Affirmed and Memorandum Opinion filed September 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00370-CR
NO. 14-09-00371-CR

KENNETH RAY ROBINSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause Nos. 1119670, 1119671

MEMORANDUM OPINION

A jury convicted appellant Kenneth Ray Robinson of two counts of possession with intent to deliver a controlled substance and sentenced him to sixteen years' confinement in cause number 1119670 and ten years' confinement in cause number 1119671, the sentences to run concurrently. In two issues, appellant claims that the indictment in cause number 1119670 is fundamentally defective and that the evidence to support both his convictions is legally and factually insufficient. We affirm.

I. BACKGROUND

In early June 2007, Houston Police Department (HPD) undercover narcotics officers Jerry McClain and Michael Baccus were conducting surveillance at the Safeguard Pharmacy located in Houston. The officers were watching for "pill crews" after receiving complaints of possible illegal narcotics activity at the location. According to the officers, a "pill crew" generally consists of a "crew leader" who hires indigent or homeless people to pose as legitimate patients requiring medication. The crew leader takes the "patient" to a clinic where the doctor will issue a prescription with little or no medical information. The patient then gets the prescription filled, usually at smaller, independent pharmacies, and delivers the prescription medication to the crew leader in exchange for cash. The pills are then packaged for distribution on the street.

At trial, Officers McClain and Baccus testified that they noticed appellant in a red Toyota Camry in the parking lot of the pharmacy. They saw him receiving prescription bags from several pharmacy patrons. They also saw him place several bags of prescription medications in the trunk of his car underneath the trunk liner. After watching these individuals deliver their prescriptions to appellant, the officers saw appellant leave the pharmacy parking lot. Shortly after driving away from the pharmacy, appellant changed lanes without signaling, and a marked patrol unit pulled him over. The patrol officers determined that appellant and one of his passengers, Rena Woods, had outstanding warrants. The other passenger, Sylvia Imihire, had a possible parole violation. All three were arrested.

McClain and Baccus arrived at the scene of the traffic stop and conducted an inventory search of the vehicle. The officers testified that they discovered six prescription bags concealed in the trunk underneath the liner. Each bag contained one bottle of Hydrocodone (dihydrocodeinone) and one bottle of Xanax (alprazolam). None of the prescriptions were in appellant's or Woods's name. One of the prescription bags, however, was issued to Imihire. A wallet, belonging to Woods, which contained around

$4,000 in cash, was also discovered. Both officers testified that they never saw appellant exchange money with any of the individuals who delivered the prescriptions to him. An HPD criminalist confirmed the weight and type of the drugs.

Appellant's mother testified that all the individuals to whom the prescriptions had been issued were either family members or friends. Appellant testified that his brother's girlfriend, Rena Woods, called him early in the morning on June 5; she claimed she was sick and needed him to take her to the doctor. Appellant agreed, and Woods picked him up at around 9:00 a.m. at his house. Appellant explained that he drove Woods and Sylvia Imihire to a doctor's office. According to appellant, another car, with the five other people to whom the prescription medications found in appellant's trunk were issued, also went with appellant to the same doctor. Appellant and Woods waited outside the doctor's office for two hours for the six individuals to complete their visits with the doctor. Even though she was sick, Woods did not see the doctor that day.

Appellant testified that after leaving the doctor's office, he and the driver of the other vehicle drove to the Safeguard Pharmacy. Appellant and Woods again waited in the car while the passengers went inside the pharmacy. Appellant claimed that each of the prescription holders passed their prescription bags to Woods, not to him. He admitted that he placed the bags in the trunk of the car; however, he stated that he did not place them under the lining or conceal them in any way. He further testified that he planned on meeting with the prescription holders, all of whom he knew and all of whom were sick (although appellant could not describe any symptoms of their illnesses), to give them their prescriptions. He was unable to give them their medications, however, because he was stopped by the police officers for the traffic violation.

The jury charge authorized the jury to convict appellant as either a principal or party. The jury found appellant guilty and, after a punishment hearing, sentenced him to sixteen years' confinement for possession with intent to deliver over 400 grams of

dihydrocodeinone[1] and to ten years' confinement for possession with intent to deliver between 28 to 200 grams of alpazolam.[2] This appeal followed.

II. ANALYSIS

1. Sufficiency of the Indictment

In his first issue, appellant asserts that the indictment in cause number 1119670, possession with intent to deliver dihydrocodeinone, is fundamentally defective because it failed to allege each and every element of an offense. However, appellant made no objections to the sufficiency of the indictment before the start of his trial.

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon 2005). Thus, when an indictment alleges that (1) a person (2) committed an offense over which the trial court has jurisdiction, the defendant is required to object to defects before the date of trial, or he forfeits any complaint about its sufficiency thereafter. *See Teal v. State*, 230 S.W.3d 172, 178–80, 182 (Tex. Crim. App. 2007).

Here, the indictment states:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, KENNETH RAY ROBINSON, hereafter styled the Defendant, heretofore on or about JUNE 5, 2007, did then and there unlawfully, knowingly possess with intent to deliver a controlled substance, namely, DIHYDROCODEINONE, weighing at least 400 grams by aggregate weight, including any adulterants and dilutants.

