Affirmed and Opinion filed March 29, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00660-CR

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TIMOTHY VAL CHAMBERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 791,677

O P I N I O N

A jury convicted appellant, Timothy Val Chambers, of the felony offense of possession with intent to deliver phencyclidine, a controlled substance, and sentenced him to the Texas Department of Criminal Justice, Institutional Division for a term of 26 years. In three points of error, appellant complains: (1) the State's evidence is legally and factually insufficient;[1] and

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[1] Although appellant's brief suggests the evidence was factually insufficient to support the court's judgment, he has not supported this assertion with any argument, authority, or citations to the record. Accordingly, we find that appellant has waived this point of error. TEX. R. APP. P. 38.1(h); *Lape v. State*, (continued...)

that the trial court reversibly erred (2) by allowing officers to testify regarding appellant's extraneous offenses and (3) in overruling appellant's request for a jury charge on the lesser included offense of possession. We affirm.

BACKGROUND

Houston Police Officer Ford and his partner were dispatched to investigate a call concerning a male selling drugs in the front yard of a residence. Upon arrival, they found appellant, who matched the description they had been given, sitting in the front yard of his house. Although appellant denied he had been selling any drugs, he volunteered to show the officers a small amount of marijuana he kept inside. He took the officers into the house and began leading them to a room he said was his. Upon entering the house, the officers noticed a strong odor of phencyclidine ("PCP") coming from another bedroom. The officers did not believe that the room appellant was directing them to was, in fact, his, as the officers had investigated appellant at his house before; rather, they believed appellant's bedroom was the one from which the odor of PCP emanated.

On the dresser of the room with the odor of PCP, one officer saw what he believed to be marijuana cigarettes, rolling papers, and small vials of PCP. This officer motioned to Officer Ford about what lay on the dresser, at which point, appellant fled. He was arrested about twenty minutes later. The officers obtained the consent of appellant's grandmother to search the house. The search yielded eighty-two rolled marijuana cigarettes, a jar of PCP, rolling papers and other paraphernalia, as well as a twenty-gauge shotgun and a .38 caliber handgun. The PCP weighed 15.9 grams.

I. LEGAL INSUFFICIENCY

In his first point of error, appellant argues the evidence adduced at trial was legally

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[1] (...continued)
893 S.W.2d 949, 953 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

insufficient because the State failed to affirmatively link appellant to the PCP. In evaluating a claim that the evidence was legally insufficient, we view the evidence in the light most favorable to the jury's verdict. *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995) (en banc). A concomitant principle of this rule is that, where an appellate court is faced with conflicting evidence, it will presume the jury resolved the conflict in favor of the State. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993) (en banc). This is true whether the evidence is direct or circumstantial. *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App. 1991) (en banc). These rules further the policy of allowing the jury to act as the *sole* judge of the credibility of the witnesses and the strength of the evidence. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). As such, it may choose to believe some, all, or none of the evidence. *Moore v. State*, 935 S.W.2d 124, 126 (Tex. Crim. App. 1996) (en banc). Additionally, the jury is free to draw reasonable inferences from the evidence. *Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000) (en banc) (citing *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). The relevant inquiry is "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." *Id*. (emphasis in original).

In order to establish the offense of possession of a controlled substance, the State had the burden to prove that the defendant knowingly possessed contraband, *i.e.*, that he (1) exercised actual care, control, or custody over the substance, (2) was conscious of his connection with it, and (3) knew what it was. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995) (en banc). Although the proof can be either direct or circumstantial, it must rise "to the requisite level of confidence[] that the accused's connection with the drug was more than just fortuitous." *Id*. Circumstantial evidence relevant to establish an "affirmative link" between the defendant and the contraband include: (1) the defendant's presence when the contraband was discovered; (2) whether the contraband was in plain view; (3) the defendant's proximity to and accessibility of the narcotic; (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 the contraband; (10) whether other contraband or drug paraphernalia was present; (11) whether the place where the drugs were found was enclosed; and (12) whether the defendant owned or had the right to possess the place where the drugs were found. *Chavez v. State*, 769 S.W.2d 284, 288–89 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd). Notwithstanding the foregoing laundry list of possible links, there is no set formula of facts which necessitate a finding of an affirmative link sufficient to support an inference of knowing possession. *Porter v. State*, 873 S.W.2d 729, 732 (Tex. App.—Dallas 1994, pet. ref'd). Rather, affirmative links are established by a totality of the circumstances. *See, e.g., Sosa v. State*, 845 S.W.2d 479, 483–84 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (finding the totality of the circumstances was of such a character that the jury reasonably could conclude the defendant was aware of the contraband and exercised control over it).

Appellant argues that the only evidence used to link him to the PCP was the testimony by the officers that (1) the drugs were found in his bedroom; (2) he ran when the officers found the PCP; (3) he matched the description they were given of a person selling drugs in the front yard; and (4) money was found in his sock.[2] With the exception of the money found in appellant's sock, however, all of the foregoing are some of the express illustrations courts have found to be affirmative links. As for the money, appellant argues that this is equally consistent with his argument that he worked mowing lawns. There are several problems with this conclusion.

