Affirmed and Memorandum Opinion filed February 22, 2018.

In the

Fourteenth Court of Appeals

NO. 14-16-00786-CR

RICARDO VELA, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1489184

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

Appellant Ricardo Vela appeals his conviction for possession with intent to deliver at least 400 grams of cocaine. *See* Tex. Health & Safety Code Ann. § 481.112(a) (West 2017). In two issues, appellant challenges the sufficiency of the evidence and contends the trial court erred in its assessment of a fine against appellant. We affirm.

I. BACKGROUND

Marco Arizpe is the cousin of appellant's wife. Arizpe arranged for the sale of eight kilograms of cocaine to undercover Pasadena Police Detective Duran. Before the meeting, Arizpe notified Duran that he would be bringing his cousin and the supplier to the deal. On November 19, 2015, appellant drove Arizpe to the deal in his red Chevy truck. Appellant parked in the lot of a Bass Pro Shop, next to a white Dodge Ram belonging to the supplier, Adrian Marez. While appellant and Arizpe were inside the truck together, Arizpe spoke with Duran on his cell phone and told him that the supplier had arrived at the location.[1]

Duran drove to the location where appellant's vehicle and the white Dodge were parked with two other undercover officers, Pasadena Police Detectives Rebollar and Alvarez. Additional detectives conducted surveillance from another spot in the parking lot. Once parked, Duran, Rebollar, and Alvarez exited the vehicle and greeted appellant, Arizpe, and Marez. Appellant remained in the driver's seat of his truck, with the driver's-side window rolled down. During the transaction, Rebollar stood next to appellant and between the red Chevy and the white Dodge while Duran got into the back of the white Dodge to inspect the cocaine. Appellant and Rebollar briefly talked about the transaction. Appellant asked Rebollar if Duran, Rebollar, and Alvarez would be going up north, and Rebollar responded affirmatively, explaining that they were trying to gather a load of narcotics because it was not worthwhile to take a small amount north. Rebollar assured appellant that the cocaine would be secure. Appellant "mentioned something about . . . the first

[1] Duran testified that Arizpe said "the cocaine is on the scene but [the supplier is] waiting on us and they're getting nervous." Arizpe testified that he did not say the word "cocaine" but only said "they already got here." In a video of appellant's police interview played to the jury, appellant denied Arizpe was ever on the phone.

time" being "challenging," and Rebollar agreed that the first narcotics deal was always difficult.

While appellant and Rebollar were talking, Duran counted the number of cocaine bricks out loud within hearing distance of appellant and Rebollar. Once Duran confirmed that all eight kilograms of cocaine were there, he took the backpack containing the cocaine to the front of the two trucks and handed it to Rebollar. Rebollar put the backpack in the detectives' vehicle at Duran's instruction. At that point, Duran signaled the officers maintaining surveillance. Appellant, Arizpe, and Marez were arrested. Subsequent analysis confirmed that the bricks were in fact cocaine, weighing approximately 7800 grams.

Appellant was charged with the felony offense of possession with intent to deliver at least 400 grams of cocaine. He pleaded "not guilty." At trial, detectives testified to the facts of the transaction stated above. The State also presented a video of appellant's interview at the Pasadena police station subsequent to his arrest. In the interview, appellant denied any involvement in the transaction. He claimed he was simply giving Arizpe a ride.

Duran testified that based on his experience as a narcotics officer, primary sellers in large narcotics transactions require assistance from other individuals to secure the transaction:

> Larger scales of narcotic operations like the one in this case you're talking about negotiated price is twenty-seven five per kilo. So you're talking about $220,000.00. So with that you have your security of your back guy is going to show-up with security and look out. There's nobody on their right mind's going to show-up with just one person and hand over eight kilos of cocaine to the buyer, which the buyer be myself and a couple of my partners show-up. So they're looking at if three cops showing up. They're looking at like three other guys that want my cocaine's showing up. I'm not sure if they're bringing my money. So until [sic] the three individuals involved in my case one was a [sic]

actual seller.

Duran explained that in an initial sale of narcotics, sellers are typically concerned about the narcotics being stolen by purported buyers:

> During the initial sell it's initial distrust. You don't know if I'm legitimately coming to buy or what they call a rip.
>
> . . .
>
> Drug rip is when you—when I arrange a meeting for the sale of cocaine and I speak to you guys and tell y'all I have ex [sic] amount ready for y'all. You can show-up with ex [sic] amount of dollars. That's when the guys try to come and rip, come up with guns, hurt or kill me and take it from me by gun force and I lose my drugs. I'm not able to call the police.

