Affirmed and Memorandum Opinion filed August 16, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00147-CR

JOSEPH TERRELL THOMPSON, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1067626

MEMORANDUM OPINION

Appellant, Joseph Terrell Thompson, was convicted by a jury of possession with intent to deliver a controlled substance, namely cocaine. *See* Tex. Health & Safety Code Ann. §§ 481.102(3)(D); 481.112(d) (West 2010). Appellant was sentenced to fifteen years' confinement by the trial court. Appellant has brought forth three points of error; we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2006, Officer William McPherson and Officer Mark Smith of the Houston Police Department were dressed in uniform and in a marked patrol car.[1]

[1] At the time of trial, McPherson had been promoted to Sergeant, but was an officer at the the time

Appellant was driving his green Ford Expedition and his friend, Michael Johnson, was a passenger in the front seat.

The State's Account

Officers McPherson and Smith both testified that they heard the music emanating from appellant's vehicle before they saw it drive by where they were parked. The officers intended to perform a traffic stop due to the volume of the sound. Officer McPherson stated he also witnessed appellant make a right hand turn without using his turn signal. According to the officers, the Expedition parked at a gasoline station in a location where someone could pump gas into the car. Both officers testified they turned on the patrol car's emergency lights and parked their patrol car directly behind the Expedition.

Officers McPherson and Smith contend that upon stopping, appellant opened his car door and he ducked his head after the door opened. Officer McPherson asserted he saw appellant's right arm make a "dropping/throwing motion." Meanwhile, Johnson left the Expedition and started walking towards the convenience store attached to the gas station. The officers separated; Officer McPherson approached the driver and Officer Smith followed the passenger.

Officer McPherson testified that as he approached the Expedition, he asked appellant to step to the front of the vehicle. Officer McPherson stated that appellant complied. As Officer McPherson began checking appellant for weapons, he looked down and saw a plastic bag with "a fairly large amount of beige rock-like substance" located an "inch or two" behind the front tire. Officer McPherson explained that he did not believe the bag could belong to anyone but appellant because it was not crushed. He stated that if it had been on the ground previously, appellant would have run over the bag with his tire.

After noticing the bag, Officer McPherson handcuffed appellant because he thought the contents of the bag were a controlled substance. Officer McPherson testified that

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of the incident. We refer to McPherson as "Officer" throughout this opinion.

while he was handcuffing appellant but before he had acknowledged the bag's presence, appellant told him, "That's not my shit." Officer McPherson explained "shit" is slang for narcotics.

Officer Smith testified he rejoined Officer McPherson when he saw appellant being handcuffed. Officer Smith picked up the bag and performed a field test on its contents. The field test showed cocaine was present in the bag. When weighed, the contents of the bag were 17.2 grams. Appellant also had $752 in cash on his person at the time of the arrest.

Johnson was questioned by Officer Smith about the bag at the gas station, but Officer Smith determined he did not have any relevant information. Johnson was never arrested.

Kari Adams, an employee of the Houston Police Crime Lab, testified that a former employee tested the contents of the bag in 2006, but she retested them in 2007 because that employee was no longer employed by the Crime Lab. She stated she received a sample weighing 15.4 grams.[2] She tested 4.4 grams of the substance in a "representative sample" and determined the tested item was crack cocaine.

The Defense Account

Johnson testified he was the passenger in the Expedition that day. He stated the car was coming from another direction than the police officers claimed. He also argued police could not have been located where they said they were because the area was chained off; consequently, they could not have seen the Expedition when they claimed to have witnessed it driving by.

Johnson also asserted that the officers were not behind the Expedition when he exited the vehicle, but only arrived as he started to go inside the store. According to

[2] Officer McPherson testified he weighed the substance at the time of arrest and it was 17.2 grams. No explanation is provided in the record for the discrepancy in weights.

Johnson, the police car was "more on the side and more toward the front" of the Expedition. This contradicted the officers' testimony that they were located behind the Expedition. In addition, Johnson testified that one of the police officers found the bag behind the Expedition, not next to the front tire.

Trial Procedure

At trial, appellant requested a hearing on the admissibility of his prior convictions if he chose to testify on his behalf. Appellant had been convicted in 2000 of three separate offenses of delivery of a controlled substance and served five years in prison as a result. Appellant urged the trial court to prohibit use of the convictions to impeach him because he believed the prejudicial effect of the convictions would outweigh the probative value of impeachment. The trial court denied his motion. Appellant did not testify.

During the jury charge conference, appellant asked that the charge also include the lesser included offenses of: (1) possession of less than a gram of a controlled substance; (2) possession of one to four grams of a controlled substance; (3) possession with intent to deliver less than a gram of a controlled substance; (4) possession of one to four grams of a controlled substance with an intent to deliver. *See* Tex. Health & Safety Code Ann. §§ 481.102(3)(D); 481.112(a)-(c). The trial court denied appellant's motion.

DISCUSSION

Appellant brings forth three points of error on appeal.

I. Did the Trial Court Err By Denying Appellant's Request to Include Lesser Included Charges in the Jury Charge?

Appellant contends the trial court erred by refusing to issue a jury charge giving instructions on the lesser included offenses listed above.

A. Standard of Review

A defendant is entitled to an instruction on a lesser included offense if: (1) it is a lesser included offense of the charged offense; and, (2) there is some evidence in the record that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser offense. *Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006). In making this determination, we must review all the evidence admitted at trial. *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000); *Paz v. State*, 44 S.W.3d 98, 100 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd). If more than a scintilla of evidence from any source raises the issue that the defendant is guilty only of the lesser included offense, the instruction must be submitted. *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999); *Paz*, 44 S.W.3d at 100.

