NUMBER 13-16-00387-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GREGORY WATKINS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 403rd District Court of Travis County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez

Appellant Gregory Watkins appeals his conviction for third-degree felony distribution of a controlled substance in a drug-free zone, enhanced to a second-degree felony because of a prior felony drug charge. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(b), 481.134(d)(1) (West, Westlaw through Ch. 49, 2017 R.S.); TEX. PENAL CODE ANN. § 12.42(a) (West, Westlaw through Ch. 49, 2017 R.S.). By two issues, appellant

first contends that the State of Texas provided insufficient evidence to identify him as the person who sold less than a gram of cocaine to an undercover officer on October 21, 2015. *See id.* § 481.112(b). Second, appellant asserts that, if the evidence establishes identity, then the State lacked sufficient evidence as to his presence within a drug-free zone, a sentencing enhancer. *See id.* § 481.134(d)(1). We affirm.[1]

I. BACKGROUND

At 10:08 P.M. on October 21, 2015, during an undercover drug operation, appellant allegedly sold .182 grams of crack cocaine to Officer Patrick Reed for $25. The transaction took place at or near the northwest corner of East 7th Street and Red River Street in Austin, Texas. According to Officer Reed's testimony, appellant removed the narcotics from his mouth, then discretely exchanged the drugs for money. Officer Reed paid with predetermined "buy money" that had specific notations logged with his team. While multiple videos show Officer Reed interacting with an individual at the time of the transaction, no video shows the cocaine and money transferring hands. Officer Reed described the individual as a tall black male, wearing a black t-shirt, blue jean shorts, and a backpack. In accordance with the "buy/walk" procedure, Officer Reed returned with the drugs to the field team a few blocks away. Officer Reed testified that a "buy/walk" procedure involves an undercover officer purchasing contraband and leaving the scene with the drugs while another officer later arrests the individual.[2]

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[1] This case is before the Court on transfer from the Third Court of Appeals in Austin pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through Ch. 49, 2017 R.S.).

[2] According to Officer Patrick Reed and Officer Justin Berry, a buy/walk operation, rather than a buy/bust operation, will not immediately result in an arrest. Before, during, and after the transaction, a surveillance team monitors the officer with publicly installed cameras then, subsequently, follows the

Officer Reed testified that a school was in the vicinity of the alleged drug transaction. According to Officer Reed, St. David's Episcopal Day School is located at 301 East 8th Street. Officer Reed testified that he utilized two methods to measure the distance from the transaction location to the school: Google Earth on his computer and the GPS device in his patrol car. From address to address, Google Earth represented the distance as 722 feet while his patrol car's GPS indicated that the two locations were 739 feet apart. Sara Davis, an analyst for the Austin Police Department, testified that she used ArcGIS software to conclude that the transaction zone was about 750 feet from the school. However, she estimated the perimeter of the school by using general, rather than fixed, property lines when measuring the distance between locations. Finally, appellant introduced evidence showing that two other direct routes, not calculated by the State, would place the two addresses more than 1,000 feet apart, beyond the range prohibited by the drug-free zone statute. *See id.*

Officer Tyson Setzler also testified at trial. According to Officer Setzler, he conducted surveillance the night of the alleged transaction. During his surveillance, he witnessed Officer Reed approach an individual at the corner of East 7th and Red River Street. According to Officer Setzler's testimony, the individual was wearing a dark-colored short sleeve shirt, light-colored blue jean shorts, a dark hat with a light-colored

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individual with whom the transaction allegedly occurred. A field lab will test the alleged drugs for a presumptive positive result while the surveillance team follows the individual. Another officer will communicate with the surveillance team to effectuate a stop and positive identification of the individual ten to fifteen minutes after the initial exchange. To protect the nature of the undercover operation, the officer will not arrest the individual that night, but rather will later obtain a warrant for his/her arrest. The officers testified that this method provides them a chance to conduct multiple undercover operations in a single evening, which may lead to the discovery of the primary drug dealers in the area.

bill and white writing, white shoes and socks, and a dark-colored backpack. Officer Setzler testified that after the transaction occurred, Officer Reed provided the surveillance team with auditory confirmation that a deal had occurred and informed the team who to follow. While Officer Setzler monitored the individual, he was in audio contact with Officer Justin Berry, the "takedown officer," who eventually stopped appellant. At trial, Officer Setzler elected not to identify appellant as the individual who transferred the drugs because he was not personally at the scene during the transaction and was not at Officer Berry's stop.

