Affirmed and Memorandum Opinion filed March 3, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00358-CR

RON CHRISTOPHER JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 13-DCR-062222

MEMORANDUM OPINION

Appellant was convicted of possessing less than one gram of cocaine. On appeal, he raises three issues: (1) whether the evidence is legally sufficient to support the conviction, (2) whether the trial court abused its discretion by denying a motion to suppress, and (3) whether the trial court erroneously refused a requested jury instruction. We overrule each issue and affirm the trial court's judgment.

BACKGROUND

Several officers went to a hotel to investigate an anonymous tip of narcotics activity. When they arrived, the officers were directed by staff at the front desk to the third floor. The officers rode the elevator up to that floor, and when they exited the elevator, there was a strong scent of marijuana in the hallway. The officers followed the scent to a room and knocked on the door.

A woman named O'Ryan Sneed opened the door, and an even stronger scent of marijuana emanated from the room. The officers asked Sneed to step out into the hallway to preserve whatever evidence was inside. Sneed complied with the request. As Sneed was stepping out, appellant emerged from the bathroom, which was located next to the door. The officers asked appellant to step out of the room as well, and he too complied.

One of the officers then performed a protective sweep of the room to ensure that no other people were inside. During his sweep, the officer saw a burnt marijuana cigarette, or joint, sitting in plain view on a nightstand. The officer asked if there was any more marijuana in the room, and Sneed confirmed that there was.

When the officers learned that Sneed had registered the room in her name, they asked her for consent to search the room, which she granted. Appellant remained silent. The record does not reveal whether appellant anticipated that the officers would search through his personal belongings inside of the room.

During their search, the officers found several items sitting on top of an air conditioning unit at the back of the room. The items included a fresh marijuana bud, two straws, and a yellow-tinted baggie containing small amounts of a white powdery substance. On the floor next to these items, the officers found men's

shoes, men's clothes, and a parcel addressed to appellant. The parcel was already open, and inside it was a box for a cellphone, which matched the model belonging to appellant. The officers opened the cellphone box, and inside they found two morphine pills and another yellow-tinted baggie containing small amounts of a white powdery substance.

The two baggies were submitted for testing at a forensics lab. A chemist collected a trace amount of the white powdery substance from the baggies and determined that the substance in the baggies was cocaine. The chemist also determined that there was cocaine residue on the two straws collected from atop the air conditioning unit.

Appellant was charged with possession of cocaine. He was not charged with respect to any other items found in the hotel room.

During the trial, appellant moved to suppress the evidence of cocaine. He asserted that the search was unreasonable because it was warrantless and unsupported by probable cause and exigent circumstances. The trial court denied the motion. No findings of fact were entered into the record.

Appellant did not testify in his own defense, but his counsel put forth a defensive theory that largely blamed Sneed for the cocaine. The jury rejected that defense and convicted appellant as charged. The trial court assessed punishment at two years' imprisonment, suspended for two years.

SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction.

Standard of Review. When reviewing the sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine

whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense. *See Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Analysis. To obtain a conviction for unlawful possession of a controlled substance, the State must prove (1) that the accused exercised care, custody, control, or management over the controlled substance; and (2) that the accused also knew that the substance was contraband. *See* Tex. Health & Safety Code § 481.115; *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). There is no requirement that the accused must possess a usable amount of the controlled substance. *See Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995).

The evidence of possession must establish that the accused's connection with the substance was more than fortuitous. *See Poindexter*, 153 S.W.3d at 405–06. When the accused is not in exclusive possession of the place where the contraband is found, the State must show additional affirmative links between the accused and the contraband. *See Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

An affirmative link generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it. *Id.* Courts have identified the following factors that may show an accused's affirmative links to the contraband: (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 the accessibility of the narcotic, (4) whether the accused was under the influence of narcotics when arrested, (5) whether the accused possessed other contraband or narcotics when arrested, (6) whether the accused made incriminating statements when arrested, (7) whether the accused attempted to flee, (8) whether the accused made furtive gestures, (9) whether there was an odor of contraband, (10) whether other contraband or drug paraphernalia were present, (11) whether the accused owned or had the right to possess the place where the narcotics were found, (12) whether the place where the narcotics were found was enclosed, (13) whether the accused was found with a large amount of cash, and (14) whether the conduct of the accused indicated a consciousness of guilt. *See Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006).

