

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-14-00505-CR

ROLANDO GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 13-02-01981 CR**

MEMORANDUM OPINION

A jury convicted Rolando Gutierrez of possession of a controlled substance with intent to deliver, and the trial court sentenced Gutierrez to ninety-nine years in prison. In two appellate issues, Gutierrez challenges the sufficiency of the evidence and the trial court's jurisdiction. We affirm the trial court's judgment.

Factual Background

According to Special Agent Joel Saldana, in 2012, a confidential informant advised the Drug Enforcement Agency that a man named Angel Vasquez, from the

Rio Grande Valley, would sell cocaine to the informant. On February 22, 2013, Saldana met with Angel Vasquez, Jose Vasquez, and Lauro Rincon in Houston. Officer Jose Benavidez, Jr. assisted Saldana with the drug transaction. He and Saldana saw Jose carrying a black bag. Rincon took Angel and Jose to the location where the cocaine was being held. Officers followed them to a “stash house.” Saldana explained that a “stash house” is a place where drug dealers keep narcotics or money. Angel agreed to meet Saldana at a local restaurant.

Deputy Kenneth Wakefield testified that he learned that a maroon van had left the stash house. Wakefield stopped the van because of a missing front plate. The van was occupied by Gutierrez, Jose, and Aroldo Aguilar. Gutierrez owned the van. Gutierrez claimed that he and the other occupants had come from the Rio Grande Valley to look for vehicles to purchase and transport to Mexico. He denied that the van contained anything illegal, including drugs. Wakefield saw a Department of Public Safety jacket inside the van, and he testified that individuals transporting narcotics often have law enforcement clothing in their possession. Wakefield also saw a crucifix in the vehicle and an air freshener; he explained that drug transporters often place religious symbols in a vehicle to make the vehicle less conspicuous and air fresheners to mask the odor of drugs. He observed vehicle sales information, tow hitches, bars, and lights, and vehicle titles inside the van.

Crime scene investigator Mark Knight, testified that he noticed a black bag located next to Jose's seat.

Wakefield testified that a narcotics dog alerted to narcotics inside the van. Officers found ten packages of cocaine inside the black bag. Wakefield testified that the cocaine was in arm's reach of all passengers. He also testified that Gutierrez was in possession of \$610. Saldana testified that people moving drugs will not entrust a large amount of drugs to someone they don't know or get into a vehicle without knowing or trusting the other individuals in the vehicle. Benavidez believed that Gutierrez, Jose, Angel, Ricon, and Aguilar all played an active role in the transaction.

Minh Nguyen, a chemist for the Texas Department of Public Safety crime lab, testified that the cocaine weighed approximately 10,000 grams. Wright testified that Gutierrez's fingerprints were not on any of the items seized. However, a receipt for an electronic scale was found on Gutierrez's person. Detective Mandy Curry testified that drug paraphernalia was found during a subsequent search of the stash house, including digital scales.

Jurisdiction

In issue two, Gutierrez contends that the trial court judge was not qualified to hear felony cases and, consequently, lacked jurisdiction over his case. The

record indicates that a county court at law judge presided over Gutierrez's trial in the district court. Gutierrez maintains that the trial judge did not have concurrent felony jurisdiction with the district court, a case may only be transferred from one felony court to another felony court, and the record does not contain an order of assignment.

“[T]he power or authority of the person presiding over the court is not jurisdictional, and depending on the type of error, cannot always be collaterally attacked.” *Davis v. State*, 956 S.W.2d 555, 559 (Tex. Crim. App. 1997). A pre-trial objection is required to preserve a complaint that a judge was improperly assigned to preside over a case. *See Wilson v. State*, 977 S.W.2d 379, 380 (Tex. Crim. App. 1998); *see also Davis*, 956 S.W.2d at 559. In this case, the record does not indicate that Gutierrez lodged a pre-trial objection to the trial judge presiding over his case; not until his motion for new trial did Gutierrez present the issue to the trial court. *See Wilson*, 977 S.W.2d at 380; *see also Davis*, 956 S.W.2d at 559; *Sparkman v. State*, 997 S.W.2d 660, 663 (Tex. App.—Texarkana 1999, no pet.). Issue two is not preserved for appellate review and is overruled.

