Affirmed and Memorandum Opinion filed April 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00271-CR

KELLI ROBINSON FIELDING AKA KELLI DEANNE ROBINSON FIELDING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 76437-CR

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

In one issue, appellant Kelli Robinson Fielding contends the evidence is legally insufficient to support her conviction for possession with intent to deliver a controlled substance, namely methamphetamine. *See* Tex. Health & Safety Code Ann. § 481.112(d) (West 2015). We affirm.

I. BACKGROUND

Brazoria County Narcotics Task Force officer Joe Lares investigated appellant and her son, Dustin Fielding, for drug activity in a residential apartment. Lares and other task force officers executed a search warrant at the residence on May 4, 2015, at 5:30 in the morning. Officers discovered a variety of narcotics dispersed in three areas: on the coffee table in the living area, beneath the couch in the living area, and in the kitchen. Officers arrested Dustin at the scene. Appellant arrived at 7:00 in the morning while officers were still present. She did not attempt to flee and she was not arrested. On May 26, 2015, an arrest warrant was issued for appellant and she was arrested June 1, 2015.

The residence had two bedrooms. Located in one bedroom was a mattress covered in papers. The second bedroom was empty. The front door opened into a living area with two couches and a coffee table. On the coffee table Lares found, in plain view, an unlabeled prescription bottle that had 37 alprazolam pills and 27 ecstasy pills. The ecstasy pills were "colorful," weighed 6.1 grams, and contained methamphetamine. Also present on the coffee table and in plain view was synthetic marijuana labeled Klimax Potpourri, a scale, aluminum foil, and small plastic baggies.

In a cardboard box located beneath the couch, officers discovered 358 abuse units of LSD, approximately 25 grams of marijuana, 1.5 grams of psilocybin, 44 clonazepam pills, and a grinder, which, as Lares testified, is used to process marijuana. This box was discovered by moving the couch. A brown bottle containing promethazine was in the refrigerator, and an unlabeled prescription bottle containing ibuprofen was in the kitchen in plain view. Finally, cigars and tobacco shavings were present. Lares testified that individuals dealing in drugs frequently empty cigars and refill them with marijuana.

Lares testified that the amount of narcotics, scale, grinder, foil, and baggies were indicative of narcotics trafficking. Two other witnesses, Margarita Segovia and Veronica Thompson, also testified regarding conduct consistent with narcotics trafficking. Segovia is the manager of the apartment complex where appellant and Dustin resided. Segovia testified that she observed numerous people coming and going from appellant's residence. Thompson, Segovia's daughter, testified that she visited the residence multiple times. The purpose of one visit was to purchase synthetic marijuana. Thompson contacted Dustin via text message for the sale. When Thompson arrived, appellant opened the front door and accepted Thompson's money. Appellant and Dustin pointed to the table, from where Thompson retrieved the synthetic marijuana. Thompson also had observed in plain view, and while appellant was present, stacks of money, scales, baggies, and pills on the coffee table. Additionally, Thompson observed Dustin counting money in front of appellant. Thompson could neither identify the pills nor provide the dates of her observations. Finally, Thompson testified that Dustin slept on the living-room couch, under which police discovered the box containing illegal drugs. Appellant slept on the other living-room couch.

Dustin pled guilty to the same offense for which appellant was charged. He testified that he lived at the residence with appellant since January or February of 2015. Dustin testified that the drugs found in the residence belonged only to him and that he had been dealing drugs for six or seven months. Dustin testified that he brought the drugs out when his mother was away at work, and she had no knowledge of his drug distribution. He also testified that appellant slept on the bed in the bedroom.

Appellant was indicted for possession with intent to deliver a penalty group one controlled substance, namely, methamphetamine weighing at least four and less

than 200 grams. *See* Tex. Health & Safety Code Ann. § 481.112(d). The jury instructions authorized appellant to be convicted as a principal or party to the offense of possession with intent to deliver a controlled substance. The jury convicted appellant of the charged offense. The charge was enhanced with a prior federal conviction for possession of equipment, chemicals, products, and materials to manufacture a controlled substance. At the punishment phase, appellant pleaded "true" to the enhancement and the jury assessed her punishment at 35 years' imprisonment and a $10,000.00 fine.