Affirmative links are established by the totality of the circumstances, and no set formula necessitates a finding of an affirmative link sufficient to support an inference of knowing possession. *See Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The number of factors present is not

as important as the logical force the factors create to prove the accused knowingly possessed the controlled substance. *See Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

The cocaine in this case was found in two separate baggies in a room jointly occupied by appellant and a woman. One of the baggies was in a parcel bearing appellant's name, which affirmatively linked appellant to the contraband. The other baggie was nearby, sitting atop an air conditioning unit next to articles of men's clothing. Because appellant was the only man in the hotel room, the jury could have reasonably concluded that appellant possessed that baggie as well.

Appellant contends that there is no evidence that any single baggie contained cocaine, but the record supports the opposite finding. The officers testified that both baggies contained a white powdery substance. The State also asked the chemist what substance he found "in the little baggies," and the chemist answered that "the residue contains cocaine." Viewed in the light most favorable to the verdict, this testimony supports a finding that both baggies contained cocaine.

Appellant also contends that there is no evidence that he knowingly possessed the cocaine. Appellant bases this argument on the chemist's testimony that only trace amounts of cocaine were collected from the two baggies.

The chemist said that the weight of the cocaine residue was less than 0.01 grams—so small that it could not be measured on the chemist's scale. The Court of Criminal Appeals has held that when the quantity of a substance is so small that it cannot be measured, "there must be evidence other than mere possession to prove that the defendant knew the substance in his possession was a controlled substance." *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) (citing *Shults v. State*, 575 S.W.2d 29, 30 (Tex. Crim. App. [Panel Op.] 1979)).

The jury could have inferred that appellant knowingly possessed cocaine, even in trace amounts, by the evidence of other drugs and drug paraphernalia. The jury heard, for instance, that the cocaine was found among other contraband—namely, a joint, a fresh marijuana bud, and two morphine pills. The jury also heard that the cocaine was found next to two straws, which are commonly used to snort cocaine, and the straws contained cocaine residue. These circumstances support a rational inference that appellant knew the white powdery substance was cocaine.[1] *See Victor v. State*, 995 S.W.2d 216, 221 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) ("The fact that the cocaine was found in an item of drug paraphernalia or an item closely associated with drug use is evidence of knowing possession."); *Levario v. State*, 964 S.W.2d 290, 294 (Tex. App.—El Paso 1997, no pet.) (concluding that the evidence was sufficient to show that the defendant had knowingly possessed a controlled substance where the defendant was found alongside a spoon used for cooking cocaine, a straw with white residue, and the butt of a marijuana cigarette).

We overrule appellant's first issue.

MOTION TO SUPPRESS

In his second issue, appellant argues that the trial court abused its discretion by denying his motion to suppress.

[1] Recently, in *Williams v. State*, No. 14-14-00700-CR, — S.W.3d —, 2015 WL 6560521, at *3 (Tex. App.—Houston [14th Dist.] Oct. 29, 2015, pet. filed), this court reversed a conviction for possession of less than one gram of cocaine where the evidence was "undisputed that the cocaine could not be seen, weighed, or measured." There, trace amounts of cocaine where collected from a crack pipe, but the cocaine residue inside the pipe was not visible to the naked eye. *Id.* at *1. The evidence of knowing possession is much stronger in appellant's case because the white powdery substance was visible to the naked eye and because the cocaine was found among other drugs and drug paraphernalia.

Standard of Review. We review the trial court's ruling on a motion to suppress under a bifurcated standard. *See Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). First, we afford almost total deference to a trial court's determination of historical facts. *Id.* The trial court is the sole trier of fact and judge of the credibility of witnesses and the weight to be given their testimony. *Id.* The trial court may believe or disbelieve all or part of a witness's testimony, even if that testimony is uncontroverted, because the court has the opportunity to observe the witness's demeanor and appearance. *Id.*

If the trial court makes express findings of fact, we view the evidence in the light most favorable to the trial court's ruling and determine whether the evidence supports the factual findings. *Id.* Where, as here, findings of fact are not entered into the record, we must assume that the trial court made all findings of fact that support its ruling, as long as those findings are supported by the record. *Id.*

Second, we review de novo the trial court's application of the law to the facts. *Id.* We will sustain the trial court's ruling if the ruling is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.*

Appellant's Arguments. Appellant contends that the trial court's ruling is erroneous for three reasons. First, appellant asserts that he "had an expectation of privacy in that hotel room and standing to challenge the search of both the room and his personal belongings." Second, appellant asserts that "the officers in the case had neither probable cause nor exigent circumstances to justify the warrantless entry and search." And third, appellant asserts that "Sneed's consent to search the room was not sufficiently attenuated from the initial unlawful entry." We begin with the question of standing.

