

**Affirmed and Memorandum Opinion filed May 5, 2016.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-15-00110-CR**

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**TERRANCE DEANDRE LEVINGSTON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 262nd District Court  
Harris County, Texas  
Trial Court Cause No. 1425672**

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**M E M O R A N D U M    O P I N I O N**

Appellant Terrance Deandre Levingston was convicted of third-degree felony possession of a controlled substance weighing more than one gram but less than four grams. Appellant pled true to two enhancement paragraphs and was sentenced to confinement in the Correctional Institutions Division of the Department of Criminal Justice for twenty-five years.

In a single issue, appellant contends the evidence is legally insufficient to sustain his conviction for possession of a controlled substance. Appellant's sole argument is that the State did not prove he possessed the substance because the only link between him and the substance was his operation of the vehicle in which the substance was found. Many affirmative links, combined with appellant's exclusive control of the vehicle and the volume of the substance seized, sufficiently link appellant to the substance. We therefore hold the evidence is legally sufficient for a rational juror to find beyond a reasonable doubt that appellant unlawfully possessed a controlled substance. We therefore affirm the trial court's judgment.

#### **BACKGROUND**

Officers Xavier Budd and Stephen Baines of the Houston Police Department testified that they were parked in the lot of a Fiesta supermarket in southeast Harris County when they heard a crash. The officers immediately drove to the nearby intersection, where they discovered the vehicle driven by appellant had crashed into another vehicle and then into a light pole. Appellant, who was the sole occupant of the vehicle, remained in the car and was noncompliant when approached by the officers. Upon opening the door of the vehicle and interacting with appellant, Officer Budd noticed a strong chemical smell emanating from the vehicle and testified that he recognized the smell as "similar to PCP or formaldehyde." Based on appellant's behavior during this interaction, both officers concluded that appellant was intoxicated.

Officer Budd testified that, as he removed appellant from the car, he noticed something fall from appellant's lap into the driver's seat where appellant had been sitting. After handcuffing appellant and escorting him to the patrol car, Officer Budd returned to the vehicle to collect the baggie, which he found to contain white

powder. Officer Budd gave the baggie to Officer Baines for safe keeping. Officer Budd and Officer Baines testified that neither the baggie nor the vehicle could have been tampered with by another party between the time that Officer Budd removed appellant and the time he returned to the car to collect the baggie.

Officer Baines ran the license plate and found that the car belonged to one of appellant's family members. The officers conducted a search of the car incident to appellant's arrest and collected what they believed to be a marijuana cigarette from the car's ashtray and other assorted items from the cabin. A chemist from the Houston Forensic Science Center confirmed that the white powder in the baggie was 1.45 grams of cocaine. The cigarette was not tested.

Appellant was tried and convicted by a jury of possession of a controlled substance of more than one gram but less than four grams. This appeal followed.

### ANALYSIS

In his sole issue, appellant asserts the evidence is legally insufficient to support his conviction because the only link connecting him to the contraband was his status as the driver of a vehicle he did not own. We therefore examine whether there is legally sufficient evidence for a rational fact finder to conclude beyond a reasonable doubt that appellant had knowledge of the cocaine and had actual care, custody, control, or management over it. *See Roberts v. State*, 321 S.W.3d 545, 548–49 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

#### **I. Standard of review and applicable law**

We review the sufficiency of the evidence under standards set forth in *Jackson v. Virginia*, considering the evidence in the light most favorable to the verdict and determining whether a rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt.

443 U.S. 307, 319 (1979); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005).

A person commits the third-degree felony offense of possession of a controlled substance if he knowingly or intentionally possesses a controlled substance, such as cocaine, in an amount between one and four grams. Tex. Health & Safety Code Ann. § 481.115(a), (c) (West 2010). “Possession” is defined as “actual care, custody, control, or management.” Tex. Penal Code Ann. § 1.07(a)(39) (West Supp. 2015). To prove unlawful possession of a controlled substance, the State must establish beyond a reasonable doubt that the accused “(1) exercised control, management, or care over the substance; and (2) knew the matter possessed was contraband.” *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). The elements of possession may be proved through either direct or circumstantial evidence, but the evidence must establish that the accused’s connection with the substance was more than fortuitous. *Id.* at 405–406.

To show more than a mere fortuitous connection, the evidence must affirmatively link the accused to the contraband by a showing that indicates the accused’s knowledge and control of the contraband. *Waldon v. State*, 579 S.W.2d 499, 501 (Tex. Crim. App. 1979). Mere presence of the accused at the scene of the offense is not enough to establish possession; the accused must exercise dominion and control over the thing allegedly possessed. *Menchaca v. State*, 901 S.W.2d 640, (Tex. App.—El Paso 1995, pet. ref’d) (citing *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985)). When the accused is not in exclusive control of the place where the contraband was discovered, the State must show additional facts and circumstances that affirmatively link him to the contraband and “[generate] a reasonable inference that the accused knew of the contraband’s existence and exercised control over it.” *Haggerty v. State*, 429

S.W.3d 1, 5–6 (Tex. App.—Houston [14th Dist.] 2013, pet. ref’d). Despite the long list of possible links, “there is no set formula of facts that necessitate a finding of an affirmative link sufficient to support an inference of knowing possession. Rather, affirmative links are established by a totality of the circumstances.” *Hyett v. State*, 58 S.W.3d 826, 830 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d).

**II. There is legally sufficient evidence that appellant knew of the cocaine’s existence and exercised control, management, or care over it.**

Having reviewed the record in light of these standards, we conclude that appellant’s status as the sole occupant and driver of the vehicle, as well as other independent facts, link appellant to the cocaine such that the jury could reasonably infer he had knowledge of the cocaine and exercised care and control over it.

