NO. 12-15-00007-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CHRISTOPHER EARL THURMAN, APPELLANT	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Christopher Earl Thurman appeals his conviction for unlawful possession of a firearm by a felon, for which he was assessed a sentence of imprisonment for fifteen years. In three issues, Appellant argues that the evidence is insufficient to support his conviction and that the trial court failed to consider the full range of punishment. We affirm.

BACKGROUND

Appellant was charged by indictment with unlawful possession of a firearm by a felon. He pleaded "not guilty," and the matter proceeded to a bench trial.

The evidence at trial showed that Appellant and Brittani Stone were inside a motel room Appellant had rented. The police came to the room looking for Stone on suspicion of theft. Appellant consented to a search of the room for stolen items. In the course of the search, the police located some ammunition. Because Appellant and Stone were convicted felons, the police then obtained a warrant to search the room for firearms. The search revealed a .38-caliber revolver under the mattress. Appellant and Stone were both subsequently charged with unlawful possession of a firearm by a felon.

Ultimately, the trial court found Appellant "guilty" and assessed his punishment at imprisonment for fifteen years. This appeal followed.

EVIDENTIARY SUFFICIENCY

In Appellant's first issue, he argues that the evidence is legally insufficient to support a finding that he intentionally or knowingly possessed the revolver.

Standard of Review

The ***Jackson v. Virginia***[1] 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, 895 (Tex. Crim. App. 2010). 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. This requires the reviewing court to defer to the trier of fact's credibility and weight determinations, because the trier of fact is the sole judge of the witnesses' credibility and the weight to be given their testimony. *See* ***Brooks***, 323 S.W.3d at 899; ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. A "court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." ***Jackson***, 443 U.S. at 326, 99 S. Ct. at 2793. 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.***

[1] 443 U.S. 307, 315-16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979).

Analysis

To prove Appellant guilty of unlawful possession of a firearm by a felon, the State was required to prove that he was previously convicted of a felony offense, and he intentionally or knowingly possessed a firearm before the fifth anniversary of his release from supervision under parole. *See* TEX. PENAL CODE ANN. § 46.04 (West 2011). Appellant contends only that the State failed to prove he intentionally or knowingly possessed the firearm.

"Possession" means actual care, custody, control, or management. ***Id.*** § 1.07(39) (West Supp. 2015). If the firearm was neither on the person of the defendant nor in his exclusive possession, the evidence must otherwise link him to the firearm. ***Williams v. State***, 313 S.W.3d 393, 397 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Such evidence may include that (1) the firearm was in plain view; (2) the defendant was the owner of a vehicle in which the firearm was found; (3) the defendant was in close proximity and had ready access to the firearm; (4) the firearm was on the same side of a vehicle as the defendant; (5) a consciousness of guilt was indicated by the defendant's conduct, including extreme nervousness or furtive gestures; (6) the defendant had a special connection or relationship to the firearm; (7) the firearm was found in an enclosed place; (8) occupants of the place gave conflicting statements about relevant matters; (9) the defendant was the driver of a vehicle in which the firearm was found; (10) contraband was found on the defendant; (11) the defendant attempted to flee; and (12) the defendant is connected to the firearm by affirmative statements, including incriminating statements by the defendant upon his arrest. ***Id.*** at 397-98. It is not the number of links that is dispositive, but the logical force of all the evidence, whether direct or circumstantial. ***Id.*** at 398. The absence of certain links is not evidence of innocence to be weighed against the links present. ***Id.***

At trial, the evidence showed that when the police knocked on the motel room door looking for Stone, Appellant answered the door naked and said he had been sleeping. He allowed the police into the room to get Stone and search for stolen property. Appellant also consented to a search of his vehicle.

To facilitate the police's search of the vehicle, Appellant directed them to a nightstand for his keys. Several items were on the nightstand, including some male hygiene products. Inside the nightstand drawer, the police found plastic baggies, a white crystalline substance they suspected to be methamphetamine, pills, a scale, and several .38-caliber bullets. On the other

nightstand, the police found some of the property that Stone was accused of stealing. The revolver was found under the mattress near the nightstand with the drugs and ammunition.

Inside Appellant's car, the police found a safe containing more ammunition. Stone claimed that the safe was hers. But the police also found Appellant's employee identification card and his wife's cell phone bill in the safe.

Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence sufficiently links Appellant to the revolver. Both Appellant and the motel manager said that Appellant was the one who rented the room. Illegal drugs, items related to drug sales, and bullets matching those found in the revolver were found in the nightstand where Appellant told the police they could find his keys. Male hygiene products were on the nightstand, and Appellant was the only male in the room. The other nightstand had items that Stone was accused of stealing, which tends to show that was the nightstand she used. The revolver was found under the mattress near the nightstand with the male hygiene products. And more ammunition was found in Appellant's vehicle in a safe containing Appellant's employee identification card. A rational trier of fact could have found beyond a reasonable doubt that the evidence sufficiently linked Appellant to the revolver. Therefore, we hold that the evidence is legally sufficient to support the trial court's finding that Appellant intentionally or knowingly possessed the revolver. Accordingly, Appellant's first issue is overruled.