Standing. Under the United States and Texas Constitutions, individuals are afforded the right to be protected from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tex. Const. art. 1, § 9. These rights are personal, however, meaning that an individual only has standing to challenge an unreasonable search if his own rights have been violated. *See State v. Granville*, 423 S.W.3d 399, 405 (Tex. Crim. App. 2014). An individual cannot assert these rights vicariously and challenge a search because the State has infringed the rights of another. *Id.*

A person has standing to contend that a search or seizure was unreasonable if (1) the person has a subjective expectation of privacy in the place or object searched, and (2) society is prepared to recognize that expectation as objectively reasonable. *See State v. Betts*, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013). Because the defendant has greater access to the relevant evidence needed to establish standing, the defendant carries the burden of proving that his expectation of privacy was legitimate. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

Courts consider several factors when deciding whether a person has demonstrated a reasonable expectation of privacy. Those factors include: (1) whether the person had a proprietary or possessory interest in the place or object searched; (2) whether the person's presence in or on the place searched was legitimate; (3) whether the person had a right to exclude others from the place or object; (4) whether the person took normal precautions, prior to the search, which are customarily taken to protect privacy in the place or object; (5) whether the place or object searched was put to a private use; and (6) whether the person's claim of privacy is consistent with historical notions of privacy. *See Granados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002). This list is not exhaustive, and no single factor is dispositive. *Id.*

The standing issue was raised during the motion to suppress and both sides presented argument to the trial court on this question. Because the trial court denied the motion to suppress without entering findings of fact, we can presume that the trial court made an implied finding that appellant did not have standing to challenge the search if that finding is supported by the record. For the reasons explained below, we conclude that the record supports a finding that appellant did not have a reasonable expectation of privacy in the hotel room registered to Sneed. However, there is nothing in the record upon which a finding could be made that appellant lacked an expectation of privacy in the parcel bearing his name.

The Hotel Room. The law is well-established that a registered guest in a hotel room has standing to challenge an unreasonable search of that hotel room. *See Stoner v. California*, 376 U.S. 483, 490 (1964). The Court of Criminal Appeals has recognized that visitors of the registered guest can also have standing, but only in certain situations. If the visitor is an overnight guest, the Court has held that the visitor has standing because the visitor shares the registered guest's reasonable expectation of privacy in the hotel room. *See Ex parte Moore*, 395 S.W.3d 152, 160 (Tex. Crim. App. 2013). However, if the visitor is a casual guest, there for just a temporary or brief stay, the Court has indicated that the visitor may not have standing. *Id.* at 160–61.

A court must evaluate the totality of the circumstances when deciding whether the visitor had a reasonable expectation of privacy. *Id.* at 160. Important factors to consider are whether the visitor had clothes or other belongings in the hotel room, or whether there was other evidence suggesting that the visitor intended to stay the evening. *Id.*

The evidence in this case showed that Sneed had registered the hotel room in her name, and that she had been staying there for thirty days when the officers

executed their search. Appellant was not a registered guest of the hotel, he presented no evidence of when he arrived in Sneed's room, and he did not claim to be an overnight visitor. The officers searched Sneed's room at approximately 12:30 in the afternoon, and that timing does not favor a suggestion that appellant had stayed overnight or that he intended to stay overnight.

Appellant emphasizes the evidence that he had clothing in the hotel room. But aside from the testimony that appellant had "a pair of men's Nike tennis shoes," there was no description of what the clothing was, or whether there was enough clothing from which a fact finder could reasonably conclude that appellant was staying in the hotel room overnight. There was also no testimony indicating whether appellant was in a state of dress or undress when the room was searched. If appellant were fully dressed, the clothing on the floor of the room could be indicative of an overnight stay. However, if appellant were not fully dressed, the clothing could suggest that appellant was just a casual visitor.

One of the officers was questioned whether he saw "anything to indicate that the defendant was someone other than a temporary guest." His answer was "no." Viewed in the light most favorable to the trial court's ruling, this testimony supports a finding that appellant was just a casual visitor and that he had no reasonable expectation of privacy in Sneed's hotel room. Therefore, it was within the zone of reasonable disagreement for the trial court to conclude that appellant lacked standing to contest the search of the hotel room.

The Parcel. Although appellant did not testify during the motion to suppress hearing, the evidence established that he had a clear property interest in the parcel. An officer testified that the parcel was addressed to appellant, and that "it had been sent to him through either the mail or other businesses, like UPS or FedEx, or

something like that." The parcel was not seized from the crime scene, but the officer recalled that Sneed's name was not on it.