**A. Appellant’s exclusive control of the vehicle and the volume of powder in the baggie supports an inference that appellant knew it contained contraband.**

Appellant contends that his conviction wrongly rests on his status as the “untimely and unfortunate driver of a family member’s vehicle.” We disagree because appellant’s status as driver and sole occupant establishes his exclusive control over the vehicle and its contents and supports an inference that he knew the vehicle contained contraband.<sup>1</sup> *Harmond v. State*, 960 S.W.2d 404, 406 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

The lynchpin of appellant’s argument is that he did not own the vehicle and, therefore, had no knowledge of its contents.<sup>2</sup> Lack of ownership, however, does

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<sup>1</sup> A defendant’s status as the driver of the vehicle is insufficient on its own to prove possession, but it can establish legal sufficiency when combined with other evidence. *Roberson v. State*, 80 S.W.3d 730, 736 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d).

<sup>2</sup> Appellant relies on *Tate v. State*, which reversed a conviction for possession of a controlled substance where the “only link between [appellant] and the syringe was that [appellant] was the driver and purported owner of the vehicle in which the syringe was found. . . .” 463 S.W.3d 272,

not preclude a finding that appellant exercised exclusive control over the place where the contraband was discovered. *Haggerty*, 429 S.W.3d at 6 (“An analysis as to exclusive possession does not necessarily turn on ownership; rather, the crucial inquiry is who exercised ‘actual care, custody, control or management.’”). Additionally, as in this case, “[w]hen a drug is found on the same side of the car where defendant is seated, it is not necessary to show ownership of the car.” *Boughton v. State*, 643 S.W.2d 147, 149 (Tex. App.—Ft. Worth 1982, no pet.).

Though appellant did not own the vehicle, he exercised exclusive control over the vehicle because he was the driver and sole occupant. *See Menchaca*, 901 S.W.2d at 652; *see also Boughton*, 643 S.W.2d at 149 (holding contraband found in key box attached to steering column was affirmatively linked to defendant because defendant was sole occupant of car and box was found on defendant’s side of car). The bag of cocaine was also found in plain view on the driver’s seat after falling from appellant’s lap, a location easily accessible to appellant. From such evidence, a rational trier of fact could infer that appellant knew it was a controlled substance. *See Harmond*, 960 S.W.2d at 406 (“Because appellant was exercising dominion and control over the car, an inference arises that he knew it contained contraband.”).

Additionally, a rational jury could infer from the volume of the contraband that appellant knew the baggie contained a controlled substance. *See Dickerson v. State*, 866 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1993, pet. ref’d)

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276 (Tex. App.—Ft. Worth 2015, pet. granted). *Tate* is factually distinguishable from this case, however, because multiple passengers were in the vehicle in *Tate*. Although *Tate* concluded that the drugs were accessible, proximate, and in plain view, the court held that these circumstances were insufficient because they applied equally to the other passengers. In contrast, appellant was the sole occupant of the vehicle in this case, providing evidence from which a reasonable fact finder could conclude appellant had exclusive control over the vehicle and the contraband it contained.

(stating that if controlled substance can be seen and measured, the amount is sufficient to establish knowledge of its presence). In this case, Officer Budd testified that he observed a “white substance” in the baggie that he retrieved. The chemist from the Houston Forensic Science Center testified that she analyzed the substance and concluded that the baggie contained 1.45 grams of cocaine. Because the cocaine accessible to appellant could be both seen and measured, we conclude that the amount is sufficient to establish that appellant knew it was a controlled substance. *Thomas v. State*, 807 S.W.2d 786 (Tex. App.—Houston [1st Dist.] 1991, pet. dismiss’d).

**B. Appellant is further linked to the cocaine by a number of additional affirmative facts.**

In addition to the appellant’s exclusive control of the vehicle in which the contraband was found, we consider whether other facts affirmatively link appellant to the cocaine. *Nickerson v. State*, 645 S.W.2d 888, 892 (Tex. App.—Dallas), *aff’d*, 660 S.W.2d 835 (Tex. Crim. App. 1983) (en banc) (examining numerous affirmative links in addition to defendant-driver’s exclusive control of vehicle as sole occupant)<sup>3</sup>. We conclude that many additional affirmative links support appellant’s conviction: (1) appellant was the sole occupant of the vehicle and was present when the vehicle was searched; (2) the cocaine was discovered in plain

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<sup>3</sup> Courts have identified the following factors that aid in establishing an accused’s affirmative links to a controlled substance: (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 narcotic; (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 drugs were 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. *Evans v. State*, 202 S.W.3d 158, 162 n. 12 (Tex. Crim. App. 2006).

view on the driver's seat; (3) the drugs were proximate and accessible to appellant; (4) Officers Budd and Baines believed appellant was under the influence of drugs; (5) the odor of contraband was recognizable at the place of discovery and arrest; (6) other contraband was found in the vehicle; (7) appellant had the right to possess his relative's vehicle; and (8) the place where the contraband was found was enclosed.

These affirmative links, combined with appellant's exclusive control of the vehicle and the volume of cocaine seized from the vehicle, sufficiently link appellant to the cocaine. Therefore, we hold the evidence was legally sufficient to allow the jury to find appellant guilty beyond a reasonable doubt of possession of a controlled substance. We overrule his sole issue.

#### **CONCLUSION**

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

/s/     **J. Brett Busby**  
          Justice

Panel consists of Justices Boyce, Brown, and Busby.  
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