Officer Berry testified that, based on Officer Setzler's description, he stopped an individual, around 10:30 P.M., a few blocks from the transaction because of the individual's suspicious lurking near an ATM. That individual told Officer Berry that his name was Gregory Watkins and that his birthdate was April 21, 1970; he provided Officer Berry unofficial identification paperwork. According to Officer Berry, he then performed a regular frisk, commonly associated with a safety search, rather than a more extensive pat-down search. Officer Berry testified that he never searched appellant's person or backpack for drugs and never asked for any of the marked, predetermined buy money. Officer Berry's dash cam recorded his interactions with the individual. Officer Berry did not arrest appellant that evening. During trial, Officer Berry stated he verified the individual's identification through a reliable database, then confirmed under oath that appellant, who was at trial, was the individual he stopped.

During trial, Officer Reed testified that the individual on Officer Berry's dash cam video was the individual from whom he purchased drugs.

At the completion of the State's case, appellant filed a motion for a directed verdict, which the trial court denied. The jury returned a verdict that appellant was guilty of selling a controlled substance in a drug-free zone, enhanced by a finding of true that he had a prior drug offense, and assessed punishment at seven years, six months in prison. This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

A. Standard of Review

When reviewing a case for sufficiency, this Court "consider[s] the evidence in the light most favorable to the [verdict]" and will consider whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, n.12 (1979) (emphasis in original). This includes deference to the factfinder's "responsibility . . . fairly to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," including credibility determinations. *Id.* at 319; *see Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.). When the record supports conflicting inferences from evidence, it is assumed that the jury resolved the dispute in favor of the State. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Each fact need not independently point toward an individual's guilt; it is enough if the combined and cumulative force of all the evidence could lead a rational trier of fact to reasonably conclude that a defendant is guilty. *See Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993) (en banc). Further, "the lack of direct evidence is not dispositive on the issue of the defendant's guilt. Circumstantial evidence is as probative

as direct evidence in establishing the guilt of an actor." *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

B. Applicable Law

A person commits the offense of manufacture or delivery of a controlled substance if he knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance in Penalty Group 1. TEX. HEALTH & SAFETY CODE ANN. § 481.112(a). Penalty Group 1 includes, *inter alia,* cocaine. *Id.* § 481.102(3)(D) (West, Westlaw through Ch. 49, 2017 R.S.). The knowing delivery of a controlled substance is a state-jail felony if the amount of controlled substance, by aggregate weight, including adulterants or dilutants, is less than one gram. *Id.* § 481.112(b). A state-jail felony for distribution of a controlled substance is enhanced to a third-degree felony if it is shown that the offense was committed in, on, or within 1,000 feet of any real property that is owned, rented or leased to a school or school board. *Id.* § 481.134(d)(1).

III. DISCUSSION

Appellant does not contest that a drug deal occurred. Rather, the issues are whether (1) the State provided sufficient evidence that appellant sold the drugs and, if so, (2) appellant was within a drug-free school zone at the time of the transaction. Because the issue of enhancement is predicated upon actual delivery of a controlled substance, we start with appellant's issue of identity.

A. Sufficient evidence exists to identify appellant as the narcotics dealer.

There is sufficient evidence, when considered collectively, that appellant sold Officer Reed cocaine. *See Johnson*, 871 S.W.2d at 186. Although the State lacked video evidence of appellant selling the cocaine, the description of appellant provided by

the buying officer to the surveillance team, then ultimately to the takedown officer, acted as connective tissue that eventually led to Officer Berry stopping him.

