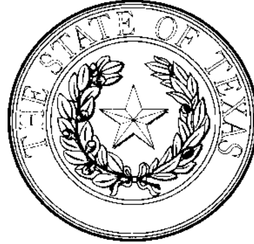
Opinion issued November 10, 2011.



In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00681-CR

NO. 01-10-00682-CR

LAMONTE DEWAYNE BUSH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th Judicial District Court
Harris County, Texas
Trial Court Case Nos. 1127967, 1127968

MEMORANDUM OPINION

A jury found appellant, Lamonte Dewayne Bush, guilty of two separate offenses of possession with the intent to deliver a controlled substance, namely

cocaine weighing more than four grams but less than two hundred grams[1] and ecstasy weighing more than four grams but less than four hundred grams,[2] and the trial court assessed his punishment at confinement for twenty-five years. In three points of error, appellant contends that the evidence is legally insufficient to support his convictions.

We affirm.

Background

Houston Police Department ("HPD") Officer A. Turner testified that on January 13, 2010, he began his shift with a plan to coordinate with undercover officers performing surveillance on a suspected "drug house." His partner, HPD Officer A. Bock, searched and thoroughly cleaned their patrol car at the start of their shift. Bock drove the patrol car to a position "just outside the neighborhood" of the "drug house" and waited for undercover officers, positioned closer to the house, to relay descriptions of cars as they arrived at and departed from the house. Turner and Bock then saw a car, which matched a description provided by the undercover officers, fail to stop at a stop sign, and they initiated a traffic stop.

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1 S*ee* TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(5), 481.102(D), 48.112(a), (d) (Vernon 2010); trial cause number 1127967; appellate cause number 01-10-00681-CR.

2 *See id.* §§ 481.002(5), 481.103(a)(1), 481.113(a), (d); trial cause number 1127968; appellate cause number 01-10-00682-CR.

After exiting the patrol car, Officer Bock approached the driver, Lisa Williams, and Officer Turner discretely approached the passenger side of the car. Although the back windows of the car were tinted, Turner explained that he could see through the front windows. As appellant, who was in the passenger seat of the car, opened the glove compartment to take out the driver's insurance information for Williams, Turner saw him "toss . . . a slab of crack" into the compartment. Not wanting to alert appellant, Turner "clicked [his] flashlight off and on" towards Bock to signal that "something [was] up." He then asked appellant to exit the car and quickly patted appellant down for weapons, finding $800 in cash. Turner handcuffed appellant and sat him in the back of the patrol car. As Bock was interviewing the driver, Turner returned to the car, searched the glove compartment, and found a bag containing 2.96 grams of crack cocaine. Appellant told Turner that the cocaine belonged to his uncle.

Officers Turner and Bock then parked their patrol car in a secured parking lot at the back of the complex and escorted appellant to the HPD central booking station. After he removed appellant from the patrol car, Turner performed a "quick search" of the patrol car to "see if maybe [appellant] left anything," but he did not find any narcotics. He explained that he could not conduct a more comprehensive search at that time because he had to simultaneously "maintain control of the suspect."

Later, as the officers were getting ready to "put the patrol shop up for the night," Bock performed another routine search of the patrol car. Bock informed Turner that, "pushed up under the passenger's seat" in the back of the patrol car, he found a tissue wrapped around powder cocaine and fourteen pills of ecstasy. Turner explained that "street-level users" generally would not have in their possession three varieties of narcotics in such quantities or have $800 in cash. On cross-examination, Turner admitted that he did not notice appellant "fidgeting" or acting "out of the ordinary" in the back of the patrol car. He explained that he did not mention the "drug house" in his initial offense report because "with the elements of the offense, we didn't need the fact that he was leaving a known drug house because that wasn't the reason for the stop." Turner also explained that he did not want to "burn the location" and alert any suspects that the house was under surveillance.

Officer Bock testified that before beginning his shift with Turner, he performed a routine, "comprehensive search" and cleaning of the patrol car. Because the patrol car was "dirty," Bock also vacuumed it out. After positioning themselves outside the neighborhood of the "drug house," the officers saw the car in which appellant was a passenger run a stop sign "between 30 seconds and a minute" after receiving an undercover officer's description of the car. Bock explained that after Turner arrested appellant, Bock "talked with" the driver,

Williams, "at length," and she said that "she thought [appellant] was going to speak with somebody in the house about his vehicle being at a storage lot." After determining that Williams was unaware of appellant's possession of the narcotics, Bock let her leave the scene, and the officers took appellant to the HPD central booking station.