II. ANALYSIS

In her sole issue, appellant asserts the evidence is legally insufficient to support appellant's conviction, as principal or party, for possession of a controlled substance with the intent to deliver. Appellant also asserts in a sub-issue that we should disregard Thompson's testimony because she is an accomplice to the offense.

A. Standard of review and applicable law

In reviewing legal sufficiency in a criminal case, we "examine all of the evidence in the light most favorable to the verdict" and determine whether, based on that evidence and the reasonable inferences therefrom, a jury could have rationally found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319–20 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). The jury is the sole judge of credibility. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 318–19). The jury may draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial. *Hooper v. State*, 214 S.W.3d 9, 15–16 (Tex. Crim. App. 2007). Although the State must prove that a defendant is guilty beyond a reasonable doubt, it need not disprove every conceivable alternative to defendant's guilt. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

(i) Principal actor of the offense

A person commits an offense if the person knowingly possesses, with intent to deliver, a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.112(a). Methamphetamine is a controlled substance. *Id.* § 481.102(6) (West 2015). Possession is "actual care, custody, control or management." *Id.* § 481.002(38) (West 2015). "In a possession-with-intent-to-deliver case, the State must prove the principal actor (1) exercised care, custody, control, or management over the controlled substance, (2) intended to deliver the controlled substance to another, and (3) knew that the substance in his possession was a controlled substance." *Cadoree v. State*, 331 S.W.3d 514, 524 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

(ii) Law of the parties

"A person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." Tex. Penal Code Ann. § 7.01(a) (West 2015). "A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, the person solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.* § 7.02(a) (West 2015). To prove appellant was criminally responsible as a party here, the State must have proven: (1) another person possessed the contraband and intended to deliver it, *see Torres v. State*, 233 S.W.3d 26, 30 n.2 (Tex. App.—Houston [1st Dist.] 2007, no pet.); and (2) that appellant, with the intent that the offense be committed, solicited, encouraged, directed, aided, or attempted to aid the other's possession with intent to deliver, *see* Tex. Penal Code Ann. § 7.02(a)(2). Implicit in the second element is the requirement that the State prove the accused knew about the presence of contraband. *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Proof of knowledge is

therefore required to convict appellant as a principal actor or party to the offense. *See* Tex. Health & Safety Code § 481.112(a); *Roberson*, 80 S.W.3d at 735.

To determine whether appellant was a party to the offense, we may look at the events occurring before, during, and after the commission of the offense and rely on the actions of appellant 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). Mere presence or even knowledge of an offense does not make one a party to joint possession. *See Oaks v. State*, 642 S.W.2d 174, 177 (Tex. Crim. App. 1982). The evidence must show that at the time of the offense, the parties were acting together, each contributing some part towards the execution of their common purpose. *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987).

The charge authorized the jury to convict appellant on alternative theories such that appellant may have been guilty for the charged offense as a principal or party. Accordingly, the verdict of guilty will be upheld if the evidence is sufficient on any one of those theories. *Sorto v. State*, 173 S.W.3d 469, 472 (Tex. Crim. App. 2005), *cert. denied*, 548 U.S. 926 (2006).

(iii) Links

When, as here, the accused is not in exclusive possession of the place where the contraband is found, the record must contain additional facts and circumstances that "link" the defendant to the contraband. *Poindexter v. State*, 153 S.W.3d 402, 406, 408 (Tex. Crim. App. 2005), *overruled in part on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 & n.32 (Tex. Crim. App. 2015). A link "generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it." *Olivarez v. State*, 171 S.W.3d 283, 291 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The elements of possession may be proven

through direct or circumstantial evidence, although the evidence must establish that the accused's connection with the substance was more than fortuitous. *Poindexter*, 153 S.W.3d at 405–06.

In *Evans v. State*, the Court of Criminal Appeals approved of a non-exclusive list of fourteen factors that may link the defendant with knowledge and possession of the contraband:

> (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.

