Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00532-CR

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MANUEL ROMERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 826,556

O P I N I O N

Manuel Romero appeals a conviction for possession of cocaine with intent to deliver[1] on the grounds of insufficient evidence and improper jury argument. We affirm.

Sufficiency of the Evidence

Appellant's first issue contends that the evidence is legally insufficient to prove that he intentionally or knowingly possessed the cocaine found in the building in which he was arrested. In particular, appellant contends there was no evidence that he: (1) knew about

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[1] A jury convicted appellant, and the trial court assessed punishment of forty years confinement.

the cocaine found behind the couch; (2) placed the cocaine behind the couch; (3) knew the contents of the package found on the floor in front of the couch; (4) was seated on the couch when the cocaine was on the floor in front of it; and (5) exercised any actual care, custody, control, or management over the cocaine recovered.

In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict, asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

To convict a defendant of possession of cocaine with intent to deliver, the State must prove, among other things, that the accused not only exercised actual care, control, or custody of the substance, but that he did so knowingly rather than fortuitously. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). To possess a substance knowingly, a defendant must have been conscious of his connection with it and have known what it was. *Id*. Such evidence of "affirmative links" may be direct or circumstantial. *Id*.

In this case, police sergeants Brian Davis and Jay Womack were executing a search warrant for a building located at 4920 West 34th, No. 5 in Harris County. Womack testified that upon his entry to the building through an open garage door, he noticed a doorway that appeared to lead to a residence. Womack testified that he entered one of the rooms in this residence after noticing appellant, who appeared to be seated on a couch in that room. According to Davis and Womack, appellant was the only person in that room, and a package of cocaine was lying at appellant's feet in plain view. Further, Davis testified that there was a knife, the blade of which was covered in cocaine, lying on the arm of a chair in that room. Womack testified that the knife could have been as close as three feet from appellant. Davis testified that cocaine residue was found on the couch where appellant was seated and behind the couch on the wall. In addition, Davis and Womack testified that a large amount of cocaine was discovered behind the couch on which appellant was seated. From this evidence, a rational trier of fact could have found that appellant knowingly

exercised care, control, and custody over the substance. Accordingly, appellant's first issue is overruled.

Improper Jury Argument

Appellant's second issue contends that the trial judge erred in overruling defense counsel's objection to the following portion of the prosecutor's closing argument, which he contends was outside the record and attacked appellant over the shoulders of his counsel:

> [The defense attorney] talked about planting evidence in Los Angeles. Does it happen? Absolutely. Do you have any reason to believe it happened here? If these guys want to plant dope on that guy, why on earth would they put it behind the couch? I would put it in his pocket. I would put it in your car. I'd put it somewhere that way we don't have to do all this. Why on earth do you put dope behind the couch? Why do you plant a bad case? You put it – how easy could it have been, stick the shotgun in his face, put the cocaine in his pocket and arrest him. That's planting dope. It didn't happen here.
>
> But that's what you're going to hear from defense attorneys in every case. They could have planted it. Let him go. But that happens in every case.
>
> MR. CERVANTES: Judge, I object to that argument. That's misleading, Judge, and it's outside the record.

Because defense counsel objected at trial only that this argument was misleading and outside the record, he preserved no complaint that it attacked appellant over the shoulders of his counsel.[2]

With regard to appellant's complaint that the argument went outside the record, defense counsel's argument had similarly done so in previously suggesting that the cocaine was planted:

> We cannot allow in Harris County what is happening in Los Angeles, California. Y'all have read the news, y'all have heard the news, planting evidence . . . .

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[2] *See* TEX. R. APP. P. 33.1(a); *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000) (stating that an objection based on one legal ground may not be used to support a different legal theory on appeal).

. . . .

Sending people to jail, lying. It doesn't just happen in California.

. . . .

. . . [The State has] to bring the evidence. The prosecution can only bring to you what these officers brought to them. That's all they can do. They don't invent things. Somebody out there at the scene might invent things. It doesn't happen just in California.

Because a prosecutor may argue outside the record in response to a defense argument that goes outside the record,[3] the trial court did not err in overruling appellant's objection. Accordingly, appellant's second issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.[4]

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

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[3] *See Wilson v. State*, 938 S.W.2d 57, 60 (Tex. Crim. App. 1996).

[4] Senior Chief Justice Paul C. Murphy sitting by assignment.