Specifically, Officer Reed immediately returned to the field team where a field technician tested the contraband as a presumptive positive of cocaine. Later, a lab technician verified the presumptive positive as .182 grams of cocaine. Officer Reed provided his team with a description of appellant as wearing a black t-shirt, blue jean shorts, and a backpack at the time of the exchange. This description was additionally confirmed by Officer Setzler who operated the surveillance cameras. Officer Berry testified and provided a dash cam video of an individual matching that description whom he stopped within twenty minutes of the initial incident. That individual, on video, identified himself as appellant. Moreover, during trial, Officer Reed testified that the man depicted on the dash cam video was, in fact, the individual from whom he purchased drugs. The picture Officer Berry provided was taken after appellant offered his name, birthdate, and corresponding identification documents. Each of the officers' similar descriptions would lead to a reasonable inference that Officer Berry stopped the individual from whom Officer Reed purchased cocaine; such circumstantial evidence is sufficient. *See Guevara*, 152 S.W.3d at 49; *see also Marines v. State*, 292 S.W.3d 103, 107 (Tex. App. Houston [14th Dist.] 2008, pet. ref'd) (finding sufficient evidence existed when a police officer arrested an individual who matched the witnesses' descriptions of the shooter).

The lack of video evidence of the exchange and Officer Berry's decision not to arrest appellant or to perform a more extensive search of appellant that evening are not dispositive. *See Guevara*, 152 S.W.3d at 49. Instead, the combined and cumulative

force of evidence rationally supports the conviction. *See Johnson*, 871 S.W.2d at 186. While performing a more extensive search may have led Officer Berry to discover additional drugs on appellant's person or arresting appellant could have allowed Officer Reed to verify that appellant was the individual from whom he purchased drugs, as both Officers Reed and Berry explained, the incident with appellant that evening was part of a broader operation. According to the officers' testimony, Officer Berry decided not to arrest appellant in accordance with his orders to avoid exposing the undercover operations in which Officer Reed and other agents were actively participating. Appellant suggests that this Court should evaluate what other reasonable steps Officer Berry could have taken that evening. However, the role of this Court is to consider the sufficiency of existing evidence rather than the lack of hypothetical evidence. *See Jackson*, 443 U.S. at 319. This Court, instead, defers to the factfinder's assessment of both the officer's and the evidence's credibility. *See Brooks*, 323 S.W.3d at 894. As discussed earlier, the evidence provided by the State, in its combined and cumulative force, supports a rational judgment for the State in regards to appellant's identity as the narcotics dealer. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(b); *Johnson*, 871 S.W.2d at 186. We overrule appellant's first issue.

B. Sufficient evidence exists for a drug-free zone sentence enhancement.

Because a reasonable trier of fact may find, beyond a reasonable doubt, that appellant sold Officer Reed cocaine, we will now consider appellant's second issue: whether the factfinder may also reasonably find appellant was within 1,000 feet of a drug-free zone at the time of the transaction.

In this case, such a determination is reasonable. *See Jackson*, 443 U.S. at 319. Three separate devices demonstrated that appellant sold Officer Reed cocaine at a location between 722 feet and 750 feet from St. David's Episcopal Day School. Officer Reed testified that Google Earth represented the distance as 722 feet from address to address. Further, when Officer Reed manually drove the distance by patrol car, he found the two locations 739 feet apart. Additionally, Davis testified that, separately, she conducted a search using the official state address of St. David's School, cross-referenced with the Travis County deed record, to find the school's official property lines. Once Davis established the general property lines, she created a buffer zone of 1,000 feet around the school; she testified that the sale occurred within that zone. Davis estimated the distance at about 750 feet. Although Davis was not able to use specific property lines that would provide a firmer definition of the distance between the two locations, it is reasonable to assume, based in combination with Officer Reed's search, that the jury resolved any lack of specificity in favor of the State. *See Brooks*, 323 S.W.3d at 894.

An individual's sentence is enhanced for distribution of narcotics when he sells within 1,000 feet of a school zone. TEX. HEALTH & SAFETY CODE ANN. § 481.134(d)(1). Although appellant offered evidence that alternative routes may place the two addresses farther than 1,000 feet from each other, the State provided sufficient evidence to show otherwise. *See Brooks*, 323 S.W.3d at 894. The State's evidence from two separate officials and three separate sources would allow a jury to reasonably conclude that appellant was within 1,000 feet of St. David's Episcopal School when he sold cocaine to

Officer Reed. *See Jackson*, 443 U.S. at 319. We conclude that the sentencing enhancement is supported by sufficient evidence.

We overrule appellant's second issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

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

Delivered and filed the
29th day of June, 2017.