Affirmed and Memorandum Opinion filed March 23, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00977-CR

THOMAS JOSEPH GAMELIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1150111

MEMORANDUM OPINION

Appellant Thomas Joseph Gamelin appeals his conviction for the felony offense of possession of a controlled substance with intent to deliver, challenging the legal and factual sufficiency of the evidence to support the conviction. We affirm.

I. Factual and Procedural Background

Police officers in a patrol car observed appellant driving a vehicle. A routine computer check revealed that the vehicle's license plate was associated with an outstanding city warrant. The officers followed the vehicle as it turned into a motel parking lot and parked behind the motel. According to one of the officers, the area was

considered a "hot spot" for criminal activity. The officers activated the patrol car's emergency lights and approached the vehicle. When one of the officers requested appellant's driver's license and proof of insurance, appellant, the vehicle's sole occupant, did not produce either document.

The officers ordered appellant to exit the vehicle, placed him under arrest, and handcuffed him. The officers observed that as appellant walked to the patrol car, he moved in a smooth, stiff-legged manner as if he were gliding. Based on their training, the officers believed that appellant's gait was indicative that he was attempting to conceal something. The officers searched appellant and felt a large, hard lump between his buttocks. The officers loosened his belt, shook his shorts, and observed a large, clear plastic bag fall from appellant's shorts.

The bag contained six separate, smaller bags, and the contents of the bags appeared to be crack cocaine. A field test confirmed that the substance in the bags was cocaine. Subsequent lab tests revealed that the package contained 13.5 grams of cocaine. Based on their training, the officers believed that the separate packaging and the amount of narcotics involved was not consistent with the packaging or quantity typically associated with personal use. The officers did not recover any narcotics paraphernalia.

Appellant was charged by indictment with the felony offense of possession of a controlled substance with intent to deliver, to which he pleaded "not guilty." At trial, appellant's brother Michael testified that the cocaine belonged to him and that appellant had taken the package of cocaine during an argument, placed it in his shorts, and planned to dispose of it to prevent Michael from abusing the narcotics.

The jury found appellant guilty as charged. After finding two enhancement paragraphs to be true, the trial court assessed punishment at forty years' confinement.

II. ANALYSIS

In a single issue, appellant challenges the legal and factual sufficiency of the evidence to support that he knowingly possessed cocaine with the intent to deliver. A

person commits an offense if he knowingly possesses, with intent to deliver, a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon 2003 & Supp. 2009). Cocaine is considered a controlled substance. *See id.* § 481.102(3)(D) (Vernon 2003 & Supp. 2009).

In evaluating a legal-sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether the reviewing court believes the State's evidence or believes that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury, as the trier of fact, "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence in a neutral light and inquire whether we are able to say, with some objective basis in the record, that a conviction is "clearly wrong" or "manifestly unjust" because the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 414–17 (Tex. Crim. App. 2006). It is not enough that this court harbor a subjective level of reasonable doubt to overturn a conviction that is founded on legally sufficient evidence, and this court cannot declare that a conflict in the evidence justifies a new trial simply because it disagrees with the jury's resolution of that conflict. *Id.* at 417. If this court determines the evidence is

factually insufficient, it must explain in exactly what way it perceives the conflicting evidence greatly to preponderate against conviction. *Id.* at 414–17. Our evaluation should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See Fuentes*, 991 S.W.2d at 271. In conducting a factual-sufficiency review, we discuss the evidence appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

Possession

"'Possession' means actual care, custody, control or management." TEX. HEALTH & SAFETY CODE ANN. § 481.002(38) (Vernon 2003 & Supp. 2009). To prove unlawful possession of a controlled substance, the State must establish that the accused (1) exercised care, control, or management over the contraband, and (2) knew the substance was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). The elements of possession may be proven through direct or circumstantial evidence, although the evidence must establish that the accused's connection with the substance was more than fortuitous. *Id.* at 405–06. Evidence must affirmatively link the accused to the offense so that one reasonably may infer that the accused knew of the contraband's existence and exercised control over it. *Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Courts have identified a non-exhaustive list of factors that may help to show an accused's affirmative links to a controlled substance, including (1) the accused's presence when a search is conducted, (2) whether the contraband was in plain view, (3) the accused's proximity to and accessibility of the narcotic, (4) whether the accused was under the influence of narcotics when arrested, (5) whether other contraband or narcotics were found in the accused's possession, (6) any incriminating statements the accused made when arrested, (7) whether the accused made furtive gestures or attempted to flee, (8) any odor of contraband, (9) the presence of other contraband or paraphernalia, (10) the accused's ownership or right to possess the place where the narcotics were found, (11) whether the place where the narcotics were found

was enclosed, (12) whether the accused was found with a large amount of cash, and (13) whether the conduct of the accused indicated consciousness of guilt. *See Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006). We also have considered the presence of a large quantity of contraband as a factor affirmatively linking an appellant to the contraband. *See Olivarez v. State*, 171 S.W.3d 283, 292 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Although no set formula necessitates a finding of an affirmative link sufficient to support an inference of knowing possession, affirmative links are established by the totality of the circumstances. *Hyett*, 58 S.W.3d at 830. The number of factors present is not as important the logical force the factors create to prove the accused knowingly possessed the controlled substance. *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