202 S.W.3d 158, 162 & n.12 (Tex. Crim. App. 2006). The number of links is not dispositive, "but rather the logical force of all the evidence, direct and circumstantial." *Id.* at 162. Additionally, the absence of certain links does not constitute evidence of innocence that is weighed against the links present. *Flores v. State*, 440 S.W.3d 180, 189 (Tex. App.—Houston [14th Dist.] 2013), *judgment vacated on other grounds*, 427 S.W.3d 399 (Tex. Crim. App. 2014).

B. Thompson is not an accomplice witness.

Appellant asserts that Thompson is an accomplice to the delivery of synthetic marijuana and methamphetamine and requests that we review the sufficiency of the non-accomplice evidence supporting appellant's conviction. We disagree that

Thompson is an accomplice witness.

A conviction cannot be had on an accomplice witness's testimony unless the testimony is corroborated by other, non-accomplice evidence that tends to connect the accused to the offense. Tex. Code Crim. Proc. Ann. art. 38.14 (West 2015). "An accomplice witness is someone who has participated with someone else before, during or after the commission of a crime . . . . If the witness cannot be prosecuted for the offense with which the accused is charged, then the witness is not an accomplice witness as a matter of law." *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986).

In support of her accomplice-witness contention, appellant first relies on Thompson's admission that she purchased synthetic marijuana from appellant. However, appellant was charged with possession with intent to deliver methamphetamine, not possession of synthetic marijuana. *See id.* Based on this conduct, Thompson is not an accomplice witness under article 38.14.

Appellant further contends that Thompson was an accomplice because she directed individuals to appellant's son to purchase narcotics. This assertion overstates Thompson's testimony.[1] During cross-examination Thompson stated that people would approach her apartment and ask if they could get "something." She said she responded "Dude[,] you want Drake. That's next-door." Thompson further testified that she did not know "what kind of stuff" these individuals were asking for. Given the vagueness of the requests by individuals who approached Thompson, we cannot assume those individuals were looking for methamphetamine. We also note that nothing in the record suggests that Thompson directed the individuals making the vague requests to appellant. Based on the record before us, we do not

[1] This testimony occurred outside the presence of the jury.

find that Thompson was an accomplice witness under article 38.14.

C. Appellant was a party to the offense.

Having declined to discount Thompson's testimony, we review the sufficiency of the evidence to support appellant's conviction. Appellant asserts the evidence is insufficient to show appellant had the requisite knowledge of the presence of the methamphetamine on May 4, 2015, as alleged within the indictment. When, as here, possession is not exclusive, we conduct the links analysis to determine whether the evidence is sufficient to prove appellant knew of, and exercised control over, the contraband. *See Olivarez*, 171 S.W.3d at 291. Factor (1) does not favor a link because appellant was not present when the search was conducted. However, we note that appellant arrived shortly after the search, while officers still were present. Factor (2) favors a link because the contraband (the 27 pills containing methamphetamine) was in plain view on the coffee table.

Factor (3) favors a link. Thompson testified that appellant slept on a couch in the same room where the contraband was found. Additionally, the only mattress in the apartment was covered in papers. Appellant directs us to Dustin's conflicting testimony that appellant slept on the bed, not the couch. When faced with conflicting evidence, we presume the factfinder resolved conflicts in favor of the prevailing party, and defer to that determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Therefore, a rational jury could have inferred that appellant slept on the living room couch and was in close proximity to, and easily could access, the contraband.

Factors (4), (5), and (6) do not link appellant to the contraband. When appellant was arrested, she did not make incriminating statements, and was not under the influence, or in possession, of narcotics. Factors (7), (8), and (9) do not link appellant to the contraband. Appellant did not attempt to flee or make furtive

gestures. The record does not indicate whether the contraband had an odor.

