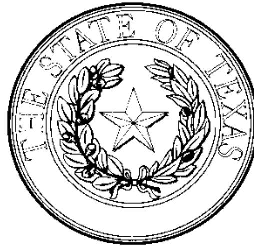
**Opinion issued February 24, 2011**




**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00400-CR**

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**RAFAEL BERNARD SMITH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 185th District Court**
**Harris County, Texas**
**Trial Court Case No. 1261100**

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## MEMORANDUM OPINION

A jury found appellant, Rafael Bernard Smith, guilty of the offense of possession of phencyclidine ("PCP") weighing less than one gram by aggregate

weight, including adulterants and dilutants.[1] After appellant pleaded true to two enhancement allegations, the jury assessed punishment at nine years in prison and a $10,000 fine. In one issue, appellant challenges the sufficiency of the evidence to support his conviction.

We affirm.

## Background

Officers D. Caballero and G. Olvera of the Houston Police Department were on patrol when they saw a car change lanes without signaling, which is a traffic violation. After the officers activated their emergency lights, the car, driven by appellant, pulled into a service station.

Officer Caballero approached the driver's side of the car and instructed appellant to roll down his window. Appellant was the only occupant in the car. Because the window would not roll down, appellant opened the driver's side door. An odor came from the car that Officer Caballero recognized from his training as PCP.

Officer Caballero asked appellant for his driver's license and insurance. Appellant appeared confused by the request and fumbled through his wallet. At that point, Officer Caballero believed there was probable cause to search appellant's car for narcotics. The officer requested appellant to step from the car.

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[1] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(8), 481.115(a)–(b) (Vernon 2010).

As he escorted appellant to the patrol car, Officer Caballero observed that appellant appeared to be physically and mentally impaired. Appellant was swaying and needed Officer Caballero's assistance to walk. Appellant's pupils were dilated; his speech was slurred, and he was incoherent.

While Officer Caballero walked appellant to the patrol car, Officer Olvera stood by the driver's side of appellant's car. Officer Olvera also smelled an odor coming from the vehicle. From his professional experience, Officer Alvaro recognized the odor as PCP. In plain view, the officers saw a small glass vial with a black cap on the driver's side floorboard. From past experience, the officers knew that this is the manner in which PCP is typically packaged. Officer Olvera retrieved the vial and saw that it contained a liquid.

In conducting an inventory of the vehicle, the officers found a number of bottles of prescription medication. Appellant's name was on the bottles as the person authorized to take the medication. Officer Caballero later testified that the prescriptions appeared valid. Officer Caballero did not know for what medical conditions the medications were prescribed.

Appellant was later indicted for possession of a controlled substance, namely PCP, weighing less than one gram by aggregate weight, including adulterants and dilutants. At trial, the State presented the testimony of Officers Caballero and Olvera. The State also presented the testimony of the employee from the police

department's crime lab, who had tested the substance in the vial recovered from appellant's car. The employee testified that her analysis of the substance revealed it was 0.3443 grams of PCP, including adulterants and dilutants.

The jury found appellant guilty of the charged offense and assessed punishment at nine years in prison and a $10,000 fine. This appeal followed.

## Sufficiency of the Evidence

In one point of error, appellant contends that the evidence is legally and factually insufficient to support his conviction. Specifically, appellant contends that the State failed to prove that he knowingly possessed the PCP, an element of the charged offense. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(38), 481.102(8), 481.115(a)–(b) (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**

A person commits an offense if he knowingly or intentionally possesses less than one gram of PCP, including adulterants and dilutants. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(8), 481.115(a)–(b). 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).

If a defendant is not in exclusive possession of the place where the illegal drugs are found, then additional independent facts and circumstances must link the defendant to the contraband in such a way that it can be concluded that he had

knowledge of the contraband and exercised control over it. *See Batiste v. State*, 217 S.W.3d 74, 79–80 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Such linkage generates a reasonable inference that the defendant knew of the contraband and exercised control over it. *See Roberson*, 80 S.W.3d at 735. Proof of a link between the defendant and the illegal drugs is needed primarily to establish knowledge or intent. *Id*. It is not sufficient to show the defendant was merely present in the vicinity of the contraband. *Batiste*, 217 S.W.3d at 80. Whether this evidence is direct or circumstantial, it must establish, to the requisite level of confidence, that the defendant's connection with the drug was more than fortuitous. *Poindexter*, 153 S.W.3d at 405–06. The link between the defendant and the illegal drugs need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *See Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995).

Possible links include, but are not limited to, the following: (1) whether the defendant was present when the search was conducted; (2) whether the contraband was in plain view; (3) whether the defendant was in close proximity to and had access to the contraband; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements

when arrested; (7) whether the accused 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 drugs were found; (12) whether the place where the drugs were 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. *Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006); *Lair v. State*, 265 S.W.3d 580, 600 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

In deciding whether the evidence is sufficient to link a defendant to contraband, the fact finder is the exclusive judge of the credibility of the witnesses and the weight to be given to their testimony. *Poindexter*, 153 S.W.3d at 406. The link between the defendant and the contraband need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). No formula of facts exists to dictate a finding of links sufficient to support an inference of knowing possession. *See Taylor v. State*, 106 S.W.3d 827, 831 (Tex. App.—Dallas 2003, no pet.). A factor that is of little or no value in one case may be the turning point in another. *See Nhem v. State*, 129 S.W.3d 696, 699 (Tex. App.—Houston [1st Dist.] 2004, no pet.). When determining whether the defendant knew

that he possessed contraband, the jury is allowed to infer the defendant's knowledge from his acts, conduct, remarks, and from the surrounding circumstances. *See Krause v. State*, 243 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). In sum, it is the logical force of the evidence, and not the number of links, that supports a fact finder's verdict. *Evans*, 202 S.W.3d at 166.

