

Affirmed and Memorandum Opinion filed August 11, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00406-CR

DONNELL LEON YOUNG, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 08CR3565**

MEMORANDUM OPINION

A jury found appellant, Donnell Leon Young, Jr., guilty of possession of a controlled substance, cocaine, with intent to deliver in an amount of four grams or more but less than 200 grams. The court assessed punishment at twenty-five years confinement. In a single issue, appellant contends the evidence was legally insufficient to support his conviction. We affirm.

I. BACKGROUND

On December 1, 2008, La Marque Police Department dispatcher Delores Dillon received an anonymous call reporting possible narcotics activity involving a gray vehicle and a maroon vehicle at 202 Edgar Street. Dillon dispatched Officers Michael Keleman and Harvey Walton to investigate. When Keleman arrived, he observed a maroon vehicle parked across the street at 201 Edgar. A man, later identified as appellant, was standing by the partially-open door on the driver's side of the vehicle. As Keleman started to exit his patrol car, appellant began to walk toward the residence at 201 Edgar. After several oral commands to stop, appellant complied and, pursuant to Keleman's previous instruction, placed his hands on his head. Walton started to search appellant, but he "bolted" and ran.

According to Keleman, he chased appellant west across Edgar, behind a residence, then north toward Nashby Street, where appellant again ran behind a residence. Appellant stopped at a white fence behind 1924 Nashby, with Keleman close behind. Appellant turned, moved sideways, and then tossed a baggie under the house. Keleman deployed his taser; however, appellant jumped the fence and ran, eventually returning to Edgar Street, where he was apprehended. After appellant was arrested, Keleman returned to 1924 Nashby with Officer Danielle Herman, where they saw a baggie under the house. They were unable to retrieve the baggie because it was about six to ten feet under the residence. They then called the fire department, and firemen used a pole to retrieve the baggie.

When appellant was booked into jail, he had \$1,325 in cash on his person. The cash was folded in a large wad consisting of four \$100 bills, several \$50 bills, thirty-one \$20 dollar bills, fifteen \$10 bills, and several \$1 bills. According to the forensic analyst, the baggie contained 11.53 grams of cocaine.

II. SUFFICIENCY OF THE EVIDENCE

In a single issue, appellant contends the evidence was legally insufficient to support his conviction of possession of cocaine with intent to deliver.¹ The crux of his argument is that there was insufficient evidence to support the possession element of the charged offense.²

A. Standard of Review and Applicable Law

When reviewing sufficiency of evidence, we view all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality op.). We may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *Id.* at 899, 901; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (expressing that jury may choose to believe or disbelieve any portion of the testimony). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

In a prosecution for possession of a controlled substance, the State must prove beyond a reasonable doubt that the defendant (1) exercised actual care, custody, control, or management over the substance and (2) knew that the substance was contraband. *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006). Whether the evidence is direct or circumstantial, it must establish that the defendant's connection with the drug was more than fortuitous. *Id.* Mere presence at the location where drugs are found is thus insufficient, by itself, to establish actual care, custody, or control of those drugs. *Id.* at

¹ Five judges on the Texas Court of Criminal Appeals recently held that only one standard should be employed to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926 (Cochran, J., concurring).

² In this court, appellant does not challenge the sufficiency of the evidence to support intent to deliver.

162. However, presence or proximity, when combined with other evidence, either direct or circumstantial (e.g., affirmative links), may be sufficient. *Id.* An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. *See Washington v. State*, 902 S.W.2d 649, 652 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). However, the link need not be so strong that it excludes every other reasonable hypothesis except the defendant's guilt. *Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995). Further, it is not the number of links that is dispositive, but rather it is the logical force of all of the evidence, direct and circumstantial. *Evans*, 202 S.W.3d at 162. Relevant factors that may affirmatively link an accused to contraband include, but are not limited to (1) the defendant's proximity to, and the accessibility of, the narcotic, (2) whether the defendant attempted to flee, (3) whether the defendant made furtive gestures, (4) whether the defendant was found with a large amount of cash, and (5) whether the conduct of the defendant indicated a consciousness of guilt. *See Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

B. Application to the Facts

Viewed in the light most favorable to the verdict, the following evidence established that appellant possessed the 11.53 grams of cocaine found under the residence at 1924 Nashby:

- Keleman's and Walton's testimony that appellant ran from them at some point before they had completed a pat-down search of appellant (factor two);
- Keleman's testimony that he chased appellant, who eventually stopped at a fence behind 1924 Nashby where Keleman observed appellant toss a baggie under the house (factors one, three, and five);
- Keleman's and Herman's testimony that, after appellant was apprehended, they went to 1924 Nashby where they observed a baggie, which Keleman estimated was about six to ten feet under the house (factor one);

