

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00459-CR

MARK BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 98384

MEMORANDUM OPINION

A jury convicted appellant Mark Brown of possession of a controlled substance and assessed punishment at two and a half years of confinement. Brown then filed this appeal, in which he contends the evidence was legally insufficient to sustain his conviction, and that the trial court erred by denying his motion for instructed verdict. We affirm.

BACKGROUND

Officer Emilio Romero of the Beaumont Police Department testified that on the date in question, he was working street crimes with Officers McBride and Laird. While

the officers were patrolling at the Magnolia Gardens housing complex in an unmarked car, they observed several individuals “on a porch gambling, throwing dice, betting.” According to Officer Romero, the individuals were huddled around with their knees bent, and they were throwing money and dice on the pavement. Officer Romero and the other officers got out of the car to detain the individuals, identify them, and check for warrants. As the officers approached the individuals, some of them backed up and tried to get off the porch, but none of them left the porch.

Brown was one of the individuals, and Officer Romero testified that Brown’s knees were bent, and he was “squatted down” as the officers approached. Officer Romero testified that Brown began to stand up, and he “[m]ade a furtive movement towards the pavement with his hand.” As Brown began to raise his hand, Officer Romero saw a substance that he believed to be crack cocaine underneath Brown’s hand. Officer Romero explained that nothing was on the ground until Brown moved his hand downward. Officer Romero testified that Brown then “[s]tands up and stomps with his shoe on the crack cocaine.” Officer Romero pushed Brown away from the substance, collected the substance, and arrested Brown. Upon arresting Brown, Officer Romero searched him and found \$1,742 in cash that was folded in halves in common increments, *i.e.* with all of the bills grouped by denomination. Officer Romero opined that based on how the cash was folded, it was the “profits of narcotics sales.”

Officer Matthew Laird of the Beaumont Police Department testified that he was patrolling with Officers McBride and Romero on the date in question. Officer Laird

testified that as the officers approached the group of individuals, he “couldn’t tell if [Brown] dropped anything or not.” Officer Laird explained that he “just saw [Brown] make a motion toward the ground[,]” and when Officer Romero began to approach Brown, Officer Laird saw Brown “start stomping the ground.”

Officer Michael McBride of the Beaumont Police Department testified that he was patrolling with Officers Laird and Romero on the date in question. According to Officer McBride, as the officers approached the group of individuals who were gambling, he saw one of the subjects “stomping on something.” Officer McBride explained that he saw Officer Romero detaining the subject who was stomping, and he also saw Officer Romero retrieve what appeared to be crack cocaine from the ground. Officer McBride opined that by stomping, Brown was attempting to destroy evidence.

Rebekah Sweetenham, a forensic scientist with the Jefferson County Regional Crime Lab, testified that she tested the substance recovered from the scene and determined that the substance was cocaine in the amount of 0.90 gram. At the conclusion of Sweetenham’s testimony, the State rested. Brown then moved for an instructed verdict, and the trial court denied his motion. After recalling Officers Romero, Laird, and McBride to the stand, the defense rested.

BROWN’S ISSUES

In his first issue, Brown argues the evidence was legally insufficient to sustain his conviction. In his second issue, Brown contends the trial court erred by denying his motion for an instructed verdict of not guilty. Appellate courts treat an issue challenging

the denial of a motion for instructed verdict as a challenge to the legal sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). Therefore, we address Brown's two issues together.

In performing a legal sufficiency review, an appellate court must view the evidence in the light most favorable to the verdict to determine whether a rational fact finder could have found each element of the offense beyond a reasonable doubt. *Ross v. State*, 133 S.W.3d 618, 620 (Tex. Crim. App. 2004) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

“To prove unlawful possession of a controlled substance, the State must first prove appellant exercised actual care, control and management over the contraband and second, that appellant had knowledge the substance in his possession was contraband.” *Nixon v. State*, 928 S.W.2d 212, 215 (Tex. App.--Beaumont 1996, no pet.) (citing *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995)). The State need not prove exclusive possession of the contraband, since control over contraband may be jointly exercised by more than one person. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *State v. Derrow*, 981 S.W.2d 776, 779 (Tex. App.--Houston [1st Dist.] 1998, pet. ref'd). However, “mere presence at a place where contraband is being used or possessed by others does not justify finding that a person is in joint possession or is a party to an offense.” *Roberson v. State*, 80 S.W.3d 730, 735 (Tex. App.--Houston [1st Dist.] 2002, pet. ref'd).

When an accused is not in exclusive possession of the location where contraband is found, additional independent facts and circumstances may affirmatively link him to the contraband. *Nixon*, 928 S.W.2d at 215. An affirmative link may be established through either direct or circumstantial evidence, and it must show that the accused's connection to the contraband was more than fortuitous. *Poindexter v. State*, 153 S.W.3d 402, 405-06 (Tex. Crim. App. 2005). Factors which tend to establish affirmative links include:

- (1) the contraband was in plain view;
- (2) the accused was the owner of the premises in which the contraband was found;
- (3) the contraband was conveniently accessible to the accused;
- (4) the contraband was found in close proximity to the accused;
- (5) a strong residual odor of the contraband was present;
- (6) paraphernalia to use the contraband was in view or found near the accused;
- (7) the physical condition of the accused indicated recent consumption of the contraband in question;
- (8) conduct by the accused indicated a consciousness of guilt;
- (9) the accused had a special connection to the contraband;
- (10) the place where the contraband was found was enclosed;
- (11) the occupants of the premises gave conflicting statements about relevant matters; and
- (12) affirmative statements connect the accused to the contraband.

Nixon, 928 S.W.2d at 215. “It is . . . not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial.” *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006).

In this case, Officer Romero testified that he saw Brown make a furtive hand gesture toward the pavement. After Officer Brown observed Brown’s hand gesture, he then saw crack cocaine, which had not previously been present. Officers Romero, Laird, and McBride all testified that as Officer Romero began to approach Brown, Brown stomped on the cocaine. Officer Romero also testified that after he searched Brown incident to arrest, he found \$1,742 in cash, with all of the bills grouped by denomination. We conclude that sufficient affirmative links exist in this case. *See Nixon*, 928 S.W.2d at 215. The evidence is legally sufficient to support the verdict. Accordingly, we overrule issues one and two and affirm the trial court’s judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on March 30, 2010
Opinion Delivered May 19, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.