Sufficiency

In issue one, Gutierrez contends that the evidence is insufficient to support his conviction for possession of a controlled substance with intent to deliver.

Gutierrez argues that the State failed to establish probative evidence linking him to the cocaine other than his presence and proximity to the cocaine. Under a legal sufficiency standard, we assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.¹ *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We give deference to the jury's responsibility to fairly resolve conflicting testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.

A person commits possession of a controlled substance with intent to deliver if he knowingly possesses cocaine that is “by aggregate weight, including adulterants or dilutants, 400 grams or more.” Tex. Health & Safety Code Ann. § 481.112(a), (f) (West 2010); *see also id.* § 481.102(3)(D). The State must prove 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); *see* Tex. Health & Safety Code Ann. § 481.002(38) (West Supp. 2015).

¹Gutierrez also challenges the factual sufficiency of the evidence, but the standards are the same under *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

Regardless of whether the evidence is direct or circumstantial, it must establish that the defendant's connection with the drug was more than fortuitous. . . . Mere presence at the location where drugs are found is thus insufficient, by itself, to establish actual care, custody, or control of those drugs. However, presence or proximity, when combined with other evidence, either direct or circumstantial (*e.g.*, "links"), may well be sufficient to establish that element beyond a reasonable doubt.

Evans v. State, 202 S.W.3d 158, 161-62 (Tex. Crim. App. 2006) (footnotes omitted). Factors showing a possible link between the accused and contraband include:

(1) the accused's presence when the search was conducted, (2) whether the contraband was in plain view, (3) the accused's proximity to and the accessibility of the contraband, (4) whether the accused was under the influence of narcotics when arrested, (5) whether the accused possessed other contraband or narcotics when arrested, (6) whether the accused made incriminating statements when arrested, (7) whether the accused attempted to flee, (8) whether the accused made furtive gestures, (9) whether there was an odor of contraband, (10) whether other contraband or drug paraphernalia were present, (11) whether the accused owned or had the right to possess the place where the contraband was found, (12) whether the contraband was found in an enclosed place, (13) whether the accused was found with a large amount of cash, and (14) whether the conduct of the accused indicated a consciousness of guilt.

Roberts v. State, 321 S.W.3d 545, 549 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). "The absence of various links does not constitute evidence of innocence to be weighed against the links present." *Satchell v. State*, 321 S.W.3d 127, 134 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

The record demonstrates that, like Angel, the man who brokered the drug deal with narcotics officers, Gutierrez had recently arrived from the Rio Grande Valley and had been present at the stash house where the cocaine was located. Gutierrez was present when officers searched the van, the cocaine was accessible to Gutierrez, Gutierrez owned the van, and Gutierrez was in possession of several hundred dollars. Officers found Gutierrez's receipt for digital scales and subsequently found scales at the stash house. The van also contained a DPS jacket, a crucifix, and an air freshener, all of which Wakefield testified are commonly found in vehicles transporting drugs. The van was also occupied by Jose, another player in the undercover drug deal, and the jury heard Saldana testify that drug transporters will not entrust a significant amount of drugs to an unfamiliar person or ride in a vehicle with someone they do not know or trust. Additionally, the jury heard Benavides opine that all five men, including Gutierrez, played an active role in the drug transaction.

Based on the evidence presented, the jury could reasonably conclude that Gutierrez exercised control, management, or care over the cocaine and knew the cocaine was contraband. *See Poindexter*, 153 S.W.3d at 405; *see also Gregory v. State*, 159 S.W.3d 254, 260 (Tex. App.—Beaumont 2005, pet. ref'd) (The State's evidence of the accused's knowledge and control over contraband need not be so

strong as to exclude every other outstanding reasonable hypothesis except the accused's guilt.); Tex. Health & Safety Code Ann. § 481.002(38). Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could find, beyond a reasonable doubt, that Gutierrez committed the offense of possession of a controlled substance with intent to deliver. *See* Tex. Health & Safety Code Ann. §§ 481.102(3)(D), 481.112(a), (f); *see also Jackson*, 443 U.S. at 318-19; *Hooper*, 214 S.W.3d at 13. We overrule issue one and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on November 16, 2015
Opinion Delivered January 13, 2016
Do Not Publish

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