NO. 12-11-00192-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

STEVEN ANDRE BARKER, APPELLANT	***§***	***APPEAL FROM THE 173RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Steven Andre Barker appeals his conviction for unlawful possession of a firearm by a felon, for which he was sentenced to imprisonment for seven and one-half years. In one issue, Appellant contends that the evidence is insufficient to support his conviction. We affirm.

BACKGROUND

Appellant was charged by indictment with unlawful possession of a firearm by a felon and pleaded "not guilty." The matter proceeded to a jury trial.

At trial, Athens Police Department Officer Jason Bosher testified that he met with Jessica Cook and that she asked that Appellant be removed from her apartment. Bosher further testified that Cook informed him that Appellant had outstanding warrants and that he had a firearm in the apartment that she wanted removed as well.

Bosher accompanied Cook to the apartment and entered the apartment with her consent.[1] Bosher stated that, once inside, he encountered a woman sitting in the living room, who was later identified as Appellant's mother. Bosher testified that he asked the woman about Appellant and

[1] Bosher's report indicates that Cook gave consent and told him that Appellant "keeps his pistol in their bedroom."

that she pointed to the back bedroom. Bosher further testified that, at that moment, he saw Appellant exiting the back bedroom and arrested him.

Bosher stated that, based on information given to him by Cook concerning where Appellant kept his pistol, he entered the bedroom and located the firearm inside a black bag along with several rounds of ammunition, a loaded magazine for the pistol, black gloves, white and blue latex gloves, and a laser aiming device. Bosher further stated that Cook told Bosher the black bag was hers, but the firearm was not. Bosher testified that the pistol was later determined to have been stolen five days earlier.

Bosher testified that as he drove Appellant to the police station, Appellant told Bosher that the pistol was in Cook's apartment, but was not in his "possession." Bosher further testified that Appellant also stated that the pistol was not found "on him." Bosher stated that he responded to Appellant that the only two people in the apartment were Appellant and his mother. According to Bosher, Appellant responded that the pistol did not belong to his mother.

Cook provided several statements prior to trial in which she stated that Appellant brought the pistol into the apartment. Cook further stated that she moved the pistol to the trunk of her car. She also stated that Appellant became angry when he discovered that she had done this, removed the pistol from the trunk, wiped off any fingerprints she may have left, and moved the pistol to the television stand in the bedroom.

During her testimony at Appellant's trial, Cook stated that her prior statements about Appellant's bringing the gun into the house were not true. Cook also testified that her statements that Appellant had removed the gun from her car trunk and wiped off her fingerprints were not true. Cook did, however, admit to making these prior statements. According to Cook, she told Bosher that there was a gun in the house. However, she stated that she could not recall if she told Bosher that it was Appellant's gun. Cook further testified that she and Appellant had reunited. Cook also testified that she was seven months pregnant with Appellant's child.

Athens Police Department Officer Adam Parkins testified that he examined the pistol recovered from Cook's apartment for fingerprints. Parkins stated that he observed fingerprint smudges on the pistol. Parkins further stated that these smudges were consistent with someone's having wiped down the pistol.

Ultimately, the jury found Appellant "guilty" as charged and assessed his punishment at imprisonment for seven and one-half years. The trial court sentenced Appellant accordingly, and

this appeal followed.

EVIDENTIARY SUFFICIENCY

In his sole issue, Appellant argues that the evidence is insufficient to support the trial court's judgment. Specifically, Appellant contends that the evidence is insufficient to support that he possessed the firearm at issue.

The ***Jackson v. Virginia***[2] legal sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *See* ***Brooks v. State***, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010). Under ***Jackson***, legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson***, 443 U.S. at 315–16, 99 S. Ct. at 2786–87; *see also* ***Escobedo v. State***, 6 S.W.3d 1, 6 (Tex. App.–San Antonio 1999, pet. ref'd). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; *see also* ***Johnson v. State***, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The evidence is examined in the light most favorable to the verdict. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; ***Johnson***, 871 S.W.2d at 186. A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." ***Id.***

In the case at hand, to support Appellant's conviction for possession of a firearm by a felon, the State was required to prove, among other things, that Appellant exercised control, management, or care over the firearm. *See, e.g.*, ***Poindexter v. State***, 153 S.W.3d 402, 405 (Tex.

[2] 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979).