The State argued at trial that appellant did not have an expectation of privacy in the parcel because it was open, rather than sealed. That argument overlooks two important considerations. First, the parcel was stored in a private hotel room, next to appellant's other belongings, rather than out in the open where anyone could take it. Second, the officer testified that he had to open the cellphone box inside of the parcel, which indicates that the cellphone box was closed. These considerations demonstrate that appellant took normal precautions to exclude others from the parcel and to protect the privacy of its contents.

There was no evidence indicating that, prior to the search, appellant gave away the parcel or was divested of his interests in the parcel. On the basis of this record, the trial court would have had no reason for finding that appellant lacked an expectation of privacy in the parcel.

We conclude that appellant had an expectation of privacy in the parcel, which society at large would recognize as legitimate. We therefore conclude that appellant had standing to challenge the search of the parcel. *See Esco v. State*, 668 S.W.2d 358, 361–62 (Tex. Crim. App. [Panel Op.] 1982) (holding that the defendant had a legitimate expectation of privacy in the contents of his briefcase, which was located in the trunk of a car owned by another, even though the defendant lacked standing to complain of the search of the car's interior).

The Searches. The remaining two arguments in appellant's brief focus on the legality of the protective sweep and whether Sneed voluntarily consented to a more thorough search of her room after the officer's initial entry. Appellant treats the protective sweep as an independent search, and argues that it was unreasonable because it was unsupported by probable cause and exigent circumstances.

Appellant cites case law showing that an anonymous tip and an odor of marijuana are insufficient by themselves to support probable cause. Appellant also explains that there was no exigency because the officer could not articulate a single factual basis for believing that a warrantless entry was needed to prevent the destruction of evidence. Appellant then argues that the officer's unlawful search tainted Sneed's consent to search the room more thoroughly, thereby rendering her consent involuntary.

Appellant's arguments fail to address the search of the parcel. Even if the initial entry was unlawful, the officer did not search the parcel during his protective sweep. The only contraband discovered during the initial entry was the burnt joint sitting on the nightstand, but appellant was not charged with possession of marijuana.

Appellant has not argued that Sneed's consent was broad enough in scope to include the parcel. Nor has he argued whether the officer had a reasonable belief that Sneed could provide third-party consent for a search that included the parcel. The State noted this omission in its brief,[2] but appellant has not replied to it. In effect, appellant has limited his argument in this court to challenging the search of Sneed's hotel room, a point foreclosed by the trial court's implied finding that appellant lacked an expectation of privacy in the hotel room.

Because appellant has presented no arguments regarding the search of the parcel—the only search for which he had standing to complain—we overrule his second issue.

[2] The State wrote: "Appellant does not argue that the female occupant's consent did not extend to his personal belongings."

CHARGE INSTRUCTION

In his third issue, appellant argues that the trial court erroneously refused a requested charge instruction under Article 38.23 of the Code of Criminal Procedure.

Standard of Review. We review a complaint of jury-charge error under a two-step process, considering first whether error exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error does exist, we then analyze that error for harm under the procedural framework of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

Analysis. Article 38.23 provides that no evidence unlawfully obtained may be admitted against the accused on the trial of a criminal case. *See* Tex. Code Crim. Proc. art. 38.23(a). An instruction pursuant to Article 38.23 instructs the jury that it must disregard the evidence if the jury believes, or has a reasonable doubt, that the evidence was unlawfully obtained. *Id.*

A defendant's right to an instruction under Article 38.23 "is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible." *See Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007). The defendant must satisfy three requirements before he may be entitled to the instruction: (1) the evidence heard by the jury must raise an issue of fact, (2) the evidence on that fact must be affirmatively contested, and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. *Id.* at 510.

Evidence to support the instruction may be raised "from any source," no matter whether the evidence is "strong, weak, contradicted, impeached, or unbelievable." *See Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004). If

there is no disputed fact issue, however, the legality of the conduct is determined by the trial judge alone, as a question of law. *See Madden*, 242 S.W.3d at 510.

Appellant argues that he was entitled to an instruction because the officers were unable to identify a factual basis for their belief that immediate entry was needed to prevent the destruction of evidence. Without evidence justifying the officers' entry, appellant argues that the reasonableness of the officers' beliefs should have been submitted to the jury.

Appellant's argument is unpersuasive because it does not involve any disputed issue of material fact. Appellant's complaint is really one about the legal significance of undisputed facts, a matter more properly left to the determination of the trial court, rather than the jury. *See Robinson v. State*, 37 S.W.3d 712, 719–20 (Tex. Crim. App. 2012). The trial court did not err by denying appellant's requested instruction.

We overrule appellant's third issue.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.
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