COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00275-CR
NO. 02-15-00276-CR

TERRY MODRIC SMALL A/K/A TERRANCE L. SMALL	APPELLANT

V.

THE STATE OF TEXAS	STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1397118D, 1397119D

MEMORANDUM OPINION[1]

A jury convicted Appellant Terry Modric Small, also known as Terrance L. Small, of possession of less than one gram of methamphetamine and possession of more than four but less than two hundred grams of heroin with intent to deliver,

[1]*See* Tex. R. App. P. 47.4.

charged in separate indictments.[2] Upon Appellant's plea of true to the habitual offender allegations in each case, the trial court sentenced him to twenty-five years' imprisonment in the heroin case and twenty years' imprisonment in the methamphetamine case, each as a habitual offender. In two points, Appellant challenges the sufficiency of the evidence to support his heroin conviction and contends that the visiting trial judge reversibly erred and denied him due process when she made statements to a defense witness that dissuaded the witness from testifying to matters in Appellant's bill that would have qualified as newly discovered evidence in a hearing on a motion for new trial, although he never filed a motion for new trial. Because the evidence was sufficient to support Appellant's heroin conviction and because the trial court did not reversibly err by making statements to Appellant's witness that resulted in the witness's decision not to testify, we affirm the trial court's judgments.

Brief Facts

Police were dispatched on a "shots fired" call to an area just east of downtown Fort Worth on December 29, 2014. Fortunately, we have the benefit of both video and audio recordings of the activities described in testimony. Police first went to the 2500 Club, a biker bar, and no one seemed to have heard anything. Then the police went next door to the Elegance Cabaret, a stripper

[2] *See* Tex. Health & Safety Code Ann. §§ 481.102(2), (6), 481.112(a), (d), 481.115(a), (b) (West 2010).

bar. Outside the Elegance Cabaret, police found an idling, locked, unoccupied late-model Nissan Altima. The car's lights were on.

Fort Worth Police Officer Robert San Filippo spotted a man, later identified as Appellant, walking up to the door of the Cabaret. We note that Officer San Filippo's testimony did not deviate even slightly from the events captured in the recording. Additionally, the recording reflects that San Filippo was at all times courteous and professional while dealing with Appellant.

While Officer Harlow Jorgensen remained with the idling car, Officer San Filippo walked toward Appellant. Officer San Filippo asked Appellant if he had heard any shots. Appellant informed him, "That's my car." Appellant then began to walk back to his idling vehicle. It was at about this point that Officer Jorgensen yelled to Officer San Filippo to handcuff Appellant. Officer Jorgensen said that he had seen methamphetamine in a clear plastic baggie in the car's cup holder.

Appellant volunteered that he had seen the methamphetamine on the ground and picked it up. The police took the keys from Appellant's pocket to unlock the car, and Officer Jorgensen searched the car. He found heroin capsules in the glove compartment and black tar heroin under the backseat. He also found small Ziploc baggies next to the methamphetamine and a glass pipe in the front seat area.

Appellant had $480 in cash on him and a number of empty plastic baggies in his car. Investigator Ramon Torres of the Tarrant County District Attorney's Office testified that drug-dealing is a cash business, that the number of heroin

capsules in the car indicated an intent to deliver, and that the type of baggie found in the car would be used by dealers for packaging their product for resale. Appellant did not object to the search, the admission of the drug evidence found in the car, or the testimony of the investigator.

Sufficiency of the Evidence

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3] This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.[4]

The trier of fact is the sole judge of the weight and credibility of the evidence.[5] Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder.[6] Instead, we determine whether the necessary

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[3]*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

[4]*Id.*; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

[5]*See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

[6]*See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012).

inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict.[7] We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution.[8] We must consider all the evidence admitted at trial, even improperly admitted evidence, when performing a sufficiency review.[9]

The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt.[10] In determining the sufficiency of the evidence to show an appellant's intent, and faced with a record that supports conflicting inferences, we "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution."[11]

To prove unlawful possession of a controlled substance with intent to deliver, the State must prove beyond a reasonable doubt that the defendant (1) exercised actual care, custody, control, or management over the substance,

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[7] *Murray*, 457 S.W.3d at 448.

[8] *Id.* at 448–49.

[9] *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *Moff v. State*, 131 S.W.3d 485, 489–90 (Tex. Crim. App. 2004).

[10] *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

[11] *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

(2) knew the substance possessed was contraband, and (3) intended to deliver it to another.[12]

Possession need not be exclusive.[13] When the defendant is not in exclusive possession of the place where the substance is found, additional independent facts and circumstances must connect the defendant to the contraband.[14] Although the element of possession may be proved by circumstantial evidence, that evidence must sufficiently tie the defendant to the offense so that a jury may reasonably infer that the defendant knew of the contraband's existence and exercised control over it.[15] Nonexclusive factors we may consider in deciding whether the evidence sufficiently links the defendant to the contraband are the defendant's presence during a search, whether the contraband was found in plain view, the defendant's proximity to the drug and how easily he could grab it, whether the defendant was under the influence of drugs when arrested, whether he made incriminating statements at the time of

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[12] *Williams v. State*, No. 02-11-00196-CR, 2012 WL 5356284, at *2 (Tex. App.—Fort Worth Nov. 1, 2012, no pet.) (mem. op., not designated for publication); *Cadoree v. State*, 331 S.W.3d 514, 524 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *see also* Tex. Health & Safety Code Ann. § 481.112(a).