Factor (10)—whether other contraband or drug paraphernalia were present—strongly favors a link. Drug paraphernalia—scales, baggies, and stacks of money—were present and in appellant's plain view before the search. The same items were present when police conducted the search, in addition to foil, a grinder, cigar paper, cigar shavings, 358 abuse units of LSD, approximately 25 grams of marijuana, 1.5 grams of psilocybin, 44 clonazepam pills, and a bottle full of promethazine. This other contraband and paraphernalia were dispersed throughout the living room, kitchen, and in the refrigerator.

Factor (11) favors a link. Segovia, Thompson, and Dustin testified that appellant and Dustin lived at the residence. Officers also discovered mail indicating that appellant paid utilities for the residence.

Factors (12), (13), and (14) do not link appellant to the contraband. The contraband was not in an enclosed space, and the record contains no evidence that appellant had a large amount of money or a consciousness of guilt.

Appellant directs us to two cases, *Jenkins v. State*, 76 S.W.3d 709, 719 (Tex. App.—Corpus Christi 2002, pet. ref'd), and *Lassaint v. State*, 79 S.W.3d 736, 746 (Tex. App.—Corpus Christi 2002, no pet.), in which the Corpus Christi Court of Appeals concluded that the defendants were not aware of the contraband. We are not bound by precedent of other courts of appeals. Nevertheless, these cases are distinguishable. Unlike the case under review, in *Jenkins* and *Lassaint*, there was no evidence that the appellants owned the place searched, that the appellants were in close proximity to the contraband, or that contraband and paraphernalia were ever in plain view.[2] All of these factors—not present in the cited cases—link appellant

[2] In *Jenkins*, the only evidence purportedly linking the defendant to the contraband was his nervousness and presence during the search. 76 S.W.3d at 717–18. In *Lassaint*, the only evidence

to the contraband.

The cumulative force of the evidence shows appellant had knowledge of the contraband. Illegal drugs and drug paraphernalia were located throughout the small apartment. Pills and drug paraphernalia were in plain view while appellant was present, just as the contraband (in pill form) and paraphernalia were in plain view during execution of the search warrant. Additionally, the evidence showed that appellant slept in the same room where the contraband was found; appellant was present when Dustin counted cash during appellant's sale of synthetic marijuana to Thompson; and appellant possessed the apartment where officers seized the contraband. The evidence forms a basis for a jury reasonably to infer that appellant knew of, and exercised control over, the contraband discovered on May 4, 2015.

Dustin testified that he owned and sold the contraband at the residence where he lived with appellant. He also testified that he pleaded guilty to possession with intent to deliver methamphetamine. A jury reasonably could have inferred that appellant knew about the contraband. In addition to her knowledge, appellant possessed the residence where the contraband was found. Likewise, appellant's name appeared on utility bills addressed to the residence. Appellant received a drug-buyer and drug-money into her residence while pills and drug-distribution paraphernalia, such as the scale, foil, and baggies, were in plain view. Lares testified that those dealing in drugs generally use such baggies to distribute pills. Dustin counted money while appellant sold the synthetic marijuana. Viewing the facts in the light most favorable to the verdict, we conclude that a rational jury could have

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linking the defendant to the contraband was a Wal-Mart bag that had his fingerprints. 79 S.W.3d at 746. The Wal-Mart bag contained another Ziploc bag, which contained the contraband. *Id.* The *Lassaint* court held that the fingerprint evidence alone was insufficient to support Lassaint's conviction. *Id.* The bag was a secondary container, Lassaint's fingerprints were not on the Ziploc bag, there was conclusive proof that one other person handled the Ziploc bag, and there was no evidence of when and under what circumstances Lassaint handled the Wal-Mart bag. *Id*

inferred that appellant, with the intent that the offense be committed, encouraged, directed, or aided Dustin's possession with intent to deliver methamphetamine. Because a rational jury could have convicted appellant for the charged offense as a party, we need not determine whether she was also guilty as a principal. *See Sorto*, 173 S.W.3d at 472.

We overrule appellant's sole issue.

III. CONCLUSION

We affirm the judgment of the trial court.

/s/ Marc W. Brown
Justice

Panel consists of Chief Justice Frost and Justices Brown and Jewell.

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