After booking appellant, Turner typed up an offense report, and Bock performed another routine search of the patrol car. He specifically checked under the back seat because "sometimes suspects are able to discard any narcotics that they have, and the first obvious thing [they] want to do is get it out of view, so [the narcotics are] kicked up underneath the seat." Underneath the back seat on the passenger side of the patrol car, Bock found a "balled-up napkin" containing approximately 14 grams of powder cocaine in a "clear, plastic baggy" and 14 pills of ecstasy. Bock explained that because cocaine users "always [have] small amounts," he sought to charge appellant with "possession with intent to deliver based on the large amount and the packaging" of the narcotics he found in the patrol car. On cross-examination, Bock explained that he did not mention the undercover officers in his offense report because he "didn't want to jeopardize" an ongoing investigation. He admitted that he had never "specifically seen [appellant] in possession of" narcotics and did not process the bags or the napkin containing the narcotics for fingerprints.

Legal Sufficiency

In three points of error, appellant argues that the evidence is legally insufficient to support his convictions for possession with intent to deliver because his connection to the narcotics found in the patrol car is based on "speculative theory," no narcotics were found on his person, and he did not own the car in which the bag of crack cocaine was found.

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 any "rational trier of fact 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). 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. *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.*

To establish the unlawful possession of a controlled substance, the State must show that a defendant (1) exercised care, custody, control, or management over the controlled substance and (2) he knew he possessed a controlled substance. TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(38), 481.112(a), 481.113(a); *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). To prove possession with intent to deliver, the State must prove that the defendant (1) exercised care, custody, control, or management over the controlled substance, (2) intended to deliver the controlled substance to another, and (3) knew that the substance in his possession was a controlled substance. TEX. HEALTH & SAFETY CODE ANN. § 481.002(38) (Vernon Supp. 2008), §§ 481.112(a), 481.113(a); *Parker v. State*, 192 S.W.3d 801, 805 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

Texas courts have identified "many non-exhaustive factors" that may demonstrate a link to contraband. *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). These factors include (1) the defendant's presence when a search is conducted, (2) whether the narcotics were in plain view, (3) the defendant's proximity to and the accessibility of the narcotics, (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 defendant attempted to flee, (8) whether the defendant made furtive gestures, (9) whether there was an odor of contraband or narcotics, (10) whether other contraband or narcotic paraphernalia was present, (11) whether the defendant owned or had the right to possess the place where the narcotics were found, (12) whether the place in which the narcotics 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). These factors constitute "a shorthand way of expressing what must be proven to establish that [narcotics] were possessed knowingly." *Roberson*, 80 S.W.3d at 735. The number of linking factors present is not as important as the "logical force they create to prove" that an offense was committed. *Id.* Other factors we have considered include whether there were other persons present at the time of the search and whether the amount of contraband was large enough to indicate the defendant knew of its existence. *Classe v. State*, 840 S.W.2d 10, 12 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd); *Ex parte Stowe*, 744 S.W.2d 615, 617 (Tex. App.—Houston [1st Dist.] 1987, no pet.). Despite this list of factors, there is no set formula necessitating a finding of an affirmative link, but rather, affirmative links are established by the totality of the circumstances. *Sosa v. State*, 845 S.W.2d 479, 483 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

The State need not show that a defendant exercised exclusive control over the controlled substance, but, when a defendant does not have exclusive control, the State must show additional affirmative links between the defendant and the contraband. *Cedano v. State*, 24 S.W.3d 406, 411 (Tex. App.—Houston [1st Dist.] 2000, no pet.). The affirmative links must raise a reasonable inference that the defendant knew of and controlled the contraband. *Dickerson v. State*, 866 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). These additional facts may include the proximity of the defendant to the contraband and its accessibility or visibility to the defendant. *Id.* at 769. Although the defendant must be affirmatively linked to the controlled substance, this link need not exclude every other reasonable theory except his guilt. *Id.*

