Affirmed and Opinion filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00651-CR

DWIGHT BERNARD POTTS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 798,722

O P I N I O N

Appellant was charged by indictment with the offense of possession of a controlled substance, namely cocaine, weighing more than one but less than four grams. Two prior felony convictions were alleged for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. Following his pleas of true to the enhancement allegations, the jury assessed punishment at thirty-six years confinement. Appellant contends the evidence is both legally and factually insufficient to sustain the jury's verdict. We affirm.

I. Standard of Review

We begin with a determination of the appropriate standard of appellate review for resolving these points of error. When we are asked to determine whether the evidence is *legally* sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This standard is applicable to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991).

When we determine whether the evidence is *factually* sufficient, we employ the standard announced in *Clewis v. State* and view all of the evidence without the prism of "in the light most favorable to the prosecution" and reverse the conviction only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). In *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997), the Court of Criminal Appeals set forth three principles that must guide a court of appeals when conducting a factual sufficiency review. The first principle is deference to the jury. A court of appeals may not reverse a jury's decision simply because it disagrees with the result. Rather, the court of appeals must defer to the jury and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *See id.* at 407. The second principle requires the court of appeals to provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the conviction is manifestly unjust, shocks the conscience or clearly demonstrates bias. *See id.* The court should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *See id.* The third principle requires the court of appeals to review all of the evidence. The court must consider the evidence as a whole, and not view it in the light most favorable to either party. *See id.* at 408.

II. Factual Summary

Officer R. C. Speckman of the Houston Police Department was on patrol on November 23, 1998. At approximately 12:30 a.m., on that date, Speckman saw three individuals standing at a pay telephone. Speckman stopped his vehicle approximately twenty feet from the individuals. A short time later, one of

the individuals began walking along a dirt path toward Speckman. This individual was identified as appellant.

Speckman noticed an object in appellant's left hand, which appeared to be the barrel of a small pistol. Just after passing Speckman, appellant dropped the object and continued walking. Speckman called for appellant to come to the patrol car. Appellant complied, was frisked, and placed in the back of the patrol car. Speckman then took his flashlight and recovered the object appellant had dropped. The object was a hand rolled marijuana cigar. Laying next to the cigar was a wadded piece of plastic, which contained ten rocks of crack cocaine. Speckman stated he was absolutely sure these items were dropped by appellant because the ground and the other objects on the ground were moist with dew; however, the cigar and plastic containing the cocaine were dry.

Connie Busby, a chemist with the Houston Police Department, testified the substance found in the plastic bag was cocaine, which weighed 1.7 grams.

Appellant called two witnesses on his behalf. Both were videographers who video-taped the scene at the approximate time of the alleged offense. Both witnesses stated the area was dimly lit. However, the second witness, Jesus Amaya, testified an individual walking toward Speckman would be visible and any movement with his/her hand would have been noticeable.

III. The Arguments

With the foregoing standards of appellate review in mind, we now turn to appellant's specific arguments. First, appellant argues the time between when appellant dropped the alleged cocaine and when it was later recovered renders the evidence legally insufficient. Second, appellant argues the alternative hypothesis that the cocaine could have been left by a third party renders the evidence factually insufficient.

IV. Legal Sufficiency Analysis

To establish the offense of possession of a controlled substance, the State must prove the accused exercised actual care, custody, control or management over the contraband, while knowing the substance

was contraband. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) (citing *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988)). Our research reveals several cases with similar circumstances where the evidence was found to be sufficient. *See Davis v. State*, 862 S.W.2d 817, 819 (Tex. App.—Beaumont 1993, no pet.) ("The act of discarding the pill bottle containing the contraband was itself conduct indicating knowledge of the illegal nature of said contraband and thus a clear indication of appellant's consciousness of guilt."); *Sneed v. State*, 875 S.W.2d 792, 795 (Tex. App.—Fort Worth 1994, no pet.) (Defendant observed actually having possession of the cocaine and attempting to dispose of it by dropping it.); *Nelms v. State*, 834 S.W.2d 110, 114 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (Evidence sufficient where defendant seen dropping the cocaine to the ground.); *Blackmon v. State*, 830 S.W.2d 711, 714 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (Officer saw defendant throw an object into the grass.).

Additionally, we have found authority contrary to appellant's time lapse theory. In *Raleigh v. State*, 740 S.W.2d 25, 28 (Tex. App.—Houston [14th Dist.] 1987, no pet.), the defendant argued the 30 to 45 seconds during which the officer did not observe the area where the object had been thrown, broke the nexus between the defendant and the contraband. The *Raleigh* court rejected the argument and found the evidence sufficient. In resolving the issue, this Court relied on *Noah v. State*, 495 S.W.2d 260, 263 (Tex. Crim. App. 1973). In *Noah*, a peace officer saw the defendant throw a package from his fast moving car. After the officer caught up to and arrested the defendant, he returned to the place where the package had been thrown. The officer recovered the package approximately three to five minutes after it had been discarded by the defendant. The *Noah* court concluded the evidence was sufficient to prove possession. *See id.* at 264.

Here, as soon as Speckman saw appellant drop the object, Speckman exited his patrol vehicle and asked appellant to approach. Appellant paused briefly and approached the vehicle. Once there, Speckman took approximately ten seconds to frisk appellant and place him in the back of the vehicle. Speckman then proceeded to recover the contraband. During this brief interval from the time appellant dropped the contraband to the time it was recovered by Speckman, only the two individuals initially seen with appellant at the pay telephone were in the area. There is nothing in the record from which we can

conclude that in the brief interim between the dropping and recovery of the contraband either of the two individuals were near the contraband.

In light of this authority, we find the evidence legally sufficient to sustain the jury's verdict.

V. Factual Sufficiency Analysis

We now turn to the question of whether the evidence was factually sufficient. *Clewis* directs us to set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. Appellant offers an alternative hypothesis to explain why the contraband could have been discovered by Speckman. Appellant posits the cocaine could have been left by a third party.

We learn from *Stone v. State*, 823 S.W.2d 375, 381 (Tex.App.-Austin 1991, pet. ref'd untimely filed), that we may consider alternative hypotheses when determining factual sufficiency. However, in the instant case, the alternative advanced by appellant was addressed and refuted by the State at trial. Through the testimony of Speckman, the State established that the cocaine had an approximate value of $100.00. When the contraband was recovered, it was dry while the ground surrounding the contraband was wet with dew. Speckman testified it would be unusual for a person who consumed crack cocaine to abandon the contraband. Instead, it would be much more likely that such an individual would immediately travel to a location where it could be consumed. Furthermore, Speckman testified that the instant scenario of an individual dropping the contraband and continuing to walk after seeing the police was quite routine.

In light of the record evidence, we cannot say the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we find the evidence factually sufficient to sustain the jury's verdict.

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Justices Amidei, Frost and Baird.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird sitting by assignment.