Affirmed and Opinion filed April 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00215-CR

JOEL FLORES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 761,902

O P I N I O N

Over his plea of not guilty, a jury found appellant, Joel Flores, guilty of possession with intent to deliver more than two hundred grams and less than four hundred grams of cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(e) (Vernon Supp. 2000). It assessed punishment at eighteen years' imprisonment in the Texas Department of Criminal Justice, Institutional Division and a one dollar fine. Appellant appeals his conviction on three points of error. We affirm the trial court's judgment for the following three reasons: (1) the evidence is legally and factually sufficient to support appellant's conviction for possession with intent to deliver cocaine; (2) the trial court did not err in overruling appellant's motions

for mistrial; and (3) appellant has not met his burden to show that he received ineffective assistance of counsel at trial.

FACTUAL BACKGROUND

Houston Police Officer Marsolais was on patrol late one evening when he observed appellant running from a gas station to a two-door light colored Ford, where two other Hispanic males were seated. Police had been alerted that two armed robberies had been committed earlier that evening, and they were watching for the suspects. Because the armed robbery suspects' car was also a light colored Ford and had three occupants, Officer Marsolais immediately thought appellant and his friends were the suspects and sent a general broadcast description of appellant and the Ford over the police department's radio channel.

Officers Kinsel and Rodriguez heard the broadcast and believed that Marsolais had seen the suspects from the armed robberies committed earlier that night. Because they were the closest unit to the scene, they drove directly to the gas station. When they arrived, they observed that the appellant, his friends, and the Ford they were driving matched the description of the suspects and the suspects' Ford. They also noticed that the same number of individuals were in the Ford as committed the earlier robberies.

Kinsel and Rodriguez followed appellant and his friends until they had enough backup police units to make a traffic stop. After the officers stopped appellants and his friends, they ordered them out of the car. Rodriguez patted appellant down for weapons and found a bag of white powdered substance on appellant, which tested positive for cocaine. Officer Gay, who was also on the scene, found a bag of marijuana on Salas, the driver of the Ford. Appellant and Salas were taken into custody, and the officers searched the car for weapons or money stolen from the earlier robberies.

During the search, the officers found a large amount of money, marijuana, a number of plastic packages containing cocaine, and many weapons in the trunk of the car appellant and his companions were driving. They also found a small computer and a printer. When Gay looked inside the car, he saw a nine-millimeter pistol slightly protruding from the front seat, where appellant was sitting. The gun was fully loaded and within appellant's easy reach. The officers also discovered that the packet of cocaine Rodriguez found on appellant was the same type of packet as those found in the trunk. Appellant told the officer that he had a fight with his girlfriend, and that he was moving his possessions from her apartment to another place. He admitted that the clothing and the property in the trunk were his, and that he helped load

them into the trunk. Appellant was later indicted for possession with the intent to deliver all the cocaine found in the car.

During trial, Salas testified about the events of that night. Salas had stolen drugs and guns from another car earlier that evening and placed them in the trunk of the Ford he was driving. Appellant called Salas to pick him up from his house after appellant had a fight with his girlfriend. Salas claimed appellant never touched his clothing or looked inside the trunk, and that he never told appellant drugs and guns were in the trunk. However, Officer Frank testified that Salas told him appellant helped load his clothing into the trunk.

DISCUSSION AND HOLDINGS

Legal and Factual Sufficiency of the Evidence

In his first point of error, appellant contends that the evidence is legally and factually insufficient to support his conviction for possession with intent to deliver cocaine. Specifically, appellant argues that the evidence was insufficient to affirmatively link him to the contraband. We find sufficient evidence to support appellant's conviction.

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but considers only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Instead, we consider all the evidence equally, including the testimony of defense witnesses and the existence of alternative hypotheses. *See Orona v. State*, 836 S.W.2d 319, 321 (Tex. App.—Austin 1992, no pet.). We will set aside a verdict for factual insufficiency 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.