Duran explained that the assistance provided to the primary seller in a drug transaction was essential to completion of the deal:

> They're all like part of the company. Everybody has their role. And each person does their role correctly and efficiently. If you—just like any team, any actual business, if you have a weak point you're going to—it's going to be hard for you to complete the entire transaction. Everybody has to know their role and everything has—they hope moves smoothly in order for it to be completed correctly and the right way they want it.

The only witness to testify on appellant's behalf was Arizpe. Arizpe had previously entered a plea bargain and signed a statement in which he stipulated that he committed the offense of possession with intent to deliver at least 400 grams of cocaine "along with" appellant and Marez. His statement came into evidence at appellant's trial. On the stand, Arizpe testified the statement was untrue and that appellant had no knowledge of the drug deal. However, Arizpe also testified that he would say "whatever it takes to make sure [appellant] doesn't go to prison."

The jury found appellant guilty. The trial court sentenced him to 32 years confinement and assessed a fine of $100,000. This appeal followed.

II. ANALYSIS

A. Sufficiency of the evidence

In his first issue, appellant contends the evidence is insufficient to show that he was guilty of possession with intent to deliver over 400 grams of cocaine. Appellant asserts there was no evidence that appellant or Arizpe had actual care, custody, or control over the cocaine, and there was no evidence that appellant was a party to the possession with intent to deliver by Marez.

Reviewing courts apply a legal-sufficiency standard in determining whether the evidence is sufficient to support a conviction. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)); *see also Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. App. 2013). Under this standard, we examine all of the evidence in the light most favorable to the verdict and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *see also Temple*, 390 S.W.3d at 360.

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 319). The jury must resolve conflicts in the evidence and is free to accept or reject any or all of the evidence presented by either side. *See Elizondo v. State*, 487 S.W.3d 185, 209 (Tex. Crim. App. 2016) ("As the fact-finder, the jury was free to reject some or all of [appellant's] version of the events . . . ."); *Temple*, 390 S.W.3d at 360. 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). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id.* at 13. Although the State must prove that

a defendant is guilty beyond a reasonable doubt, it need not disprove every conceivable alternative to the defendant's guilt. *Jackson*, 443 U.S. at 326; *Tate*, 500 S.W.3d at 413.

1. Principal or party

Appellant was charged with possession with intent to deliver at least 400 grams of cocaine. The trial court's charge authorized the jury to convict appellant either as a principal or as a party. To prove the offense as a principal actor, the State was required to show that appellant: (1) exercised care, custody, control, or management over the controlled substance;[2] (2) intended to deliver the controlled substance to another; and (3) knew that the substance in his possession was a controlled substance. *See* Tex. Health & Safety Code Ann. §§ 481.002(38), 481.112(a) (West 2017); *Cadoree v. State*, 331 S.W.3d 514, 524 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

To convict under the law of parties, the State was required to show that appellant acted with the intent to promote or assist the offense by soliciting, encouraging, directing, aiding, or attempting to aid the other person in the commission of the offense. Tex. Penal Code Ann. § 7.02(a)(2) (West 2017). Accordingly, proving possession with intent to deliver as a party requires showing that: (1) another person possessed the controlled substance 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) appellant, with the intent that the offense be committed, solicited, encouraged, directed, aided, or attempted to aid the other person's possession with intent to deliver. Tex. Penal Code Ann. § 7.02(a)(2). For conviction, either as a principal or a party to the offense, the State must show knowledge of the presence

[2] Cocaine is a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.102(3)(D) (West 2017).

of the controlled substance. *See* Tex. Health & Safety Code Ann. § 481.112(a); *Robinson v. State*, 174 S.W.3d 320, 325 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

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 that 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 possession. *See Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). 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) *superseded in part on other grounds by rule change as stated in Barnes v. State*, 876 S.W.2d 316, 325–26 (Tex. Crim. App. 1994).

When, as here, alternative theories of committing the same offense are charged and the jury returns a general guilty verdict, the verdict stands if the evidence supports any of the theories charged. *See Sorto v. State*, 173 S.W.3d 469, 472 (Tex. Crim. App. 2005). We will first apply sufficiency standards of review to the evidence of appellant's guilt as a party.

2. Links

Because appellant was not in exclusive possession of the place where the controlled substance was found, the State must affirmatively link appellant to the controlled substance. *Poindexter v. State*, 153 S.W.3d 402, 406 (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. 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). Additionally, the presence of a large quantity of contraband may be a factor affirmatively linking an appellant to the contraband. *See Olivarez*, 171 S.W.3d at 291–92.