First, while standing in isolation, the fact that appellant stowed money untraditionally in his sock is insufficient to establish appellant's guilt beyond a reasonable doubt, in the totality of circumstances, it is yet another link in the chain of evidence affirmatively tying him to the contraband. *See, e.g., Gutierrez v. State*, 628 S.W.2d 57, 60 (Tex. Crim. App. 1980)

[2] The money was described in the officers' testimony only as a "wad of cash."

(affirming conviction where affirmative links included defendant counting large sum of money), *overruled on other grounds, Chambers v. State*, 711 S.W.2d 240 (Tex. Crim. App. 1986) (en banc). It is not necessary that each piece of evidence "point directly and independently to the guilt of the accused." *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987) (en banc). Second, appellant urges that this evidence is equally consistent with appellant's theory that he worked for a living in the cash industry of lawn mowing; a legal sufficiency challenge, however, reviews only the evidence consistent with guilt. *Clewis v. State*, 922 S.W.2d 126, 133 n.12 (Tex. Crim. App. 1996) (en banc). Finally, given that appellant was charged with possession with intent to deliver, a large "wad of cash" is some evidence that appellant was doing just that, particularly when viewed together with the other evidence.

In a similar vein, citing *Flores v. State*, 756 S.W.2d 86 (Tex. App.—San Antonio 1988, pet. ref'd) and *Tatum v. State*, 836 S.W.2d 323 (Tex. App.—Austin 1992, pet. ref'd), appellant argues that his flight from the scene cannot establish guilt. Again, appellant misconstrues the totality of circumstances test. Appellant's flight is just one link in the chain of evidence connecting him to the crime.

Moreover, both cases are distinguishable on their facts. In *Flores* the defendant was convicted of possession of heroin. 756 S.W.2d at 87. The court found that, because he was not in exclusive control of the house and because the heroin was not in plain view, Flores's flight—which otherwise might suggest a guilty conscience—did not affirmatively link him to the heroin, as there was no evidence he knew the balloon contained heroin or that heroin is often kept in balloons. *Id*. at 88. Here, however, Officer Ford testified that PCP has an *unmistakable* and *powerful* odor which he and his partner immediately recognized as PCP upon entering the house, and the PCP was lying atop of a dresser in appellant's bedroom.

Nor is *Tatum* sufficiently analogous on its facts to provide much support for appellant's argument. In *Tatum*, the defendant was inside an abandoned house when officers approached.

Upon seeing them, he ran. After returning to the house, they found a syringe of cocaine. 836 S.W.2d at 323–24. The Austin Court of Appeals held that these links were insufficient to establish the defendant's connection to the syringe, particularly in view of the fact that no one testified the defendant was seen with a syringe, and the syringe was found in an area noted for its high drug use. *Id*. at 325. Appellant does not suggest that his house is noted for its high drug use. Moreover, the contraband in this case was not found in an abandoned place where appellant just happened to be present; rather, it was found in a room which the State's evidence proved belonged to appellant.

There are additional problems with appellant's argument that the evidence was legally insufficient to support a finding of guilt beyond a reasonable doubt: the record reflects additional links, besides those identified in appellant's brief, which tend to support the jury's verdict that appellant and the PCP-laced marijuana cigarettes were linked. First, Officer Ford testified that "fry"—street slang for marijuana cigarettes dipped in PCP—was found in plain view. Second, upon being questioned about whether he was selling drugs, appellant let Officer Ford and his partner into the house where the fry was found to show them some marijuana. Third, Officer Ford testified that the PCP has a distinctive smell of ammonia. This odor, Officer Ford testified, emanated throughout the house from the room where the drugs were found. Fourth, Officer Ford testified that the quantity of drugs found in appellant's bedroom indicated appellant was dealing or manufacturing, as opposed to possessing it for his own use. Fifth, other drug paraphernalia, *viz*., several small brown empty vials used to transport PCP and papers used to roll the marijuana, was also found in appellant's bedroom. Sixth, Officer Ford testified the only other people who lived in the house with appellant were his grandmother and some children, all of whom were under the age of five and none of whom fled from the scene. Officer Ford also testified that appellant was nervous and that he led them to a room Officer Ford and his partner knew did not belong to him. Finally, both officers testified that, on prior

occasions, appellant had identified the bedroom where the PCP was found as his own[3]. The foregoing evidence demonstrates that appellant's affirmative link to the controlled substance was based upon much more than the four pieces of evidence suggested in appellant's brief. Indeed, nearly all of the factors the *Chavez* Court has previously identified as affirmative links were established in this case. *See Chavez*, 769 S.W.2d at 288–89. Appellant's first point of error is overruled.

II. Evidence of Extraneous Offenses

Appellant's second point of error complains that the trial court erred in allowing testimony from the officers of extraneous investigations involving appellant that they had conducted, even though neither testified about the subject matter of those investigations. This, appellant contends, left jurors with the perception that he had committed other bad acts or wrongs. The rules of evidence prohibit the State from attempting to prove a defendant's guilt by establishing he has a bad reputation generally. TEX. R. EVID. 404(b). Appellant's brief submits that the trial court "seemed to admit the evidence to eliminate confusion in the minds of the jurors as to the reason why the police officers were so certain that the bedroom in question was appellant's room." Appellant argues that elimination of confusion is not among the "permissible purposes" listed in 404(b).