A person commits an unlawful offense if that person knowingly or intentionally possesses cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a) (Vernon Supp. 2000). The Texas Penal Code defines possession as a voluntary act if a person has had knowledge or control over an object long enough to enable him to terminate his control over it. *See* TEX. PEN. CODE ANN. § 6.01 (Vernon 1994). When an accused is charged with unlawful possession of a controlled substance, the State must prove two things. First, the State must show that the defendant "possessed" the contraband, meaning that he exercised actual care, custody, control, or management over it. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Secondly, the State must show that the accused knew the objects he possessed were contraband. *See Grant*, 989 S.W.2d at 433.

Proof of appellant's crime - possession with intent to deliver cocaine - may be proved circumstantially. The element of possession may be proved by circumstantial evidence. *See Williams v. State*, 859 S.W.2d 99, 101 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Without an admission by the accused, the knowledge element of the crime may also be inferred. *See McGoldrick*, 682 S.W.2d at 578; *Grant*, 989 S.W.2d at 433. Intent to deliver may also be proved by circumstantial evidence, such as evidence of the quantity of the drug possessed, the manner of packaging, and the presence of large amounts of money. *See Smith v. State*, 737 S.W.2d 933, 941 (Tex. App.—Dallas 1987, pet. ref'd).

The evidence must affirmatively link the defendant to the offense, so that a reasonable inference arises that the accused knew of the contraband's existence, and that he exercised control over it. *See id.* Affirmative links may be established by facts and circumstances that indicate the accused's knowledge of and control over the contraband, including whether the contraband was in close proximity or was conveniently accessible to the accused. *See Grant*, 989 S.W.2d at 433; *Cabrales v. State*, 932 S.W.2d 653, 656 (Tex. App.—Houston [14th Dist.] 1996, no pet.). We may also consider other factors: (1) whether the contraband was in a place the accused owned or in an enclosed space; (2) whether conduct of the accused indicated a consciousness of guilt; (3) whether occupants of the automobile gave conflicting statements about relevant matters; and (4) whether affirmative statements connect the accused to the contraband. *See Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). All facts need not necessarily point directly or indirectly to the defendant's guilt; the evidence is sufficient if the combined and cumulative effect of all the incriminating circumstances points to the defendant's guilt. *See Russell v. State*, 665 S.W.2d 771, 776 (Tex. Crim. App. 1983).

In this case, appellant contends that the evidence is insufficient to affirmatively link him to the cocaine because he was merely present at the scene and was not aware of the contents of the trunk. However, we may infer all the elements of his crime - knowledge, possession, and intent - circumstantially from the evidence. Although Salas testified that appellant did not know cocaine was in the trunk, appellant admitted that the property in the trunk of the vehicle was his property. Appellant also admitted that he helped load his possessions into the trunk. A large amount of money was found with the cocaine, and the cocaine was found on top of appellant's possessions. Appellant presented evidence that the cocaine was in the trunk when his possessions were loaded; if so, the cocaine would have to have been moved for appellant to load his possessions into the trunk. Cocaine was also found in appellant's wallet, in packaging identical to the cocaine found in the trunk. The amount of cocaine in the trunk was a large amount - more than two hundred grams and less than four hundred grams. These facts are sufficient to support a conclusion that appellant knowingly possessed the cocaine with intent to deliver it.

After viewing the evidence in the light most favorable to the prosecution, we conclude the evidence provided an affirmative link from which a rational trier of fact could have found the essential elements of possession of cocaine. The jury's verdict was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellant's first point of error.

Improper Testimony Before the Jury

In his second point of error, appellant contends that the trial court erred in overruling his motions for mistrial. Appellant moved for a mistrial after two testifying officers for the State repeatedly referred to the substances recovered during his arrest as "marijuana" and "cocaine." Defense counsel timely objected each time, moved for a mistrial, and the trial court instructed the jury to disregard these comments because a chemist or a toxicologist had not yet testified and concluded that the substances were marijuana or cocaine. The trial court overruled each of appellant's motions for mistrial. Appellant argues that the prejudicial effect of the officers' testimony was not cured by the trial court's instructions to disregard. We disagree.