Crim. App. 2005). The State must establish, to the requisite level of confidence, that the accused's connection with the contraband was more than just fortuitous. *See* ***id.*** at 406. When the accused is not in exclusive possession of the place where the contraband is found, we cannot conclude that he had knowledge of and control over the contraband unless there are additional independent facts and circumstances which link the accused to the contraband. ***Poindexter***, 153 S.W.3d at 406. Links that may circumstantially establish the sufficiency of the evidence to prove that a defendant had knowing "possession" of contraband include the following: (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 possessed other contraband when arrested; (5) whether the defendant made incriminating statements when arrested; (6) whether the defendant attempted to flee; (7) whether the defendant made furtive gestures; (8) whether other contraband was present; (9) whether the defendant owned or had the right to possess the place where the contraband was found; (10) whether the place where the contraband was found was enclosed; and (11) whether the conduct of the defendant indicated a consciousness of guilt. *See* ***Evans***, 202 S.W.3d at 162 n.12. It is not the number of links that is dispositive, but rather the logical force of all of the evidence, both direct and circumstantial. ***Id.*** Ultimately, the question of whether the evidence is sufficient to link the appellant to the contraband must be answered on a case by case basis. *See* ***Whitworth v. State***, 808 S.W.2d 566, 569 (Tex. App.–Austin 1991, pet. ref'd).

In the instant case, it is undisputed that Appellant was not in exclusive possession of the place where the pistol was found. However, Appellant was arrested in the house immediately prior to Bosher's conducting the search that resulted in his locating the pistol. Moreover, Appellant had the apparent right to possess the place where the contraband was found[3] and was exiting the bedroom when Bosher first encountered him. Further still, the pistol was located in an enclosed place—a black bag. Finally, in response to Bosher's statement that the only two people in the apartment were Appellant and his mother, Appellant declared that the pistol did not belong to his mother.

On the other hand, the pistol was not in plain view. Appellant did not possess other contraband, and no other contraband was located on the premises. Appellant made no furtive

[3] Cook testified that Appellant was not on the lease. However, she also testified that he had "moved in," regularly spent the night at her apartment, and did not own or lease another residence.

gestures nor did he attempt to flee. Finally, Appellant did not overtly indicate consciousness of guilt. However, his statements made to Bosher in the patrol vehicle could be interpreted as his ruling out the only other occupant of the apartment in the time before his arrest, his mother, as the owner of the pistol.

The strongest evidence linking Appellant to the pistol is Cook's pretrial statements that the pistol belonged to Appellant. Appellant argues that Cook's testimony at trial conflicts with her pretrial statements, which she testified were not truthful. However, the jury was entitled to consider the testimony that Cook and Appellant had reconciled as well as the fact that Cook was seven months pregnant with Appellant's child at the time of trial. In fact, Cook specifically stated that she did not want Appellant to go to jail. From the entirety of the evidence, the jury could have reasonably concluded that Cook's pretrial statements were true and that Cook was not being truthful in her trial testimony in order to protect Appellant.[4] *See* ***Staley v. State***, 888 S.W.2d 45, 48 (Tex. App.–Tyler 1994, no pet.) (full responsibility on jury to weigh evidence, to resolve conflicts in testimony, and draw reasonable inferences from basic facts to ultimate facts). Furthermore, in evaluating the veracity of Cook's pretrial statement that Appellant had wiped her fingerprints from the pistol, the jury could have considered Parkins's testimony that the fingerprint smudges he observed on the pistol were consistent with someone's having wiped down the pistol.

Having examining the evidence in the light most favorable to the verdict, we conclude that the jury could have determined beyond a reasonable doubt that Appellant exercised control, management, or care over the firearm recovered from Cook's apartment. Therefore, we hold that the evidence is legally sufficient to support the trial court's judgment. Appellant's sole issue is overruled.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

[4] We are mindful of the rule that a witness's prior inconsistent statement may be used to impeach the witness's credibility, but it cannot be used as primary evidence of guilt. *See* ***Jernigan v. State***, 589 S.W.2d 681, 687 n.8 (Tex. Crim. App. 1979). However, the burden is on the defendant alone to request a limiting instruction. ***Walker v. State***, 300 S.W.3d 836, 849 (Tex. App.–Fort Worth 2009, pet. ref'd). If the defendant fails to request a limiting instruction at the introduction of the impeachment evidence, then the defendant does not preserve error and the trial court is not required to provide an instruction. ***Id.*** In the case at hand, Appellant did not request a limiting instruction, nor was a limiting instruction given in the court's charge. Accordingly, Cook's prior inconsistent statement was part of the general evidence in the case, and the jury could have used it for any purpose. *See* ***Klein v. State***, 273 S.W.3d 297, 318 (Tex. Crim. App. 2008).

SAM GRIFFITH
Justice

Opinion delivered July 11, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JULY 11, 2012

NO. 12-11-00192-CR

STEVEN ANDRE BARKER,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeals from the 173rd Judicial District Court of
Henderson County, Texas. (Tr.Ct.No. B-18,138)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the trial court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.