In this case, the police officers testified that they observed appellant walking in such a manner that they believed he was attempting to conceal something. Appellant's unusual gait attracted their attention and aroused their suspicions. When they searched appellant, they felt a hard lump between appellant's buttocks, and they observed a clear plastic bag containing 13.5 grams of cocaine fall from appellant's shorts during their search, suggesting appellant's intent to conceal the substance, knowing it was illegal contraband. Appellant's brother testified that appellant took the narcotics from his brother's possession and concealed them in his pants before leaving the apartment that the brothers shared. These factors, especially when combined, can be considered evidence of appellant's possession and knowledge of the presence and nature of the contraband and his control over the contraband that would support a trier of fact's conclusion in that regard. *See Evans*, 202 S.W.3d at 166.

Appellant points to the testimony of his brother, Michael, as evidence that the narcotics belonged to Michael and that appellant possessed the narcotics only because he removed them from Michael's possession in an attempt to prevent substance abuse. For support, appellant points to the brief passage of time between his arrest and his departure from the apartment. Though appellant was arrested shortly after leaving the apartment

and in close proximity to the apartment the brothers shared, the jury, as the trier of fact, serves as the sole judge of the credibility of the witnesses and of the strength of the evidence, and the jury was free to believe or disbelieve any portion of the witnesses' testimony. *See Sharp*, 707 S.W.2d at 614; *Fuentes*, 991 S.W.2d at 271. The jury could have believed the officers' testimony and disbelieved Michael's testimony. *See Evans*, 202 S.W.3d at 165 (providing that jury was not required to believe evidence that narcotics belonged to someone else).

Viewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have found beyond a reasonable doubt that appellant had knowledge of the contraband and exercised control over it. *See id.* at 166; *Moreno v. State*, 195 S.W.3d 321, 326 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Viewing the evidence in a neutral light, we are not able to say with some objective basis in the record that the jury's determination that appellant possessed the narcotics is clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury's verdict. *See Moreno*, 195 S.W.3d at 326 (holding evidence was legally and factually sufficient to support conviction for possession of heroin with intent to deliver). We therefore hold that the evidence is legally and factually sufficient to support the element of possession of a controlled substance.

Intent to Deliver

"Deliver" means to transfer, actually or constructively, a controlled substance to another. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon 2003). Intent to deliver a controlled substance can be proven through circumstantial evidence, such as the quantity of the narcotics possessed or evidence that an accused possessed the contraband. *Patterson v. State*, 138 S.W.3d 643, 649 (Tex. App.—Dallas 2004, no pet.). "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).

Factors that a reviewing court may consider in determining intent to deliver include (1) the nature of the location at which the accused was arrested, (2) the quantity of the contraband in the accused's possession, (3) the manner of packaging of the narcotics, (4) the presence of or lack of narcotics paraphernalia for either use or sale, (5) large amounts of cash, or (6) the accused's status as a narcotics user. *Moreno*, 195 S.W.3d at 325. The quantity of factors implicated in our analysis is not as important as the logical force of the factors in establishing the elements of the offense. *Id.*

The record reflects that appellant possessed a plastic bag containing approximately 13.5 grams of cocaine, divided between six smaller plastic bags. Expert testimony by experienced law enforcement officers, as in this case, may be used to establish an accused's intent to deliver. *See Mack v. State*, 859 S.W.2d 526, 529 (Tex. App.—Houston [1st Dist.] 1993, no pet.). Although appellant claims that the quantity of cocaine was minimal and indicative of an amount intended for personal use, one of the officers testified that the quantity of cocaine found in appellant's possession was not consistent with an amount intended for personal use. *See id.* at 528–29 (holding possession of 8.9 grams of crack cocaine was a sufficient amount from which to infer an intent to deliver). Each of the officers testified that the geographic area where the incident occurred was a known "hot spot" for criminal activity and narcotics trafficking. The manner of packaging of the contraband suggests that the smaller bags of cocaine were intended for sale or distribution. The record also indicates that the officers on the scene did not recover any paraphernalia used to consume narcotics in appellant's possession or in the vehicle. *See Moreno*, 195 S.W.3d at 326 (concluding absence of paraphernalia for consumption supports evidence to show intent to deliver); *Mack*, 859 S.W.2d at 528, 529 (concluding that absence of paraphernalia for smoking or using cocaine supports an intent to deliver rather than an intent to consume). Had such paraphernalia been found, it could have been considered as a factor indicating intent to make personal use of the contraband. The lack of such paraphernalia tends to show intent to deliver.

In viewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have determined beyond a reasonable doubt that appellant possessed the narcotics with intent to deliver. *See Moreno*, 195 S.W.3d at 326. Likewise, when viewing the evidence in a neutral light, we are not able to say with some objective basis in the record that appellant's conviction is clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury's verdict. *See id*. Therefore, we hold that the evidence is legally and factually sufficient to support appellant's conviction for possession of cocaine with intent to deliver.

We overrule appellant's sole issue and affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Brown, and Senior Justice Hudson.[*]
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[*] Senior Justice H. Harvey Hudson sitting by assignment.