"Mistrials are an extreme remedy for prejudicial events occurring during the trial process." *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). Harm that results when improper testimony is admitted may be cured by instructing the jury to disregard the testimony. *See Hall v. State*, 753 S.W.2d 438, 440 (Tex. App.—Texarkana 1988, no pet.) *rev'd on other grounds*, 795 S.W.2d

195 (Tex. Crim. App. 1990). We must presume that a jury obeys an instruction to disregard the evidence. *See Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). Generally, a jury can "consciously recognize the potential for prejudice, and then consciously discount the prejudice, if any, in its deliberations." *Id.* A motion for mistrial may only be granted when an objectionable event at trial is so emotionally inflammatory that curative instructions cannot prevent the jury from unfair prejudice against the defendant. *See Bauder*, 921 S.W.2d at 698.

To determine whether any harm resulted from the trial court's denial of appellant's motions for mistrial, "we must calculate the probable impact of the error on the jury in light of the existence of other evidence." *Nevels v. State*, 954 S.W.2d 154, 159 (Tex. App.—Waco 1997, pet. ref'd). We weigh the evidence presented in support of appellant's guilt with the State's improper testimony. *See id.* We may consider the nature of the error, whether or to what extent the error was emphasized by the State, and how much weight a jury would probably place on the error. *See id.*

When we view the probable impact of the testimony with the evidence presented in support of appellant's guilt, we find that the incriminating evidence negates the impact, if any, that the improper testimony had on the jury. *See id.* The State did not emphasize the testimony in its closing argument, and the information appellant complains of - that the substances were cocaine and marijuana - was introduced into evidence during trial without objection. *See id.* (holding that other evidence of defendant's guilt introduced during trial without objection negated the harm of an improper comment before the jury). The State introduced the results of tests a chemist performed on the substances, which positively identified the substances as cocaine and marijuana. Additionally, one other officer, who testified before the chemist, testified that the substance field tested positive for cocaine. Moreover, defense witness, Salas, admitted that the substances in the trunk of the vehicle were cocaine and marijuana.

In light of this other evidence presented at trial and the trial court's instructions to disregard the testimony, we conclude that a jury would probably not place much weight on this particular testimony from the officers. We hold that the trial court did not error in failing to grant appellant's motions for mistrial, and we overrule appellant's second point of error.

Ineffective Assistance of Counsel

In his third point of error, appellant argues that he was denied effective assistance of counsel at trial. Appellant asserts that his trial counsel was ineffective for three reasons: (1) counsel failed to challenge the

legality of his arrest; (2) counsel failed to challenge the search and seizure of evidence; and (3) counsel failed to object to a juror's question during trial proceedings. We disagree.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Hernandez*, 726 S.W.2d at 55.

Appellant carries the burden to prove by a preponderance of the evidence that his trial counsel was ineffective. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 688-89; *Thompson*, 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in record. *See Thompson*, 9 S.W.3d at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet ref'd). As we explain below, appellant has not met his burden to show his trial counsel was ineffective.

First, appellant contends that counsel was ineffective for failing to challenge the legality of his arrest.[1] He argues that no probable cause existed to arrest him without a warrant.

A peace officer must have a warrant for an arrest unless a statutory exception applies. *See Josey v. State*, 981 S.W.2d 831, 841 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Because appellant was arrested without a warrant, the State must show probable cause and an exception to the warrant requirement to justify the warrantless arrest. *See Cornejo v. State*, 917 S.W.2d 480, 481 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). Probable cause to make a warrantless arrest exists when

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[1] Appellant's trial counsel filed a motion to suppress before trial, challenging the legality of appellant's arrest and the evidence from his search and seizure. However, he did not obtain a ruling from the trial judge on the motion and, thus, did not preserve error for appeal. *See* TEX. R. APP. P. 33.1(a); *Wilson v. State*, 857 S.W.2d 90, 94 (Tex. App—Corpus Christi 1993, pet. ref'd).

"the facts and circumstances within the officer's knowledge, and of which the officer had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *See Cornejo*, 917 S.W.2d at 482-83. An exception to the warrant requirement exists when a peace officer observes an offense being committed in his presence or within his view. *See* TEX. CODE CRIM. PROC. ANN. Art. 14.01(b)(Vernon 1977).

