NUMBER 13-15-00507-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DARRELL WAYNE HARDAWAY A/K/A DARRELL HARDAWAY, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant Darrell Wayne Hardaway appeals a conviction for manufacture or delivery of a controlled substance in the amount of four grams or more but less than two-hundred grams, a first-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West, Westlaw through Ch. 49, 2017 R.S.). In two issues, Hardaway

contends that (1) the evidence is legally insufficient to support the "possession" element of the offense, and (2) the trial court erred in overruling his motion to suppress. We affirm.

I. BACKGROUND[1]

On August 9, 2014, at approximately 1:30 a.m., Jason Stover, a detective with the Victoria Police Department, was traveling eastbound on Houston Highway in a police unit when he observed a vehicle exiting the Six Flags Motel. According to Stover, the motel is considered a "high crime" location because of "illegal narcotic drug" activity and prostitution. When the vehicle drove onto the westbound lane of Houston Highway, Stover "turned around in the middle of the road just to see if [he] could get some probable cause to stop the vehicle."

As the vehicle traveled on Houston Highway, its driver, according to Stover, committed two traffic infractions—changing lanes without a signal and making a "wide turn" off of the highway and onto an adjoining street. Stover followed the vehicle off of the highway and into a residential neighborhood. Stover activated his police unit's lights, and, as the pursuit proceeded, he later activated the siren. The vehicle did not immediately stop. It traveled at approximately forty to forty-five miles per hour through a residential neighborhood that, according to Stover, was not known for drug activity. After turning three corners, the vehicle collided with a parked pickup truck. The collision caused the vehicle's airbags to deploy. Stover recalled that no other cars were parked

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

along the street where the collision occurred and no pedestrians were in the vicinity.

After the collision, Stover approached the vehicle and asked Hardaway to exit it. According to Stover, Hardaway did not appear intoxicated. When Stover asked Hardaway why "he was running," he answered that "his foot got stuck on the brake pedal." Soon thereafter, two police officers arrived. One of officers spotted a baggie along the curb, approximately fifteen feet behind Hardaway's vehicle. Forensic testing later determined that the baggie contained 7.86 grams of crack cocaine; no fingerprints were found on the baggie. The State asked Stover whether the amount of crack cocaine found was "somewhere from 25 to 70 personal usage amounts," to which he answered, "Yes." Stover also testified that the crack cocaine found could be valued "anywhere from eight, [$]800 to $1,200." He further testified that the passenger window on Hardaway's vehicle was rolled down. Stover posited that Hardaway could have thrown the baggie out of the passenger's side window before the collision. According to Stover, there are only two causes of an accident during a police pursuit: (1) speed or (2) "somebody's dividing their attention, i.e., discarding evidence from the vehicle, they tend to wreck it." On cross-examination by Hardaway, Stover denied seeing Hardaway discard the baggie and he acknowledged that no narcotics were found on Hardaway when he was searched.

The trial court found Hardaway guilty of one count of manufacture or delivery of a controlled substance in the amount of four grams or more but less than two-hundred grams, a first-degree felony, *see* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d), and one count of evading arrest with a vehicle, a third degree felony. *See* TEX. PENAL CODE ANN. § 38.04(b)(2)(A) (West, Westlaw through Ch. 49, 2017 R.S.). Additionally, the trial

court found that at the time Hardaway committed the two counts, he had previously been convicted of two felonies. *See* TEX. CODE CRIM. PROC. ANN. art. 12.42 (West, Westlaw through Ch. 49, 2017 R.S.). It sentenced Hardaway for fifteen years' confinement for the evading arrest conviction, and twenty-five years' confinement for the manufacture or delivery conviction, to run concurrently. Hardaway[2] only appeals the conviction for manufacture or delivery.

II. DISCUSSION

A. Standard of Review Regarding Legal Sufficiency

In Hardaway's first issue, he contends that the evidence is legally insufficient to support the "possession" element of the offense of manufacture or delivery of a controlled substance.[3]

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict (or trial-court finding when the case is tried to the bench) and determine, based on that evidence and any reasonable inferences therefrom, whether a rational factfinder could have found the elements of the offense beyond a reasonable doubt. *See Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, (1979)). In making this review, we

[2] We note that the indictment and judgments of conviction in trial court cause number 14-10-28274-A identify the defendant as "Darrell Hardaway," but that the notice of appeal and briefs before us identify the defendant/appellant as "Darrell Wayne Hardaway." Both the trial court and appellate court filings refer to the same person.

[3] Hardaway does not challenge the intent to deliver element. Intent to deliver can be proven by circumstantial evidence. *Rhodes v. State*, 913 S.W.2d 242, 251 (Tex. App.—Fort Worth 1995), *aff'd*, 945 S.W.2d 115 (Tex. Crim. App. 1997). Some factors to consider in determining intent include (1) the nature of the location where the defendant was arrested, (2) the quantity of drugs the defendant possessed, (3) the manner of packaging of the drugs, (4) the presence or absence of drug paraphernalia, (5) whether the defendant possessed a large amount of cash in addition to the drugs, and (6) the defendant's status as a drug user. *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

consider all evidence in the record, whether it was admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury (or trial court in this case) is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict (or trial-court finding as in this case). *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

B. Applicable Law Regarding Legal Sufficiency Challenge

To prove appellant committed this offense, the State was required to show beyond a reasonable doubt that Hardaway knowingly possessed with intent to deliver crack cocaine in the amount of four grams or more but less than 200 grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d). The State was required to establish that Hardaway exercised control, management, or care over the controlled substance and knew it was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005). Hardaway's connection to the crack cocaine must be more than fortuitous. *Evans v. State*, 202 S.W.3d 158, 161–62 (Tex. Crim. App. 2006). Mere presence in the same place as the controlled substance is insufficient to justify a finding of possession. *Id*. at 162.