3. Appellant's role in the offense

Appellant concedes that the evidence supported findings that Marez possessed the cocaine with intent to deliver, and that Arizpe "facilitated the connection between Marez and the undercover." Appellant concedes "[t]here was evidence that [a]ppellant aided Arizpe's criminal conduct." More specifically, appellant concedes, "[a]ppellant, in bringing Arizpe to consummate that offer to sell, would have aided Arizpe's crime of delivery of a controlled substance." Appellant asserts, however, that he could not have been a party to Arizpe's possession with intent to deliver because Arizpe himself was only a party to Marez's possession. Appellant contends that he could not have been a party to Marez's possession because no evidence was presented that appellant interacted with Marez. According to appellant, "[t]he record is devoid of any testimony suggesting [a]ppellant solicited, encouraged, directed, aid or attempted to aid Adrian Marez in committing the alleged offense." We disagree.

The record supports a finding that Arizpe committed the offense of possession of at least 400 grams of cocaine with intent to deliver as a principal actor. The law does not require exclusive possession of the controlled substance. *See Poindexter*, 153 S.W.3d at 412. Duran and Arizpe himself testified that it was Arizpe who negotiated the amount of cocaine, the price of cocaine, and where to meet up for the deal. Duran and Arizpe also testified that when the undercover officers arrived at the designated spot, Arizpe directed the detectives to the location of the cocaine and accompanied Duran while he inspected the cocaine. Arizpe testified that he is guilty of this offense and pleaded guilty to the offense. Arizpe's signed statement, stipulating that he was guilty of possession with intent to deliver (along with Marez and appellant) was entered into evidence in appellant's trial. As the "sole judge of credibility and weight to be attached" to the evidence, the jury was entitled to rely on Arizpe's signed statement and disbelieve conflicting evidence, including Arizpe's

testimony that appellant had no knowledge of the drug deal. *See Temple*, 390 S.W.3d at 360 (citing *Jackson*, 443 U.S. at 319). A jury could easily have inferred from this direct and circumstantial evidence that Arizpe had care, custody, control, or management of the cocaine.

Moreover, appellant did not have to interact with Marez in order to solicit, encourage, direct, aid, or attempt to aid Marez in the commission of possession with intent to deliver. We consider the factors adopted in *Evans* to determine whether the evidence is sufficient to prove appellant knew of, and with the intent that the offense be committed, solicited, encouraged, directed, aided, or attempted to aid Arizpe or Marez's possession with intent to deliver. Although not all the factors provide links between appellant and the cocaine, the logical force of all the evidence supports the conclusion that appellant had knowledge of the cocaine and was a party to its possession with intent to deliver.

Factor (1) favors a link. Appellant was present when the search was conducted. With respect to factor (2), the contraband was not in plain view of appellant, but discussions concerning the contraband were conducted within hearing distance of appellant, and Duran handed the backpack full of cocaine to Rebollar in plain view of appellant. These facts link appellant to the cocaine. Factor (3) also favors a link, as appellant parked his vehicle right next to the white Dodge containing the cocaine. A jury could reasonably infer that it was not accidental that appellant drove Arizpe to a specific spot in a Bass Pro Shop parking lot next to a Dodge containing eight kilograms of cocaine. Factor (12) favors a link because the cocaine was found enclosed in a green backpack. Factor (14), which asks whether appellant's conduct indicated consciousness of guilt, also favors a link. Appellant's conversations with Rebollar about the detectives' purported plan to travel with the cocaine and the difficult nature of a first narcotics transaction clearly implicated

appellant in commission of the offense by showing appellant's knowledge of and participation in cocaine deals. As the fact finder, the jury was "free to draw reasonable inferences and make reasonable deductions from the evidence as presented within the context of the crime." *Price v. State*, 227 S.W.3d 264, 266 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd). The jury could have reasonably inferred from appellant's comments that he knew about the cocaine in the backpack and was assisting Arizpe and/or Marez in securing the cocaine for sale.

The amount of cocaine involved in the transaction also links appellant to the cocaine. A jury could have reasonably found that Arizpe would not bring an innocent bystander to a large-scale narcotics transaction. Arizpe admitted at appellant's trial that it would be "strange not to tell your cousin about the drug deal you're taking him to." In addition, evidence existed from which the jury could have concluded that appellant overheard and was aware of Arizpe's cell phone conversations with Duran concerning the arrival of the cocaine. A jury could have reasonably found beyond a reasonable doubt that appellant's connection to the 7.8 kilograms of cocaine was much more than a fortuitous accident. A jury could have also reasonably relied on the testimony of Duran, an experienced narcotics investigator, that such a large-scale transaction would require security or a lookout. A jury could have reasonably inferred from his testimony and the actions of appellant that appellant served as security or a lookout for the transaction. These facts and circumstances affirmatively link appellant to the contraband.

As the sole judge of the weight and credibility of the evidence, the jury was entitled to disbelieve Arizpe's testimony to the contrary, as well as appellant's denials in his police interview. *See Jackson*, 443 U.S. at 319.

