Affirmed and Memorandum Opinion filed June 14, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00597-CR

WILLIE JAMES MCDADE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1421436

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

Appellant Willie James McDade appeals his conviction for possession of a controlled substance, namely dihydrocodeinone (hydrocodone), weighing at least 400 grams by aggregate weight. *See* Tex. Health & Safety Code Ann. §§ 481.104(a)(4), 481.117(e) (West 2010). In a single issue, appellant contends the trial court erred in overruling his motion for a directed verdict because the evidence at trial was legally insufficient to support his conviction. We affirm.

BACKGROUND

On March 17, 2014, Agent Lonnie Crook of the Drug Enforcement Agency, on assignment for a Houston Police Department task force specializing in crimes involving controlled substances, was investigating the Mainstream Pharmacy on Bellaire Boulevard in Harris County, Texas. Crook was on the lookout for "pill crews" who frequented the pharmacy. At trial, a pill crew was described as a team, consisting of a driver, usually the crew leader, who handles the money and recruits unemployed or homeless individuals whom he drives to a certain clinic to obtain prescriptions for controlled substances. The individuals are then taken to a certain pharmacy to fill the prescriptions, which they turn over to the crew leader.

Around 10:00 a.m., Crook saw a black Sebring pull up to the pharmacy with five individuals inside. The passenger in the front seat was later identified as appellant, and the driver was identified as Joseph Dowell. The three passengers in the back seat briefly went into the pharmacy and returned to the car carrying white prescription bags. When Crook saw this, he became suspicious and contacted Officer Jerry McClain of the Houston Police Department (HPD), narcotics division, who was investigating another pharmacy in the area. After a short time in the car, the three passengers got out and walked to a nearby bus stop. From his observations, Crook believed the three passengers had turned over controlled substances to Dowell and appellant.

Dowell and appellant then left the pharmacy and drove to a Denny's. Crook followed them. McClain also arrived at Denny's and pulled into a business across the street where he could monitor the suspects. A white minivan pulled up next to the Sebring in the Denny's parking lot, and while appellant went inside the Denny's, Dowell got in the minivan holding a red bag. Appellant came back to the car, and then Dowell returned to the car with the red bag. McClain testified that

Dowell was holding the top of the bag so tightly McClain could see the outline of what he believed to be prescription pill bottles.

Subsequently, a black Jeep Cherokee pulled up next to the Sebring. Dowell got out of the car again and approached the driver's side window of the Jeep. McClain testified he saw Dowell and the driver of the Jeep conduct a hand-to-hand transaction, and he saw an amber color prescription bottle in Dowell's hand. Appellant was in the car during Dowell's interaction with the driver of the Jeep.

After returning to the car, Dowell and appellant left Denny's and drove to a Wendy's. McClain followed them and witnessed the car make two turns without signaling. McClain then radioed for HPD patrol officers to initiate a traffic stop. Two patrol cars arrived at the Wendy's and blocked in the Sebring. One officer approached Dowell on the driver's side while McClain and Officer Sergio Avila approached appellant on the passenger's side.

When the officers approached the car, they saw a red bag in plain sight on the floorboard between appellant's feet. The officers commanded appellant to unlock his door and get out of the car. When appellant complied, his leg hit the red bag, and McClain testified the pills rattled as if shaking in a bottle. Avila testified that he smelled marijuana in the car.

Both Dowell and appellant were arrested. McClain examined the contents of the red bag and found ten prescription bottles of hydrocodone and ten prescription bottles of carisoprodol (soma). Some of the bottles still had the patients' names on them, and others had their labels either partially or fully removed. None of the bottles were labeled with appellant's name. Ahtavea Barker of the Houston Police Department Crime Laboratory tested a sample of the pills from the bag and testified that the combined weight of the pills containing hydrocodone was 445.86 grams.

Avila searched appellant and found seven hydrocodone pills, three soma pills, and a partially smoked marijuana joint. The pills in appellant's pocket matched the pills in the bottles found in the red bag, and several of the bottles were later found to be short on pills. A black spiral notebook with names and birthdays was also found in the car in a bag with other paperwork belonging to Dowell. McClain testified the notebook was a drug ledger used to record pill crew information. Avila also found $1,026 in currency on Dowell.

Appellant waived the right to a trial by jury, and pleaded not guilty to possession as charged in the indictment. At the close of evidence, appellant's trial counsel moved for a directed verdict, which was denied. The judge found appellant guilty of possession as a party.[1] Appellant pled true to two enhancement paragraphs for prior felony convictions. The judge sentenced appellant to twenty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

DISCUSSION

In a single issue, appellant argues the court erred in denying his motion for a directed verdict because the evidence was insufficient to support his conviction for possession as a party.

