is sufficient to support the judgment of conviction.

We overrule appellant's sole issue.

Punishment

We have noticed an error in the judgment that we will correct sua sponte. Appellant was indicted for possession with intent to deliver at least 400 grams of a Penalty Group 1 controlled substance, hydrocodone, enhanced by two prior convictions, the first prior conviction having become final before the second felony occurred. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(A), 481.112(a); TEX. PENAL CODE ANN. §§ 12.41(1), 12.42(d) (Vernon 2011). Without enhancement allegations, the indictment would have charged an offense outside the Penal Code's felony classification, with a punishment range of life or 15 to 99 years in prison, plus a fine not to exceed $250,000. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (f). But the State opted to charge appellant as a habitual felony offender. *See* TEX. PENAL CODE ANN. § 12.42. As enhanced under the

habitual-felony-offender statute, appellant's offense thus carried a punishment range of life or 25 to 99 years in prison, with no fine. *See id.* § 12.42(d).

The judgment correctly indicates that appellant was punished as a habitual felony offender. However, it mistakenly recites that the degree of the offense for which appellant was indicted was a first-degree felony. Because the offense for which appellant was charged and convicted is outside of the Penal Code's felony classification, it is considered a third-degree felony for the purposes of the habitual-felony-offender statute. *See* TEX. PENAL CODE ANN. § 12.41(1) ("For purposes of this subchapter, any conviction not obtained from a prosecution under this code shall be classified as follows: (1) 'felony of the third degree' if imprisonment in [a penitentiary] is affixed to the offense as a possible punishment. . . ."); *see also Jackson v. State*, No. 01-07-00859-CR, 2009 WL 1886174, at *5 (Tex. App.—Houston [1st Dist.] July 2, 2009, no pet.) (mem. op.) (not designated for pub.). Thus, we modify the judgment to reflect that the offense was a third-degree felony. *See Jackson*, 2009 WL 1886174, at *4–5.

Conclusion

We modify the judgment to reflect that appellant's offense was a third-degree felony, and we affirm the judgment as so modified.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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