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

**C. Analysis**

To support his sufficiency challenge, appellant points out that the State presented no evidence regarding a number of the link factors. Appellant also relies on Officer Caballero's testimony that valid prescription medications issued to appellant had been found in the car. Appellant points out that the State did not show that his physical and mental impairment at the scene was caused by PCP. Although no evidence was offered to establish why appellant was taking the prescription medication found in the car, appellant suggests that his conduct and demeanor at the scene were attributable either to the prescription drugs or to the underlying medical condition for which he was prescribed the medication.

Appellant also points out that the State never showed that he was the owner of the vehicle he was driving. Officer Olvera testified that he thought that he had determined who owned the vehicle but could not remember whether he had

determined that appellant owned the car. Appellant also cites evidence that he was cooperative with the officers and did not make incriminating statements.

Appellant asserts that the jury had to make too many inferences to convict him. Appellant acknowledges that the officers testified that there was evidence of an odor of narcotics, but asserts that the jury could not, without more, infer that appellant knew the odor was a controlled substance.

Generally, appellant accurately cites the record. Nonetheless, appellant's analysis does not appropriately view the evidence in the light most favorable to the verdict and improperly discounts significant evidence, which links him to the PCP.

The absence of various affirmative links does not constitute evidence of innocence to be weighed against the affirmative links that are present. *James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). Moreover, proof that appellant owned the car was not necessary to establish a knowing possession of the PCP. Appellant was driving the car and was its sole occupant; this linked appellant to the PCP in a significant manner. *See Hyett v. State*, 58 S.W.3d 826, 831 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding evidence sufficient to show knowing possession in case in which defendant was sole occupant of car that he controlled but did not own, crack pipe was not present immediately before defendant entered car, and cocaine was in plain view and in close proximity to defendant); *see also Harmond v. State*, 960

S.W.2d 404, 405 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding evidence was legally sufficient to support defendant's conviction for possession of cocaine when evidence showed that defendant was sole occupant and driver of the car in which a makeshift crack pipe containing cocaine was found in plain view on floorboard between front bucket seats).

In addition, the State was not required to establish that appellant's impairment was caused by the PCP rather than the prescription drugs found in the car. Nor was the State required to establish that appellant knew that the odor emanating from the car was PCP. Rather, the jury was entitled to weigh and to resolve conflicts in the evidence presented and to draw reasonable inferences therefrom. *See Clayton*, 235 S.W.3d at 778. From the evidence, the jury could have reasonably inferred that appellant's impairment was caused by PCP and that he was aware of the odor. We also note that the State is not required to disprove alternative reasonable hypotheses, such as whether appellant was impaired from the PCP or from prescription drugs. *See Chaloupka v. State*, 20 S.W.3d 172, 175 (Tex. App.—Texarkana 2000, pet. ref'd).

As discussed, the State offered the following evidence linking appellant to the PCP:

- Appellant was the driver and sole occupant of the car in the PCP was recovered;

- The PCP was found on the driver's side floorboard, easily accessible to appellant;

- The vial containing the PCP was plainly visible to the officers;

- The officers and the crime lab employee testified that the odor emanating from the vial of PCP was strong and distinct; and

- At the scene, the officers formed the opinion that appellant was impaired. Appellant was swaying and needed Officer Caballero's help to walk. Appellant's speech was slurred, his pupils were dilated, and he was incoherent.

The circumstantial evidence outlined above, when viewed in combination, constitutes ample evidence connecting appellant to the actual care, custody, control or management of the PCP such that a jury could have reasonably inferred that appellant knowingly possessed it.[2] *See Evans*, 202 S.W.3d at 166. Although appellant cites link factors on which the State presented no evidence, as well as evidence that weighs in his favor, "[i]t is the logical force of the circumstantial

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[2] Appellant cites *Blackman v. State*, No. 01-08-00138-CR, 2009 WL 5064763 (Tex. App.—Houston [1st Dist.] 2009, pet. granted) and *King v. State*, 254 S.W.3d 579, (Tex. App.—Amarillo 2008, pet. ref'd) to support his sufficiency challenge. We note that the facts of those cases are distinct from the instant one in significant aspects. In *Blackman*, the appellant was the passenger, not the driver, of the van in which the narcotics were found. *See* 2009 WL 5064763, at *10. We held that appellant's mere presence in the van was not sufficient to link him to the narcotics and establish the element of possession. *See id.* In *King*, the appellant was convicted of money laundering. *See King*, 254 S.W.3d at 580. The court of appeals held that the State's evidence showing that a drug dog had alerted on the appellant's luggage, which contained $30,000 in cash, was legally insufficient to show that the appellant was transporting the proceeds of a narcotics' sale. *See id.* at 584–85. In his brief, appellant fails to account for the critical distinctions between this case and the cases that he cites. After considering the cited authority, we conclude that *Blackman* and *King* are of limited assistance to the sufficiency analysis in this case.

evidence, not the number of links, that supports a jury's verdict." *See id*. Viewing the evidence in a light most favorable to the verdict, we conclude that a rational fact finder could have found beyond a reasonable doubt that appellant knowingly possessed the PCP. *See Hyett*, 58 S.W.3d at 831; *Harmond*, 960 S.W.2d at 405. Accordingly, we hold that the evidence is sufficient to support the judgment of conviction.

We overrule appellant's sole point of error.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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