Under Texas law, presence or proximity, when combined with other evidence, either direct or circumstantial, may establish possession. *Id*. When a defendant does not have exclusive possession of the place where the contraband was found, such as in this case, we must examine the record to determine if there are additional, independent facts that "affirmatively link" Hardaway to the crack cocaine. *See Poindexter*, 153 S.W.3d at 406. The requirement of "affirmative links" is aimed at protecting innocent bystanders from conviction based solely on their proximity to someone else's contraband. *Id*.

The following nonexclusive list of factors has been recognized as tending to establish affirmative links: (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 contraband; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband 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. *See Evans*, 202 S.W.3d at 162 n. 12; *Black v. State*, 411 S.W.3d 25, 29 (Tex. App.—Houston [14th Dist.] 2013, no pet.). It is "not the number of links that is dispositive, but

rather the logical force of all of the evidence, direct and circumstantial." *Evans*, 202 S.W.3d at 162.

C. Analysis of Legal Sufficiency Challenge

Hardaway's legal sufficiency challenge contends that twelve of the "affirmative links" factors articulated in *Evans* are not present in this case and that the only two—the third factor, Hardaway's proximity, and the seventh factor, Hardaway's flight—are insufficient to satisfy a legal sufficiency review.

But, we are prohibited from taking a "divide and conquer approach" in analyzing the legal sufficiency of evidence in criminal cases. *See generally, Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011) (holding that a "divide and conquer approach" is "incorrect" in assessing the legal sufficiency of evidence and requiring reviewing courts to consider the combined force of all of the non-accomplice evidence that tends to connect the accused to the offense). With this rule in mind, we must reject Hardaway's legal sufficiency challenge and hold that the cumulative weight of the evidence, along with all reasonable inferences the trial court could draw, sufficiently establishes affirmative links that support the trial court's finding of guilt.

The third "affirmative links" factor, Hardaway's proximity to and the accessibility of the contraband, weighs against Hardaway's legal sufficiency challenge. As part of the terms "proximity" and "accessibility," we credit the fact that Hardaway was seen leaving a location that, according to Stover, was known as a "high crime" location because of "illegal narcotic drug" activity and prostitution. A reasonable factfinder could infer that someone at such a location may have been able to purchase contraband such as crack cocaine.

The twelfth "affirmative links" factor, whether the place where the drugs were found was enclosed, when read broadly, tends to weigh against Hardaway's legal sufficiency challenge. True, the crack cocaine was not found in an enclosed place and was instead on a public street. But, that street was in a residential neighborhood that, according to Stover, was not known for drug activity. A reasonable factfinder could infer that it would be highly unlikely for eight hundred to twelve hundred dollars' worth of crack cocaine to be coincidentally misplaced on a curb, where no pedestrians were present, fifteen feet from where Hardaway's vehicle, with its passenger window rolled down, collided with a parked pickup truck.

The seventh factor, Hardaway's flight, as he acknowledges, weighs against his legal sufficiency challenge. Additionally, in connection with this factor, we note the manner in which Hardaway's flight ended. Stover suggested that Hardaway collided with a parked pickup truck because he was distracted—presumably by throwing the baggie out of the rolled down passenger-side window. A reasonable factfinder could have believed Stover's theory, unsubstantiated as it was, for why Hardaway collided with a parked pickup truck.

Giving "cumulative force" to evidence before the trial court and lending any reasonable inference in support of its finding that Hardaway "possessed" the crack cocaine found at the accident scene, we hold that that evidence is legally sufficient.

Hardaway's first issue is overruled.

D. Analysis Regarding Motion to Suppress

In Hardaway's second issue, he asserts that for "the same reasons noted" in relation to his first issue, the trial court erred in overruling his motion to suppress. Hardaway also challenges the findings of fact and conclusions of law made by the trial court.

We review a trial court's ruling on a motion to suppress using a bifurcated standard of review. *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). We give almost total deference to the trial judge's determination of historical facts and of mixed questions of law and fact that rely on credibility determinations if they are supported by the record. *Id*. However, we review de novo questions of law and mixed questions of law and fact which do not rely on credibility determinations. *Id*. It is on the question of law where Hardaway's second issue falters.

Hardaway fails to reference any legal authority in support of his contention that the "affirmative links" doctrine controls, in any way, how a trial court should rule on a motion to suppress. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). On the other hand, the basis for Stover's decision to pull over Hardaway is clear: a police officer may lawfully stop a motorist who has committed a traffic violation. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). In this case, the trial court found that Hardaway committed a traffic violation by violating Texas Transportation Code Section 545.101. *See* TEX. TRANSP. CODE ANN. § 545.101(a) (West, Westlaw through Ch. 49, 2017 R.S.) ("To make a right turn at an intersection, an operator shall make both

the approach and the turn as closely as practicable to the right-hand curb or edge of the roadway.").

Similarly, although Hardaway claims to "expressly challenge[] the findings and conclusions of law made by the" trial court, he fails to reference any legal authority in support of his contention. *See* TEX. R. APP. P. 38.1(i). He also fails to direct us to which of the six factual findings and nine legal conclusions that he seeks to challenge. *Id*. Accordingly, the arguments raised in connection with Hardaway's second issue are inadequately briefed. *See id*.

Hardaway's second issue is overruled.

III. CONCLUSION

We affirm the judgment of the trial court.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
10th day of August, 2017.