Affirmed and Memorandum Opinion filed February 1, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00764-CR

JUAN JOSE SERRATO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1144276

MEMORANDUM OPINION

Appellant, Juan Jose Serrato, was charged by indictment with the felony offense of possession with intent to deliver a controlled substance, namely, cocaine. *See* Tex. Health & Safety Code § 481.112(a), (f) (West 2010). The jury found appellant guilty. It assessed punishment at twenty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a $250,000 fine. Tex. Health & Safety Code § 481.112(f). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2007, officers from the narcotics division of the Houston Police Department ("HPD") started surveillance on the house located at 7829 Williford. The police had received information that large amounts of cocaine were being trafficked at that residence. The police continued the surveillance on December 1, 2007, and again on December 3, 2007.[1]

The December 3 surveillance began at approximately 1:00 p.m. For the duration of the December 3 surveillance, the police observed a single person enter the Williford house. That person did not carry anything into the house and left the house after fifteen minutes.

At 3:45 p.m. on December 3, Officer Robert Bradley, an HPD narcotics officer and the officer in charge of the investigation, obtained a knock-and-announce search warrant for the 7829 Williford house. This warrant authorized a search for "property described in the affidavit that the suspected party, or others in control of the suspected place, are alleged to be concealing and to have in his/her possession in violation of the laws of the State of Texas, to wit: cocaine." Once Officer Bradley had obtained the search warrant, he notified Sergeant William Rios, the HPD narcotics officer conducting the surveillance, that the warrant had been signed. Soon thereafter, an entry team of five officers in raid jackets, accompanied by additional uniformed HPD officers, entered the house.

As the officers approached the house, they observed two individuals in a vehicle in the driveway and an individual on the front porch. Two of these individuals were later identified as Gabino Ortuno and Manuel Ortuno. The third individual was not identified during appellant's trial. Once inside the house, the officers found Magali Serrato, appellant's wife, and their two children in the main entrance. Appellant was discovered in one of the residence's bedrooms. The police eventually moved all of these people into the living room of the house.

[1] The evidence indicates that the surveillance during that four-day period was not continuous, but only occurred during a part of each day.

With the house cleared, the police then searched each of the rooms in the house. In the dining room, the police found an open Playstation box sitting on the floor. Inside the box was a plastic grocery bag containing four kilogram bricks of cocaine. In the kitchen, the police found a small quantity of cocaine inside a microwave oven and several ounces of black tar heroin inside the freezer. In the bedroom where the police initially detained appellant, the police discovered an unlocked metal lockbox under a bed. The lockbox held $1,450 in cash, two small .22-caliber handguns with the chambers detached, and .22-caliber bullets. Sitting on top of a dresser in that same bedroom, the police found appellant's Social Security card and a Western Union money-transfer receipt. The receipt indicated that appellant had sent $200 to his grandmother. In the second bedroom of the house, the police found a digital scale, rubber bands, and duct tape. All of these items were admitted into evidence during appellant's trial.

Andrea Robinson is the evening shift supervisor for Harris County Pretrial Services. She testified during appellant's trial that appellant, while being interviewed by a former employee of Harris County Pretrial Services, gave 7928 Williford as his home residence.[2]

Appellant's wife, Magali Serrato, testified as part of appellant's defense. Ms. Serrato confirmed that appellant lived at 7829 Williford on December 3, 2007. She also explained that appellant paid half the rent while Manuel Ortuno paid the other half. Ms. Serrato explained that Mr. Ortuno was her mother's boyfriend and was also living at 7829 Williford on December 3, 2007. Ms. Serrato also explained that her mother had leased the house and had previously lived there, but had left and returned to her home country. Ms. Serrato testified that appellant normally worked as an electrician's helper but he had been unemployed for about a month prior to December 3, 2007.