Here, Officer Rodriguez, the arresting officer, had probable cause to believe appellant had committed or was committing a felony in his presence. Rodriguez was one of the officers who heard Marsolais describe appellant and the Ford over the police radio. When Rodriguez initially stopped appellant, he removed him from his car, asked him to show his hands, and detained him with his hands on the side of the patrol car. Rodriguez then patted appellant down for weapons and asked for his identification. Appellant told Rodriguez that his identification was in his wallet, and when Rodriguez retrieved it, he saw a plastic bag of cocaine. Because Rodriguez knew appellant owned the wallet, he could reasonably infer that the cocaine belonged to appellant. *See Josey*, 981 S.W.2d at 842. After he discovered the cocaine, Rodriguez placed appellant into the patrol car. Thus, Rodriguez had probable cause to believe appellant had committed or was committing the felony offense of possession of cocaine in his presence, and he was justified in arresting appellant without a warrant under section 14.01(b) of the Texas Code of Criminal Procedure. Therefore, we cannot say that counsel was ineffective for failing to challenge the legality of appellant's arrest.

Secondly, appellant argues that counsel was ineffective for failing to challenge the search and seizure of evidence.[2] He contends that the search of his automobile was not justified. "To prevail on his claim of ineffective assistance of counsel, appellant had the burden to develop facts and details of the search to conclude that it was invalid." *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1997).

The warrantless search of the automobile was justified under the automobile exception to the warrant requirement. Under this exception, an officer may conduct a warrantless search of a vehicle if the officer has probable cause to believe the vehicle contains evidence of a crime. *See Powell v. State*, 898 S.W.2d 821, 827 (Tex. Crim. App. 1994); *Cornejo*, 917 S.W.2d at 483. Based on the totality of circumstances, the officers on the scene had probable cause to believe the Ford and some of its contents

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[2] As we noted, appellant's trial counsel filed a pre-trial motion to suppress challenging the search and seizure of the evidence, however, no signed order appears in the record.

were associated with criminal activity. The officers had probable cause to believe appellant and his cohorts had just committed robberies because their description and the Ford's description matched that of the suspects and vehicle used in the earlier robberies. Further, upon stopping the vehicle, the officers found marijuana and cocaine on Salas and appellant and saw a pistol in plain view protruding from appellant's seat. Consequently, appellant has not met his burden to show the search of his vehicle was invalid, and we cannot hold that counsel was ineffective for failing to challenge the search and seizure of evidence.

Lastly, appellant contends that counsel was ineffective for failing to object to a juror's question during trial proceedings. The State offered the weapons from appellant's vehicle into evidence during its case-in-chief. After the weapons were admitted, one juror questioned the court:

> THE COURT: Yes, sir?
>
> JUROR: I'm not a firearms expert. What is the thing that looks like an antiaircraft gun?
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> THE COURT: I don't know. But my problem is our law doesn't permit me to let jurors ask. I wish it did. But they don't let me let you. I suspect that since you did, you might get an explanation.

Appellant argues that trial counsel's failure to object and request the trial court to instruct the jury to disregard the statement lowered his representation below the reasonable standard of effectiveness. However, the juror's comment was not so egregious that its mere utterance deprived appellant of a fair trial. *See Cuellar v. State*, 943 S.W.2d 487, 490 (Tex. App.—Corpus Christi 1996, pet. ref'd). The question had no bearing on appellant's guilt for his charge of possession of cocaine. *See id.* Moreover, counsel may have concluded that it would negatively reflect on his client if he objected to a question a juror had about the case. Appellant failed to overcome the presumption that failure to object might be considered sound trial strategy. *See Thompson*, 9 S.W.3d at 813. For these reasons, we conclude that trial counsel's failure to object did not render him ineffective.

A reviewing court must examine the adequacy of counsel's assistance based upon a totality of the representation. *See Johnson v. State*, 614 S.W.2d 148, 149 (Tex. Crim. App. [Panel Op.] 1981). After reviewing the record and appellant's arguments, we hold the appellant has not met his burden to show

that trial counsel's representation fell below an objective standard of reasonableness, and overrule his third point of error.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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