Affirmed and Opinion filed April 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00561-CR

ALFREDO QUIADO GARBAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 778,214

O P I N I O N

Appellant, Alfredo Quiado Garbay, was charged by indictment with possession of a firearm by a felon. TEX. PEN. CODE ANN. § 46.04 (Vernon 1994). The jury found him guilty. Appellant pleaded true to one enhancement paragraph and the trial court assessed punishment at confinement for twenty years in the Institutional Division of the Texas Department of Criminal Justice. In eight points of error, appellant contends the evidence was legally and factually insufficient to support the conviction and that the jury charge misstated the elements of the offense. We affirm.

Background Facts

Houston Police Officer J.C. Helton responded to a disturbance call at a Chevron food mart. When he arrived, several people told him that appellant had a gun and had fired some shots. Helton saw appellant walking around in circles. He approached appellant and had him place his hands over his head. He then patted appellant down to determine whether appellant was carrying any weapons. Helton found two revolvers hidden beneath appellant's shirt. One contained two live bullets and three spent cartridges. Appellant had a previous felony conviction for robbery. Appellant was arrested and charged with possession of a firearm by a felon.

Legal and Factual Sufficiency of the Evidence

In his first five points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction. Specifically, appellant argues that the State failed to present any evidence to show that the possession occurred before or after the fifth anniversary from his release from confinement from his robbery conviction as required by TEX. PEN. CODE ANN. § 46.04 (Vernon 1994). We hold that the State was not required to prove this element because the possession occurred at a place other than appellant's residence.

When an appellant challenges both the legal and factual sufficiency of the evidence, we must first determine whether the evidence introduced at trial was legally sufficient. *See Clewis v. Stat*e, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). In making this determination, we must decide "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." *King v. Stat*e, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995)(*citing Jackson v. Virgini*a, 443 U.S. 307, 319 (1979)). This standard of review applies to both direct and circumstantial evidence cases. *See Geesa v. Stat*e, 820 S.W.2d 154, 156-61(Tex. Crim. App. 1991). In our review, we do not re-evaluate the weight and credibility

of the evidence but assess only whether the jury reached a rational decision. *See Muniz v. Stat*e, 851S.W.2d 238, 246 (Tex. Crim. App. 1993).

When reviewing the factual sufficiency of the evidence, we consider all of the evidence without the prism of "in the light most favorable to the prosecution," and 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 v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). We review the jury's weighing of the evidence and are authorized to disagree with the jury's determination. *See Id.* at 133. This review, however, must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See Id.* We must consider all of the evidence, both that which tends to prove or disprove a vital fact in evidence. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.–El Paso 1996, no pet.). A factual insufficiency point should be sustained only if the verdict is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. *See Id.*

Under TEX. PEN. CODE ANN. § 46.04 (Vernon 1994), it is unlawful for a convicted felon to possess a firearm at any location other than the premises at which he lives. If, however, a felon possesses a firearm at his residence, then the State must prove that the possession occurred after his conviction, but before the fifth anniversary of his release from confinement or supervision. The State alleged that appellant possessed a firearm at a place other than his residence; therefore it was not legally necessary for the State to allege and prove that the possession occurred on a date following the fifth anniversary of appellant's release from confinement. *See Mason v. State*, 980 S.W.2d 635, 642 (Tex. Crim. App. 1998)(Keller, J., concurring). Appellant does not contest that he possessed a firearm at a place other than his residence. He also stipulated to his previous felony conviction.

Based on all of the evidence, we find that the evidence was legally and factually sufficient to support appellant's conviction. We overrule appellant's first five points of error.

Jury Charge

In his sixth, seventh, and eighth points of error, appellant contends that the jury charge misstated the law and misled the jury into rendering a verdict of guilty on less evidence than was required by the statute. Again, appellant contends that the State was required to prove that the possession occurred after conviction, but before the fifth anniversary of his release from confinement or supervision. We disagree and find that jury charge was a proper statement of the law.

An appellant who seeks reversal on the basis of error in the jury charge must demonstrate that the error exists in the charge, and then show that the error was calculated to injure his rights or caused denial of a fair and impartial trial. TEX. CODE CRIM. PROC. ANN. Art. 36.19 (Vernon 1994); *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App.1986). Appellant failed to satisfy the first part of this standard.

We previously held that it was not legally necessary for the State to allege and prove that the possession occurred on a date following the fifth anniversary of appellant's release from confinement, since it alleged that the possession occurred at a place other than appellant's residence. The jury charge tracked the indictment and required the State to prove that appellant was a convicted felon and possessed a firearm at a place other than his residence. We find no error in the jury charge. We overrule appellant's sixth, seventh and eighth points of error.

We affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed April 13, 2000.

Panel consists of Justices Sears, Draughn, and Hutson-Dunn.*

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

* Senior Justices Ross A. Sears, Joe L. Draughn, and D. Camille Hutson-Dunn sitting by assignment.