Ms. Serrato then turned to the events of December 3, 2007; Ms. Serrato testified that her family had departed the house in appellant's vehicle in the morning to shop and go for

[2] Ms. Robinson was the only witness who testified that appellant's residence was located at 7928 Williford.

a walk. Ms. Serrato, while not certain as to the exact time, testified they did not return to the house until late in the afternoon. Ms. Serrato also testified that upon their return to the house, they went into one of the bedrooms to eat and watch a movie with their children. Ms. Serrato told the jury there was a problem with the DVD player and while appellant tried to fix the problem, she went to get juice for the children. At that point in time, Ms. Serrato testified she saw a man she did not know at the time but subsequently learned was named Gabino, walk into the house along with two other people to see Mr. Ortuno. According to Ms. Serrato, Gabino was carrying a closed Playstation box, which he set on the floor between the kitchen and the dining room. Ms. Serrato then testified that she returned to the bedroom and a few minutes later, the police entered the house.

Ms. Serrato asserted that her family had no knowledge of the narcotics that the police found in the house. However, Ms. Serrato admitted that she was aware of the lockbox under the bed, which she said belonged to her mother. She claimed the $1,450 inside the lockbox belonged to her family and constituted their savings and funds borrowed from others. She denied ownership of the two handguns and testified they belonged to her mother and that her mother had left them in the house when she moved out.

The jury found appellant guilty and assessed his punishment at twenty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a $250,000 fine. This appeal followed.

DISCUSSION

Is the evidence sufficient to support appellant's conviction?

Appellant asserts three issues on appeal. As explained below, we address them together.

A. The standard of review and applicable law.

In his first issue appellant challenges the legal sufficiency of the evidence supporting his conviction. In his second issue appellant asserts the trial court erred when

it denied his motion for an instructed verdict of acquittal. Because we address a challenge to the denial of a criminal defendant's motion for instructed verdict as a challenge to the legal sufficiency of the evidence, we need not address appellant's second issue separately from his first. *See Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990), *overruled on other grounds*, *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991); *Jacobs v. State*, 230 S.W.3d 225, 229 n. 6 (Tex. App.—Houston [14th Dist.] 2006 no pet.).

In his third issue on appeal, appellant asserts the evidence is factually insufficient to support his conviction. However, because a majority of the judges of the Texas Court of Criminal Appeals recently determined that "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt," we need not separately address appellant's third issue. *See Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.).[3] In addition, because the standard of review is the same, we do not separately refer to legal or factual sufficiency.

In a sufficiency review, we view all 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 crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L. Ed. 2d 569 (1979); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). The jury, as the sole judge of the credibility of the witnesses, is free to believe or disbelieve all or part of a witness' testimony. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses to, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Reconciliation of conflicts in the evidence is within the

[3] Nonetheless, this does not alter the constitutional authority of the intermediate courts of appeal to evaluate and rule on questions of fact. *See* TEX. CONST. art. V, § 6(a) ("[T]he decision of [courts of appeal] shall be conclusive on all questions of fact brought before them on appeal or error.")

jury's discretion, and such conflicts alone will not call for reversal if there is enough credible evidence to support a conviction. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). An appellate court may not re-evaluate the weight and credibility of the evidence produced at trial and in so doing substitute its judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Inconsistencies in the evidence are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

To demonstrate possession of cocaine with intent to deliver, the State is required to show that (1) appellant knowingly or intentionally; (2) possessed; (3) cocaine; (4) in an amount greater than four hundred grams; (5) with the intent to deliver the cocaine. *See* Tex. Health & Safety Code § 481.112(a), (f). In order to prove the possession element of the offense, the State is required to present evidence that appellant had actual care, custody, control, or management over the contraband and that appellant knew it was contraband. *See id.* § 481.002(38) (West 2010); *Deshong v. State*, 625 S.W.2d 327, 329 (Tex. Crim. App. 1981); *Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Possession may be proven by direct or circumstantial evidence that the accused exercised care, control, or management over the substance knowing it was contraband. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). The State must affirmatively link the accused and the contraband from the totality of the circumstances, demonstrating the accused's knowledge of and control over the contraband. *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995). An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. *Olivarez*, 171 S.W.3d at 291. The State is not required to prove exclusive possession of the contraband for conviction. *Roberson v. State*, 80 S.W.3d 730,

735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (*citing Harvey v. State*, 487 S.W.2d 75, 77 (Tex. Crim. App. 1972)).