Viewing the evidence in the light most favorable to the verdict, we conclude that the factors linking appellant to knowledge of the cocaine and the logical

inferences that may reasonably be drawn from these factors together provide sufficient evidence from which a rational jury could have found beyond a reasonable doubt that appellant was a party to possession with intent to deliver at least 400 grams of cocaine. We overrule appellant's first issue.

B. Fine

In his second point of error, appellant contends that the manner in which the trial court assessed a $100,000 fine during the punishment phase of trial violated his right to due process.

The punishment range for possession with intent to deliver a controlled substance is from 15 to 99 years or life in the Texas Department of Criminal Justice along with a mandatory fine not to exceed $250,000. Tex. Health & Safety Code Ann. § 481.112(f). At the conclusion of the punishment phase in this case, the trial court assessed a punishment of 32 years in prison and a $100,000 fine:

> The Court: Mr. Vela[,] the jury having previously found you guilty of intent to deliver controlled substance charged in the indictment and having heard all the evidence in the punishment phase at this time[, I] assess punishment at 32 years confinement in the Institutional Division of the Texas Department of Criminal Justice.
>
> . . .
>
> You'll receive credit for the time you've served. You're now remanded to the custody of the sheriff of Harris County, Texas.
>
> Please step back.
>
> Mr. Overhuls [for the State]: Your Honor, before we stop it's a mandatory fine on this.
>
> The Court: Is it a—
>
> Mr. Overhuls: Fine up to 200. It can be a dollar.

> The Court: Yeah well doesn't make a difference. And a hundred thousand dollars fine. So 32 years, [$100,000] fine.

For the first time on appeal, appellant takes issue with the manner in which the trial court assessed the fine. Appellant objects to the court's comment, "Yeah well doesn't make a difference." Appellant also objects to the court's assessment of the large fine after initially assessing no fine. Appellant contends these actions show that the fine was not based upon an "informed normative judgment" but "was so capriciously rendered as to be a violation of Appellant's right to due process." Appellant further contends the court was not "informed" when it commented that the fine "doesn't make any difference" because inmate accounts may be garnished to pay fines and defendants may be required to pay fines as a condition of parole.

The State responds that appellant failed to preserve this issue for appeal, and even assuming appellant's claim was preserved for appeal, the trial court's comment does not constitute error. Assuming without deciding that this issue was preserved for appeal, we agree that the trial court did not err in assessing or commenting on the $100,000 fine against appellant.

A court's assessment of punishment within the statutorily prescribed range for a given offense "is a normative, discretionary function." *Barrow v. State*, 207 S.W.3d 377, 379–80 (Tex. Crim. App. 2006). Due process requires a neutral and detached judge. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). "A court's arbitrary refusal to consider the entire range of punishment constitutes a denial of due process." *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). However, the court's "discretion to impose any punishment within the prescribed range [is] essentially 'unfettered.'" *Ex parte Chavez*, 213 S.W.3d 320, 323 (Tex. Crim. App. 2006). "Subject only to a very limited, 'exceedingly rare,' and somewhat amorphous Eighth Amendment gross-disproportionality review, a

punishment that falls within the legislatively prescribed range, and that is based upon the [court's] informed normative judgment, is unassailable on appeal." *Id.* at 323–24.

"To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party." *Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). Absent a clear showing of bias, a reviewing court will presume that the trial court was neutral and detached and its actions were correct. *Brumit*, 206 S.W.3d at 645; *Cabrera v. State*, 513 S.W.3d 35, 38 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). Judicial remarks made during trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases, generally do not support a bias or partiality challenge. *Dockstader*, 233 S.W.3d at 108. "Such remarks may constitute bias if they reveal an opinion deriving from an extrajudicial source; however, when no extrajudicial source is alleged, such remarks will constitute bias only if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.*

The trial court's assessment of the $100,000 fine fell well within the prescribed range, which was not to exceed $250,000. There is no evidence in the record that the trial court failed to consider the full range of punishment. Appellant does not contend, and the evidence does not show, that the trial court's comment reflected bias or partiality. Appellant asserts the trial court erred by being "too detached," but appellant has not presented any authority to support the proposition that being "too detached" constitutes error. Appellant has not even presented authority or an explanation as to what constitutes being "too detached." Moreover, appellant's contention that the court was "callously unaware of the law and the impact the sentence could have" is not supported by the record. Appellant presumes

that the trial court's comment "doesn't make a difference" meant the trial court was unaware of or uninformed of how fines are paid by inmates in prison or on parole, but nothing in the record supports the conclusion. Consequently, appellant has failed to make a clear showing that the trial court's actions were incorrect. We overrule appellant's second issue.

III. CONCLUSION

The judgment of the trial court is affirmed.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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