We consider a challenge to the trial court's denial of a motion for directed verdict to be a challenge to the sufficiency of the evidence supporting the conviction. *See Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003). When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational factfinder could have found

[1] The judge stated, "I find the case proves possession, joint possession as a party beyond a reasonable doubt."

the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). We may not substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the factfinder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* Each fact need not point directly and independently to the appellant's guilt, as long as the cumulative effect of all incriminating facts is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

To prove appellant was criminally responsible as a party to Dowell's possession of a controlled substance, the State was required to prove that Dowell was guilty of possession, and appellant, "acting with intent to promote or assist the commission of the offense," solicited, encouraged, directed, aided, or attempted to aid Dowell to commit the offense. *See* Tex. Penal Code Ann. § 7.02(a)(2) (West 2011); *Torres v. State*, 233 S.W.3d 26, 30 n.2 (Tex. App.—Houston [1st Dist.] 2007, no pet.). To prove possession as either a principal or a party the State must show the accused had knowledge of the presence of a controlled substance. *See Roberson v. State*, 80 S.W.3d 730, 736 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

Appellant does not challenge the evidence showing that Dowell was guilty of possession. Appellant's argument is that the evidence was insufficient to prove appellant acted with intent to promote or assist the commission of the offense and encouraged, directed, aided or attempted to aid Dowell in his possession.

In determining whether a defendant was a party to possession, the court may look at the events occurring before, during, and after the commission of the offense

and rely on the actions of the defendant which show an understanding and a common design to commit the offense. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). "Although mere presence at the scene of an offense alone is not sufficient to support a conviction, it is a circumstance tending to prove guilt which may be combined with other facts to show that appellant was a participant." *See Wilkerson v. State*, 874 S.W.2d 127, 130 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (citing *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987) (en banc)).

When a defendant does not have exclusive possession of the place where the contraband was found, we must examine the record to determine if there are additional independent facts that "affirmatively link" the defendant to the contraband. *See Poindexter v. State*, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005). The requirement of "affirmative links" is meant to protect innocent bystanders from conviction based solely on their proximity to someone else's contraband. *Id.*

The following factors have been recognized as tending to establish affirmative links:

> (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). It is "not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial." *Id* at 162.

At least six of the factors above were established by the evidence at trial. First, appellant was present when the search of the Sebring was conducted. Second, the prescription bottles were in plain view of the arresting officers. Third, the pills were in close proximity and accessible to the appellant—they were sitting in an open bag between appellant's feet. Fourth, other contraband was present in the form of the marijuana found on appellant. Fifth, Officer Avila testified there was an odor of marijuana in the car. Sixth, the car where the drugs were found was an enclosed space.

In addition to these affirmative links, appellant also had seven hydrocodone pills in his pocket that matched those found in the red bag. The trial judge stated that it was the pills in appellant's pocket that were "the kiss of death" because it was a reasonable inference that the pills had come from the bottles. This fact implies both knowledge of the contraband and an understanding of a common design to commit the offense of possession.

The quantity of the pills is also an affirmative link from appellant to the controlled substance. *Roberson*, 80 S.W.3d at 740. Appellant was found with twenty pill bottles at his feet, eight of which were analyzed and found to contain hydrocodone. Appellant was also present when officers observed the pill crew at the pharmacy and Dowell's interactions with other vehicles at Denny's.

The facts show that appellant was present before Dowell acquired possession of the pills, stayed with Dowell while he drove to two different locations, and had several pill bottles sitting at his feet with their label removed. Thus, viewing the evidence in the light most favorable to the trial court's finding, it is a reasonable inference that appellant knew the pills were contraband and was a party to their possession by soliciting, encouraging, directing, aiding, or attempting to aid Dowell's possession.[2] *See Torres*, 233 S.W.3d at 30 n.2; *Howell v. State*, 906 S.W.2d 248, 253 (Tex. App.—Fort Worth 1995, pet. ref'd).

Based on the cumulative effect and logical force of the evidence, a rational factfinder could reasonably conclude appellant was guilty of possession as a party. *See Hooper*, 214 S.W.3d at 13. Accordingly, we hold there was sufficient evidence to deny appellant's motion for a directed verdict. We overrule appellant's sole issue and affirm the judgment of the trial court.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Donovan, and Brown.
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[2] The evidence is also sufficient to support the inference that appellant himself exercised actual care, custody control or management, and care over the pills with knowledge that they were contraband. *Evans*, 202 S.W.3d at 166.