FAILURE TO CONSIDER FULL RANGE OF PUNISHMENT

In Appellant's second and third issues, he contends that he was denied due process and due course of law by the trial court's failure to consider the full range of punishment when assessing his sentence.

Standard of Review and Applicable Law

Due process requires a neutral and detached hearing body or officer. ***Gagnon v. Scarpelli***, 411 U.S. 778, 786, 93 S. Ct. 1756, 1761, 36 L. Ed. 2d 656 (1973). It is a denial of due process for a trial court to arbitrarily refuse to consider the entire range of punishment for an offense or to refuse to consider the evidence and impose a predetermined punishment. ***McClenan v. State***, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983). In the absence of a clear showing of bias, we will presume the trial judge was a neutral and detached officer. ***Earley v. State***, 855 S.W.2d 260, 262 (Tex. App.—Corpus Christi 1993, pet. dism'd). Bias is not shown

when (1) the trial court hears extensive evidence before assessing punishment, (2) the record contains explicit evidence that the trial court considered the full range of punishment, and (3) the trial court made no comments indicating consideration of less than the full range of punishment. ***Brumit v. State***, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). In applying our state constitutional guarantee of due course of law, we follow contemporary federal due process interpretations. ***U.S. Gov't v. Marks***, 949 S.W.2d 320, 326 (Tex. 1997); ***Fleming v. State***, 376 S.W.3d 854, 856 (Tex. App.—Fort Worth 2012), *aff'd*, 455 S.W.3d 577 (Tex. Crim. App. 2014), *cert. denied*, 135 S. Ct. 1159, 190 L. Ed. 2d 913 (2015).

Analysis

Appellant argues that when the trial court found him guilty before hearing the evidence on punishment, it foreclosed the possibility of granting him deferred adjudication. Appellant contends that this foreclosure constituted a failure to consider the full range of punishment, resulting in a denial of his due process right to a detached and neutral magistrate. Appellant further argues that the alleged error is structural, does not require preservation by objection, and is not subject to a harm analysis. The State responds that Appellant failed to preserve his issue by a timely objection, and that his issue has no merit because he was not eligible for deferred adjudication.

Preservation of error is a systemic requirement on appeal. ***Wilson v. State***, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010). It is the duty of the appellate courts to ensure that a claim is preserved in the trial court before addressing its merits. ***Id.*** In general, a claim is preserved for appellate review only if (1) the complaint was made to the trial court by a timely and specific request, objection, or motion, and (2) the trial court either ruled on the request, objection, or motion or refused to rule and the complaining party objected to that refusal. TEX. R. APP. P. 33.1(a); ***Geuder v. State***, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). If a party fails to properly object to errors at trial, even constitutional errors can be forfeited. ***Clark v. State***, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012).

But Rule of Appellate Procedure 33.1 is not absolute. ***Grado v. State***, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). Whether it applies to a particular complaint turns on the nature of the right allegedly infringed. ***Id.*** The court of criminal appeals has separated defendants' rights into three categories: (1) absolute requirements and prohibitions, which cannot lawfully be avoided even with partisan consent; (2) waivable-only rights, which must be implemented unless

expressly waived; and (3) forfeitable rights, which are forfeited unless requested by the litigant. ***Id.***; ***Marin v. State***, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by* ***Cain v. State***, 947 S.W.2d 262 (Tex. Crim. App. 1997). Rule 33.1's preservation requirement applies only to the last category. ***Id.***

The right to be sentenced after consideration of the full range of punishment is a category two waivable-only right. ***Grado***, 445 S.W.3d at 743. Therefore, Appellant's complaint that the trial court failed to consider deferred adjudication when assessing his punishment was not forfeited by his failure to object at trial. *See* ***id.*** Furthermore, the record does not show that Appellant expressly waived the right at issue. We therefore consider the merits of Appellant's complaint.[2] *See* ***id.***

Contrary to Appellant's assertion, the trial court did not foreclose the possibility of granting him deferred adjudication when it orally found him guilty before hearing the evidence on punishment. The availability of deferred adjudication is limited to defendants who plead guilty or nolo contendere. ***Reed v. State***, 644 S.W.2d 479, 483 (Tex. Crim. App. 1983); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (West Supp. 2015). Here, Appellant pleaded "not guilty." Therefore, deferred adjudication was not available to him, and his issue is thus without merit. Accordingly, we overrule Appellant's second and third issues.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered January 13, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

[2] The State cites ***Teixeira v. State***, 89 S.W.3d 190, 192 (Tex. App.—Texarkana 2002, pet. ref'd) and ***Washington v. State***, 71 S.W.3d 498, 499-500 (Tex. App.—Tyler 2002, no pet.) in support of its contention that Appellant's issue required preservation by timely objection. We need not decide whether those cases are distinguishable. The cases predate ***Grado***, and we simply note that to any extent they might conflict with ***Grado***, we decline to follow them.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 13, 2016

NO. 12-15-00007-CR

CHRISTOPHER EARL THURMAN,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th District Court
of Smith County, Texas (Tr.Ct.No. 007-1224-14)

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 court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.