[13] *See Poindexter v. State*, 153 S.W.3d 402, 405–06 (Tex. Crim. App. 2005), *overruled on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 n.32 (Tex. Crim. App. 2015).

[14] *Id.* at 406; *Missimer v. State*, No. 02-14-00369-CR, 2015 WL 4076935, at *2 (Tex. App.—Fort Worth July 2, 2015, no pet.) (mem. op., not designated for publication).

[15] *Poindexter*, 153 S.W.3d at 405–06; *Missimer*, 2015 WL 4076935, at *2.

arrest, whether he attempted to flee or made furtive gestures, whether other drugs were present, whether the defendant owned or had the right to possess the place where the drugs were discovered, whether that place was enclosed, whether the defendant had a large amount of cash on him, and whether his conduct showed an awareness of guilt.[16]

Intent to deliver may likewise be established through circumstantial evidence.[17] Nonexclusive factors we may consider in determining intent to deliver include the nature of the location where the defendant was arrested, the amount of drugs he possessed, the drug packaging, the presence or absence of drug paraphernalia, whether the defendant possessed a large amount of cash, and the defendant's status as a drug user.[18]

Appellant argues in his first point that the evidence is insufficient to prove that he possessed at least four but less than 200 grams of heroin with the intent to deliver. Appellant does not challenge the sufficiency of the evidence to support his conviction for the possession of methamphetamine.

While he challenges the amount of heroin found in the glove compartment (and admitted as State's Exhibit 6), he appears to concede that the amount found under the back seat and admitted as State's Exhibit 5 is sufficient to support his

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[16] *Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006).

[17] *Williams*, 2012 WL 5356284, at *2; *Jordan v. State*, 139 S.W.3d 723, 726 (Tex. App.—Fort Worth 2004, no pet.).

[18] *Williams*, 2012 WL 5356284, at *2; *Jordan*, 139 S.W.3d at 726.

conviction. Jason Allison, senior forensic scientist for the City of Fort Worth crime lab, testified that the heroin in State's Exhibit 5 weighed 5.219 grams. State's Exhibit 6 contained twenty-eight capsules containing heroin. Allison had weighed only three of the twenty-eight capsules because he had already weighed the heroin in State's Exhibit 5, and that amount had been well above four grams.

Appellant specifically challenges the possession element. He argues that there was no evidence that he had driven the car without a passenger and no evidence that unbeknownst to him, a previous owner of the car had not hidden the heroin under the back seat. Appellant points out that he attempted to elicit the testimony of Miguel Torres that he had possessed drugs in Appellant's car, but Torres did not testify. Appellant also argues that he did not act guilty by attempting to flee, that no one testified about fingerprints on the pipe or baggies found in the car, and that there was an absence of affirmative links between him and the contraband. Indeed an absence of the *Evans*[19] factors, he argues, helps render insufficient the evidence of his guilt.

Additionally, he appears to argue that the evidence was insufficient to show intent to deliver as opposed to mere possession. Appellant was arrested in a bar area after he announced that the locked, idling car was his and after the police found methamphetamine in plain view. Appellant claimed that he had

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[19] *Evans*, 202 S.W.3d at 162, n.12.

found the methamphetamine and picked it up. The police found almost $500 in cash on his person. Upon opening the car with a key they took from Appellant, the police found two types of heroin, including twenty-eight capsules, baggies, and a glass pipe in the car. The investigator testified that the money, the baggies, and the number of heroin capsules all pointed to a conclusion that Appellant was dealing. From the evidence, the jury could have reasonably inferred beyond a reasonable doubt that Appellant possessed the heroin with an intent to deliver it to others. Viewing all the evidence in the light most favorable to the verdict, we hold that it is sufficient to support the jury's verdict. We overrule Appellant's first point.

Judicial Misconduct

In his second point, Appellant argues that the visiting trial judge violated his Fifth and Fourteenth Amendment due process rights by advising Miguel Torres of his right not to testify during a hearing while the jury was deliberating. Appellant argues that Torres's testimony could have been used during a hearing on a motion for new trial as newly discovered evidence.

Appellant appears to attempt to raise a *Webb* issue.[20] *Webb* involved harsh language from the trial judge regarding perjury.[21] Here, Torres testified at a voir dire hearing that he knew Appellant, and Torres answered "Yes" when

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[20] *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351 (1972).

[21] *Id.* at 95–98, 93 S. Ct. at 352–54.

asked if he had ever possessed drugs in Appellant's car. The trial judge reminded Torres that he needed to listen to his lawyer about how to answer these questions, asked if he had had enough time to consult with his lawyer, and gave him more time to consult with his lawyer because Torres's lawyer had indicated to her that Torres would "answer a particular way and [he] just answered differently from that." The conscientious trial judge acted properly in pointing out Torres's right to confer with counsel.[22] Regardless, Appellant did not preserve the issue.[23] We overrule Appellant's second point.

Conclusion

Having overruled Appellant's two points on appeal, we affirm the trial court's judgments.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 6, 2016

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[22] *See Cathey v. State*, 992 S.W.2d 460, 465 (Tex. Crim. App. 1999), *cert. denied*, 528 U.S. 1082 (2000).

[23] *See* Tex. R. Evid. 103; Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016); *Sanchez v. State*, 418 S.W.3d 302, 306 (Tex. App.—Fort Worth 2013, pet. ref'd).