B. Analysis

The State does not contest the first prong of the requirements. Thus, we turn our attention to the second prong. Appellant argues there are two reasons the trial court should have included instructions on the lesser included offenses: (1) appellant cross-examined Adams and raised "issues with the reliability of the quantity and the process;" and, (2) Adams did not test the entire sample, so she could not state equivocally that the bag held only cocaine.

Adams testified she was not the first crime lab analyst to test the substance in the bag. In 2006, another analyst had performed that work, but Adams stated the other analyst no longer worked in the lab. Appellant questioned Adams about whether the previous analyst was fired. She responded, "I'm under the impression he resigned." When asked if she knew whether the previous analyst was fired for failure to follow procedure, Adams explained that she did not know the reasons that the analyst had left. On the basis of this testimony alone, we cannot conclude a rational jury would have concluded that appellant could have been guilty of only a lesser included offense. *Guzman*, 188 S.W.3d at 188.

Appellant was charged with possession of between four and two hundred grams of cocaine, including adulterants or dilutants. Tex. Health & Safety Code Ann. § 481.112(d). Adams testified that she retested the substance after the other analyst left the Houston Crime Lab. The total weight of the substance Adams weighed was 15.4 grams. Adams stated she performed a "spot test" on 4.4 grams of the substance in the bag and confirmed it was cocaine.

Appellant claims that because Adams only tested 4.4 grams of the contents of the bag, she could not conclude the entire bag was filled with cocaine. Even assuming *arguendo* appellant's theory is true, Adams testified she performed chemical tests to prove 4.4 grams of the substance was cocaine. Thus, she provided evidence that the bag contained between four and two hundred grams of cocaine, including adulterants or dilutants, as required by statute. Tex. Health & Safety Code Ann. § 481.112(d). As a result, there was no reason a rational jury should have determined appellant could only have been guilty of a lesser included offense of possession of less than four grams of cocaine. *Guzman*, 188 S.W.3d at 188.

We overrule appellant's first point of error.

II. Did the Trial Court Err By Denying Appellant's Motion to Prohibit the Prosecution from Impeaching Him with Prior Convictions if He Testified?

Appellant contends that the trial court committed reversible error when it decided that he would be subject to impeachment with his three prior felony convictions if he chose to testify. *See* Tex. R. Evid. 609.

Appellant did not testify at his trial and did not provide any evidence of what his testimony would have been. Consequently, we do not reach the merits of appellant's claim. *Jackson v. State*, 992 S.W.2d 469, 479 (Tex. Crim. App. 1999). To preserve error on a trial court's ruling that permits the State to impeach a defendant with prior convictions, the defendant must have testified. *Id.* A reviewing court cannot review

testimony that does not exist for indicia of whether a cross examination question was improper. *Id.* We overrule appellant's second point of error.

III. Was the Evidence Insufficient to Support a Conviction?

Appellant argues the State did not meet its burden to prove that the cocaine found was possessed by appellant.

A. Standard of Review

Five judges on the Texas Court of Criminal Appeals have 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." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion).[3]

In a sufficiency review, we view all evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *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 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 reevaluate the weight and credibility of the evidence produced at trial and in so doing substitute its judgment for that of the fact finder.

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

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.).

B. Analysis

Appellant contends the evidence is insufficient to show he exercised care, custody or control over the bag of cocaine. *See Poindexter v. State*, 153 S.W.3d 402, 405-406 (Tex. Crim. App. 2005).

When a person is not found to be in exclusive possession of contraband, the State must affirmatively link the defendant to the item. *Id.* at 406. Courts have identified a non-exhaustive list of factors that may help show an accused is linked to a controlled substance or illegal firearms, including: (1) the defendant's presence 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 other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the contraband was 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. *See, e.g., Evans v. State,* 202 S.W.3d 158, 162 n. 12 (Tex. Crim. App. 2006). It is not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial. *Evans*, 202 S.W.3d 158, 161.

Appellant was present when the cocaine was found and did have close proximity and access to the place where the narcotics were located on the ground. Both police officers testified that appellant made a ducking motion when he stopped driving. Officer McPherson also testified that appellant opened the vehicle's door and made a "dropping/throwing motion" while he ducked down. Officer McPherson stated that the drugs could not have been present prior to the appellant driving into the gas station because they were found directly behind his tire. Thus, if they had been lying on the ground, appellant's car would have crushed the bag.

Furthermore, Officer McPherson testified that appellant made the statement disclaiming ownership of the drugs before he picked up the bag or asked appellant any questions about it. As a result, the jury could have inferred appellant was making incriminating statements. Finally, appellant carried a large amount of cash on his person when he was arrested.

Johnson refuted much of the testimony above, but the jury was the sole judge of the credibility of the witnesses. *Jones v. State*, 984 S.W.2d at 257. The jury impliedly believed the testimony of the officers above that of Johnson. *Id.* We resolve all conflicts in favor of the verdict. *Curry*, 30 S.W.3d at 406. We conclude a reasonable jury could have determined there was sufficient evidence to find appellant guilty beyond a reasonable doubt. *Muniz*, 851 S.W.2d at 246; *Harris*, 164 S.W.3d at 784.

We overrule appellant's third point of error.

CONCLUSION

Having overruled each of appellant's points of error, we affirm the trial court's verdict.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Brown, and Christopher.

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