- Keleman’s testimony that State’s Exhibit 1A, a baggie established by forensic evidence to contain 11.53 grams of cocaine, was the baggie Keleman saw appellant throw (factor one);
- Herman’s testimony that appellant’s arrest on Edgar and the discovery of the baggie at 1924 Nashby happened “pretty simultaneously” (factor one);
- Keleman’s testimony that they requested assistance from the fire department when they were unable to retrieve the baggie;
- The dispatch report showing Keleman arrived on Edgar Street at 1:14 pm, and the fire engine was dispatched at 1:23 pm, a span of only nine minutes, which would have included time expended in the initial contact with appellant, the chase preceding disposal of the baggie, and time Keleman and Herman attempted to retrieve the baggie before requesting the fire department’s assistance (factor one);
- Cagnon’s testimony that, when appellant was searched during the booking process, a large wad of bills totaling \$1,352 was found on his person (factor four).

The present case is similar to *Floyd v. State*, in which the court of criminal appeals concluded the evidence was sufficient to support the defendant’s conviction of unlawful possession of a dangerous drug. 494 S.W.2d 828 (Tex. Crim. App. 1973). In *Floyd*, a police officer was patrolling a public park where there were three to four hundred people. *Id.* at 828–29. The officer began looking for Floyd based on information from a confidential informant. *Id.* at 829. When the officer first saw him, Floyd was on a bicycle. *Id.* The officer pursued Floyd in his patrol car for approximately 120 yards, at which point Floyd dismounted his bicycle in the restroom area. *Id.* The officer then observed Floyd take a plastic baggie from his front pocket, run to the door of the women’s restroom, step inside the restroom, and throw the baggie full of what looked like pink capsules inside a partially boarded window of the restroom. *Id.* As the officer ran up to the restroom, Floyd came out, mounted his bicycle, and rode around the restroom and concession area. *Id.* The officer finally arrested Floyd in an area outside the view of the

restroom entrance. *Id.* The arrest required three to four minutes, but within a span of approximately two minutes, the officer sent a park employee to stand in front of the restroom to ensure that no one entered. *Id.* After Floyd's arrest and arrival of another squad-car, the officer entered the restroom and found a baggie full of capsules on the window sill. *Id.*

The court of criminal appeals reasoned:

In the case at bar the State offered direct evidence that appellant (1) entered the ladies' restroom, (2) threw a baggie containing pink capsules into a partially boarded window, (3) fled from Officer Brown, and that (4) a bag containing capsules of LSD was found in the boarded window of the restroom. The State relied on circumstantial evidence only to prove that the bag of pink capsules identified as LSD was the same bag that appellant was observed throwing into the restroom. Thus, appellant was affirmatively linked with a baggie of pink capsules found in the ladies' restroom of Tietze Park in Dallas.

The question remaining is whether the baggie of red capsules that appellant was seen to have thrown into the window of the ladies' restroom was the same as the bag of capsules of LSD found in the window. The fact that the dangerous drug was found in the exact location that Officer Brown saw appellant throw the baggie was probative fact that the bags were the same. Likewise, appellant's flight was also probative value in establishing guilt[.] Although the restroom area was unobserved for a few minutes following appellant's arrest, when a jury, advised of the restrictions which the law places on circumstantial evidence, reaches the conclusion upon evidence properly before them that the accused is guilty, it is not for the reviewing court to support their findings by its own unless it is able to point to weaknesses, omissions, or inconsistencies in the evidence which destroy its cogency. The evidence reflected that the contraband was found where it was observed to have been thrown by appellant.

Id. at 830 (citations omitted). The court of criminal appeals then held that (1) an affirmative link had been shown between Floyd and the LSD and (2) the evidence was sufficient to support his conviction. *Id.*

Similar to *Floyd*, the evidence in the present case reflected that the cocaine was found where it was observed to have been thrown by appellant. Accordingly, the evidence was sufficient to support appellant's conviction.³

For the preceding reasons, we overrule appellant's sole issue and affirm the judgment.

/s/ Charles W. Seymore
Justice

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

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³ Appellant argues that two aspects of the testimony indicate Keleman did not see appellant throw the cocaine under the house. First, Keleman's attention would necessarily have been on appellant rather than the object. In the context of this argument, appellant represents that Keleman never described the object appellant threw. Keleman, however, described a "baggie tossed from [appellant's] hand, tossed under the house." Second, appellant contends that, given the size and weight of the baggie of cocaine, it would have been physically impossible for appellant to have thrown it six to ten feet under the house. It was the jury's role to consider and weigh these aspects of the evidence. See *Orsag v. State*, 312 S.W.3d 105, 115 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) ("The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, and it is the exclusive province of the jury to reconcile conflicts in the evidence.").