[1] Cause No. 1119670.

[2] Cause No. 1119671.

The indictment alleges both a person—appellant—and an offense—possession with intent to deliver a controlled substance. Therefore, because appellant failed to timely object, he has forfeited any right to complain about defects in the indictment. Accordingly, we overrule his first issue.

2. Legal Sufficiency of the Evidence

In his second issue, appellant concedes that he exercised control over the medications discovered in his trunk but asserts that the evidence is legally insufficient to establish that he knew these medications were contraband.[3] In other words, appellant does not challenge the sufficiency of the evidence that he possessed the medications,[4] but challenges only the sufficiency of the evidence to establish that he knowingly possessed contraband. *See, e.g., Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005) ("To prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband.").

When reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). We do not ask whether we believe the evidence at trial established guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). We may not re-weigh the evidence and substitute our judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). In our review, we afford great deference to the fact finder's

[3] Appellant states in his brief, "Appellant concedes he exercised control over both the Hydrocodeinone and Alprazolam but he maintains on appeal, as he did at trial, that he did not know the medications in his trunk were contraband."

[4] A person commits an offense if he knowingly or intentionally possesses with the intent to deliver a material containing alprazolam (Xanax) without a valid prescription. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.114(a), 481.104(a)(2) (Vernon 2010). A person also commits an offense if he knowingly or intentionally possesses with the intent to deliver a material containing dihydrocodeinone (Hydrocodone) without a valid prescription. *See id.* §§ 481.112(a), 481.102(3)(a).

responsibility to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences regarding basic to ultimate facts. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We presume the fact finder resolved any evidentiary conflicts in favor of the prosecution and defer to that resolution. *Id.* at 133 n. 13. Finally, because appellant was charged as both a principal and a party to these offenses, we will review the evidence to determine whether it is legally sufficient under either theory. *Cf. Guevara v. State*, 152 S.W.3d 45, 49, 52 (Tex. Crim. App. 2004) ("[W]hen the trial court's charge authorizes the jury to convict on more than one theory, as it did in this case, the verdict of guilty will be upheld if the evidence is sufficient on any one of the theories.").

Appellant focuses his argument on whether he was sufficiently "linked" to the contraband. *See, e.g., Evans v. State*, 202 S.W.3d 158, 161–62 & n.9 (Tex. Crim. App. 2006) (discussing the "affirmative links" rule, which is a shorthand phrase for the large variety of circumstantial evidence that may establish *knowing possession* of contraband); *Roberts v. State*, —S.W.3d—, 2010 WL 2301293, at *2 (Tex. App.—Houston [14th Dist.] Jun. 10, 2010, no pet.) ("[P]resence or proximity combined with other direct or circumstantial evidence (e.g. 'links') may be sufficient to establish the elements of possession beyond a reasonable doubt."). But because appellant has conceded that he exercised control over the medications, i.e., that he knowingly possessed the prescription medications, this discussion is not relevant to his contention that he was unaware that what he possessed was *contraband*.

Viewing the evidence in the light most favorable to the jury's verdict, appellant, accompanied by Rena Woods and Sylvia Imihire, drove to a doctor's office. There, appellant and Woods waited in the car while Imihire and five others, who met them there, went into the doctor's office. Appellant and Woods waited for about two hours while these six individuals, all related to or friends with appellant and his family, obtained identical prescriptions for Xanax and Hydrocodone from this doctor. Appellant then

drove Woods and Imihire to the Safeguard Pharmacy. At the pharmacy, undercover narcotics officers McClain and Baccus saw numerous individuals walk up to the vehicle appellant was driving and hand him white prescription bags. They also saw appellant place these prescription bags in the trunk of the vehicle, underneath the liner. After appellant drove away from the pharmacy, he was stopped by a marked patrol unit for failure to use a turn signal. The three occupants of the vehicle were arrested for various outstanding warrants. After arriving at the scene, McClain and Baccus performed an inventory search of the vehicle. They discovered six prescription bags, each containing one bottle of Hydrocodone and one bottle of Xanax concealed underneath the liner in the trunk of the car. The bottles contained a total of 720 Hydrocodone pills and 360 Xanax pills. The officers testified that it is common for "pill crews" to illegally obtain narcotics with prescriptions issued to individuals posing as legitimate patients. Additionally, Officer Baccus testified, "Quantities in an amount obtained in this fashion, through experience, that is usually packaged up for later purposes for street level distribution."[5] None of the prescriptions were issued to appellant or Woods. The officers also found a wallet belonging to Woods that contained around $4,000 in cash.

Although appellant testified that he did not know that these medications constituted "contraband," there is sufficient evidence from which the jury could infer the contrary. Moreover, based on the basic facts described above, the jury could reasonably infer that appellant, as either a principal or party, possessed both dihydrocodeinone and alprazolam with the intent to deliver. *See Clewis*, 922 S.W.2d at 133. We therefore overrule appellant's second issue.

[5] *Cf. Reed v. State*, 158 S.W.3d 44, 49 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (stating that intent to deliver may be supported by evidence of an appellant's possession of a large amount of drugs and testimony from narcotics officer that such a large amount is generally not for personal use).

Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.

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