Intent to deliver a controlled substance may be established through circumstantial evidence, including evidence that the defendant possessed the contraband. *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.). Courts have considered several factors in determining such intent, including the following: (1) the nature of the location at which the defendant was arrested; (2) the quantity of contraband in the defendant's possession; (3) the manner of packaging; (4) the presence or lack thereof of drug paraphernalia (for use or sale); (5) the defendant's possession of large amounts of cash; (6) the

defendant's status as a narcotics user; and (7) evidence of narcotics transactions. *Williams v. State*, 902 S.W.2d 505, 507–08 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see also Moreno v. State*, 195 S.W.3d 321, 325 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *Gabriel v. State*, 842 S.W.2d 328, 331–32 (Tex. App.—Dallas 1992), *aff'd*, 900 S.W.2d 721 (Tex. Crim. App. 1995). The number of factors present is not as important as the logical force the factors have in establishing the elements of the offense. *Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). An oral expression of intent is not required, and "[i]ntent 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) (en banc). Expert testimony by experienced law enforcement officers may be used to establish the defendant's intent to deliver. *See Mack*, 859 S.W.2d at 529.

In his first two points of error, appellant argues that the evidence is legally insufficient to support his conviction for possession of the powder cocaine and ecstasy found in the officers' patrol car because Officer Turner would have found any narcotics on him when Turner performed the "pat-down" search of appellant for weapons before placing him in the patrol car. Appellant further argues that because the officers were "worried for their safety" and there were no "factors that might cause [the] officers to be distracted," Turner's weapon search would have been thorough enough to discover any narcotics. Appellant notes that no

fingerprints were found on the bags or the napkin containing the narcotics and no personal items of appellant were found with the narcotics in the patrol car. As a result, appellant asserts that his connection to the narcotics in the patrol car is based on "speculative theory."

Officer Bock testified that he thoroughly searched, cleaned, and vacuumed out the patrol car before starting his shift without finding any narcotics. Officer Turner testified that although he patted appellant down for weapons before detaining him, his "main concern [was] officer[] safety," and he wanted to leave the scene "as quickly as possible." Both officers testified that appellant was the only person that they arrested that night, and Bock testified that he found the narcotics underneath the seat in the patrol car where appellant was placed. The officers arrested appellant as he was leaving a suspected "drug house," and they found him in possession of $800 in cash. In a similar case, the Texas Court of Criminal Appeals held that there was legally sufficient evidence to support a defendant's conviction because the evidence showed that no controlled substance was beneath the back seat of a patrol car before the defendant was placed in it. *Williams v. State*, 784 S.W.2d 428, 429–30 (Tex. Crim. App. 1990).

Thus, viewing all of the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have inferred that the defendant deposited the controlled substance beneath the seat. *Id.* Accordingly,

we hold that the evidence is legally sufficient to support appellant's conviction for the narcotics found in the patrol car. *See id*; *Goracki v. State*, No. 01-01-00101-CR, 2002 WL 537972, at *2–3 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002) (mem. op.) (not designated for publication) (holding evidence legally sufficient to link defendant to narcotics found in patrol car where officer searched car before his shift and narcotics were found "in close proximity to where appellant was sitting").

We overrule appellant's first two points of error.

In his third point of error, appellant argues that the evidence is legally insufficient to establish that he possessed the narcotics found in the glove compartment of Williams' car because the car did not belong to him and the narcotics were not found on his person. He argues that because the conditions were too dark and the car windows were tinted, Officer Turner could not have seen him place the narcotics into the glove compartment. He asserts that Officer Bock was in a better position to watch him and Bock's failure to notice appellant place narcotics into the glove compartment indicates that the narcotics did not belong to him.

However, Officer Turner testified that he approached Williams' car "between the passenger and the driver's side door" and the front windows were not heavily tinted. Officer Bock testified that he was focused on Williams during the stop. Standing less than two feet from appellant, Officer Turner saw appellant toss

"a slab of crack" into the glove compartment, which was illuminated by a light therein. Furthermore, the evidence revealed that appellant was leaving a suspected "drug house," appellant had $800 in cash on his person, and Williams appeared to have no knowledge of the narcotics. It is the role of the jury to weigh the evidence, evaluate the credibility of the witnesses, and draw reasonable inferences. *Williams*, 235 S.W.3d at 750.

Given this evidence, a reasonable trier of fact could have concluded that the narcotics found in the glove compartment belonged to appellant. *See Evans*, 202 S.W.3d at 612 & n.12 (listing defendant's presence, defendant's proximity and accessibility to narcotics, presence of other narcotics, and defendant's possession of large amount of cash as evidence tending to link defendant to narcotics). Accordingly, we hold that the evidence is legally sufficient to support appellant's conviction for the narcotics found in the glove compartment.

We overrule appellant's third point of error.

Conclusion

We affirm the judgments of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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