When the accused is not in exclusive possession of the place where the contraband is found, then additional, independent facts and circumstances must link the defendant to the contraband in such a way that it can reasonably be concluded that he had knowledge of the contraband and exercised control over it. *Id.* Texas courts have identified many non-exhaustive factors that may help to show an affirmative link to the contraband: (1) the defendant is present when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of 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 defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether the contraband was found in a place owned by the accused or a place he had the right to possess; (11) whether the contraband was found in an enclosed space; (12) whether the defendant possessed a large amount of cash at the time of the arrest; (13) the amount of contraband found; (14) whether the amount was large enough to indicate the defendant knew of its existence; and (15) any conduct of the accused indicating consciousness of guilt. *Olivarez*, 171 S.W.3d at 291; *Taylor v. State*, 106 S.W.3d 827, 831 (Tex. App.—Dallas 2003, no pet.). The number of linking factors present is not as important as the logical force they create to prove the crime was committed. *Olivarez*, 171 S.W.3d at 291.

In a possession-with-intent-to-deliver case, the "intent to deliver" element may be proved by circumstantial evidence, such as the quantity of drugs possessed, the manner of packaging, and the presence of the accused in a drug house. *Taylor*, 106 S.W.3d at 831. Further, intent to deliver is a question of fact for the jury to resolve, and it may be inferred from the acts, words, or conduct of the accused. *Id.*

B. Analysis.

In his appeal, appellant contends the evidence is insufficient to support his conviction because "the State did no more than establish [a]ppellant's legitimate and otherwise justified presence at the residence where the contraband was found."

We disagree that, when viewed in the light most favorable to the verdict, the evidence is insufficient to support appellant's conviction. First, there is no dispute that appellant was an active resident of the house where the contraband was found. Even if there were, we conclude a rational jury could have believed the evidence mentioned above established that appellant resided at the Williford house. In addition, we hold that a rational jury could have concluded from the evidence presented by the State that appellant was guilty beyond a reasonable doubt. This evidence included the police testimony that four bricks of cocaine, totaling more than 4 kilograms, or 8.8 pounds, were found in an open box in plain view on the dining-room floor. The jury could also have reasonably concluded that the contraband had been inside the house for a significant amount of time as the police conducting the surveillance testified they did not see appellant leave the house that day and that no one arrived at the house carrying a box. Based on this evidence a rational jury could have concluded that appellant was aware of its existence.

A rational jury could also have concluded that appellant was not an innocent bystander but instead possessed the cocaine with the intent to distribute. This evidence includes the large amount of cocaine found in the house. It also includes the fact that the presence of contraband was not isolated to a single location in the house but was also found in two other common areas of the house: a microwave oven and the freezer. This evidence includes the discovery of a large amount of cash and two handguns in the same bedroom where appellant was initially detained as well as the discovery of a digital scale, rubber bands, and duct tape in another bedroom. The evidence also included testimony that each of these items are commonly associated with and used in drug trafficking. A rational jury could have concluded that, based on the evidence recounted above, appellant

knowingly possessed the four kilograms of cocaine found in the dining room with the intent to distribute it. Therefore, we hold the evidence is sufficient to support appellant's conviction. *See Moreno v. State*, 195 S.W.3d 321, 326 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (holding that evidence that police found 49.4 grams of heroin along with a large quantity of heroin balloons during a search of appellant's vehicle was sufficient to support conviction for possession with intent to deliver); *see also Porter v. State*, 873 S.W.2d 729, 733 (Tex. App.—Dallas 1994, pet. ref'd) (holding evidence was sufficient to link the defendant to cocaine found in apartment which was not under the defendant's exclusive control, where the defendant was found near the cocaine, which was in plain view in apartment and no one was seen entering or leaving the apartment immediately before the police officers entered). Having determined the evidence is sufficient to support the jury's conviction of appellant, we overrule appellant's issues on appeal.

CONCLUSION

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

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Brown.
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