The admission of evidence is a matter within the discretion of the trial court. *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1991) (en banc). "As long as the trial court's ruling is within the zone of reasonable disagreement, an appellate court will not disturb its ruling." *Willis v. State*, 932 S.W.2d 690, 696 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (citing *Montgomery*, 810 S.W.2d at 391). To constitute an extraneous offense, the evidence must show that a crime or bad act was committed and that the defendant was connected to it. *Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993) (en banc).

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[3] Appellant's grandmother also identified the room as appellant's; however, it is not clear from the testimony whether her identification to the police occurred on the night appellant was arrested in this case or on a previous occasion.

This necessarily includes some sort of extraneous conduct on the part of the defendant which forms part of the alleged extraneous offense. *Id*. Here, however, no one testified about the nature of the investigations. Nor did the State offer evidence that appellant had committed an extraneous crime or bad act. Officer Ford did testify, however, that none of the prior investigations at appellant's home resulted in his arrest.[4]

Furthermore, even assuming the testimony in question constitutes evidence of an extraneous offense, evidence of "other wrongs" may be admissible if it is relevant to a material issue other than to show that the accused acted in conformity with the character trait. *Montgomery*, 810 S.W.2d at 387; TEX. R. EVID. 404(b). In addition, the permissible uses listed in Rule 404(b), of when character evidence may be used, are illustrative, not exhaustive. *Montgomery*, 810 S.W.2d at 377; *Butler v. State*, 936 S.W.2d 453, 458 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). The Court of Criminal Appeals has held that evidence of extraneous transactions may be admitted in drug possession cases whenever they tend to prove the requisite affirmative links to the contraband. *Brown v. State*, 911 S.W.2d at 748 (citing *Saenz v. State*, 843 S.W.2d 24, 27 (Tex. Crim. App.1992)).

Here, appellant's cross-examination suggested Officers Ford and Griffith had no basis for believing that the room where the PCP was found belonged to appellant. Therefore, on re-direct, the State was entitled to establish the basis for the officers' belief that the room really belonged to appellant. Because this testimony was certainly relevant to establish the basis of the officers' knowledge, and because it tended to prove the requisite affirmative links, we hold that the testimony of Officers Ford and Griffith concerning the investigations they conducted at appellant's home was not impermissible under 404(b). Appellant's second point of error is overruled.

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[4] Officer Griffith, who apprehended appellant after his flight from the residence, did testify, but only on *cross-examination*, that he had arrested appellant more than one time, although he further testified that none of the other arrests were drug related.

III. Lesser Included Offense

Appellant's third point of error complains that the trial court erred by not submitting to the jury the lesser included offense of possession. In Texas, a defendant is entitled to a charge on a lesser included offense if (1) the lesser included offense is included within the proof necessary to establish the offense with which the defendant is charged and (2) the record contains some evidence to support a jury's finding that, if the defendant is guilty, he is guilty only of the lesser included offense. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993) (en banc). Questions such as the credibility of the evidence and whether it conflicts with other evidence may not be considered in determining whether such an instruction should be given. *Penry v. State*, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995).

Appellant was convicted of possession with the intent to distribute. Possession is a lesser included offense of possession with the intent to distribute. *Upchurch v. State*, 23 S.W.3d 536, 538 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). Therefore, appellant has satisfied the first prong of the *Rousseau* test. Although the jury is entitled to believe all, some, or none of a witness's testimony, the Court of Criminal Appeals has stated that "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be *some* evidence directly germane to a lesser included offense" before a defendant is entitled to an instruction on a lesser included offense. *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994) (en banc) (emphasis added). In determining whether a defendant was entitled to the lesser included offense of possession, we review the entire record. *Id*. at 23. Anything more than a scintilla of evidence entitles a defendant to the lesser included charge. *Id*. at 23.

Here, the defense strategy at trial was not that, if appellant were guilty, he was guilty only of mere possession. Rather, the strategy at trial was that the drugs found in the bedroom did not belong to appellant at all. The defense presented no evidence to show that, even if the PCP did belong to appellant, he did not intend to deliver it to anyone. Appellant did not testify

at the guilt/innocence phase of the trial, nor did he offer any evidence or testimony that might reasonably have raised the inference that he was guilty only of possession of a controlled substance. The fact that the State, in proving the offense of possession with intent to deliver, also proved the lesser offense of possession, does not, of itself, entitle appellant to a charge on the lesser offense. Accordingly, because appellant presented no evidence that he committed an offense, and because there was no evidence otherwise showing he was guilty only of a lesser included offense, a charge on the lesser included offense was not required. *See Bignall*, 887 S.W.2d at 24. We overrule appellant's third point of error.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 29, 2001.

Panel consists of Justices Yates, Wittig, and Frost. (Wittig, J., concurs in the result only).

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