Reversed and Remanded and Opinion filed July 8, 1999, Withdrawn; Majority and Concurring Opinions filed October 21, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00169-CR

TAMEKA SHAKMEEN FOXX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 717,256

MAJORITY OPINION ON MOTION FOR REHEARING

We withdraw our opinion of July 8, 1999 and substitute the following opinion. Following a jury trial, appellant was convicted of the offense of possession of marijuana in an amount more than fifty pounds and less than two thousand pounds. After finding an enhancement paragraph true, the jury set appellant's punishment at forty years confinement in the Texas Department of Criminal Justice, Institutional Division, and a $1,000.00 fine.

In a single point of error, appellant attacks the legal sufficiency of the evidence to support her conviction. The State concedes that appellant actually possessed less than fifty pounds of marijuana herself, but predicates criminal responsibility under the law of parties,

claiming she was a party to a co-defendant's possession of the additional thirty pounds of marijuana. However, the jury charge required proof beyond a reasonable doubt that appellant either possessed more than fifty pounds of marijuana or that her co-defendant, Roger Baltrip, possessed more than fifty pounds of marijuana and that appellant, with intent to promote or assist the commission of the offense, solicited, encouraged, directed, aided or attempted to aid Baltrip to commit the offense.

An actor is criminally responsible as a party to an offense if, acting with intent to promote or assist in the commission of the offense, he or she solicits, encourages, directs, aids, or attempts to aid another person to commit the offense. *See* TEX. PEN. CODE ANN. §§ 7.01(a), 7.02(a)(2) (Vernon 1994). The evidence must show the parties were acting together, each contributing to their common purpose, at the time of the offense. *See Ex parte Welborn*, 785 S.W.2d 391, 394 (Tex. Crim. App. 1990) (citations omitted). In determining whether a defendant participated in an offense as a party, the court may examine facts before, during, and after the commission of the offense, and may rely on actions of the defendant that show an understanding and common design to commit the offense. *See id*.

Mere presence alone at the scene of the offense will not support a conviction; however, it is a circumstance which, combined with other facts, may show that the defendant was a participant. *See Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987). Similarly, a defendant's mere knowledge that an offense has been committed is insufficient. *See Markham v. State*, 761 S.W.2d 553, 562 (Tex. App.—San Antonio 1988, no pet.); *see also Oaks v. State*, 642 S.W.2d 174, 177 (Tex. Crim. App. 1982).

To establish the unlawful possession of a controlled substance, the State must prove the defendant exercised care, control, and management over the substance and the accused knew the matter possessed was contraband. *See Harris v. State*, 781 S.W.2d 365, 366 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). Possession of contraband need not be exclusive and evidence that shows the defendant jointly possessed the contraband with another is sufficient. *See Vargas v. State*, 883 S.W.2d 256, 262 (Tex. App.—Corpus Christi 1994, pet. ref'd). The State, however, must affirmatively link the defendant to the contraband which establishes the defendant's knowledge and control of the contraband. *See*

id. In other words, possession means more than being where the action is; "it involves the exercise of dominion and control over the thing actually possessed." *Harris*, 781 S.W.2d at 367. Because the evidence fails to establish that appellant aided Baltrip in the possession of more than fifty pounds of marijuana, we hold that the evidence is legally insufficient to convict appellant of that offense under the law of parties.

Standard of Review

In reviewing a legal sufficiency question, we must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). While a correct standard of review under *Jackson* includes an examination of *all* of the evidence, it must be reviewed for the purpose of determining whether it supports the verdict. We must measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge for the offense. *See Malik*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Factual Analysis

A Bellaire police officer, Jorge Florido, requested an informant to set up a marijuana sale to an undercover officer, Zell Woods. Officer Woods wanted to purchase fifty pounds of marijuana from Ronald Baltrip at a motel in Bellaire. On the afternoon of March 6, 1996, Baltrip arrived at the motel around 4:45 p.m. and went to Room 13 with the informant and Officer Woods, who was wired and had been furnished $38,000 for the drug buy. Officer Florido watched from an unmarked vehicle across the street from the motel while an arrest team waited in Room 12. The informant went outside and got in Baltrip's red Mustang to talk to him, then the two men returned to the motel room. After the informant introduced Baltrip to Officer Woods, Baltrip agreed to sell fifty pounds of marijuana to Woods for $650 per pound. Officer Woods showed Baltrip the $38,000 in cash, and Baltrip offered Woods a sample of marijuana from Baltrip's briefcase. Baltrip, however, did not want to transport the marijuana and asked Officer Woods to drive with him to another location where the drugs

were kept. Officer Woods refused which caused Baltrip to become hesitant about the transaction. Baltrip then left the room with the informant.

Officer Florido saw the two men get in Baltrip's car and drive away, so he followed in his unmarked vehicle as they drove around for ten minutes. Baltrip returned to the motel, dropped off the informant, and left again with Officer Florido still following him. Officer Florido testified that Baltrip was making "heat runs" to see if he was being followed by the police. After a while, Baltrip returned to the motel, picked up the informant, and drove to a house on Deluxe Street in south Houston. The informant and Baltrip went inside for about twenty minutes, returned to the car, and drove back to the motel while being followed by a blue Mercury Cougar. The informant returned to Room 13 and told Officer Woods that Baltrip had some of the marijuana in his car and someone else would bring the remainder. Officer Woods met Baltrip in the parking lot and asked to see the marijuana. He got in Baltrip's car and immediately smelled marijuana which was in a large package wrapped in brown paper on the back seat of Baltrip's car. Officer Woods then got out of Baltrip's car, gave the "bust signal," and Officer Florido told other police officers to "come out and effect the arrest" via radio. Baltrip was then taken into custody. An HPD chemist later testified that the marijuana from Baltrip's car totaled thirty pounds. Officer Woods later learned from Baltrip that a black female driving a green Hyundai Sonata would be bringing another twenty pounds.

Police officers took Baltrip to a hotel room and moved his car from the parking lot. The informant stood outside the motel room, and the green Hyundai driven by appellant arrived about twenty minutes later. Officer Woods then advised the arrest team "it was a bust." The informant told the police that he had seen appellant at the house on Deluxe Street. After pulling into the parking lot, police arrested appellant and found a large plastic bag containing marijuana on the back seat of the car. The chemist testified these exhibits totaled twenty plus pounds (20.3 pounds plus .75 ounces). There was evidence in the record to show that appellant used the last name "Baltrip." A relationship between Baltrip and appellant was also established through joint cellular telephone and automobile dealership account charges.

During Officer Florido's cross examination, it was developed that the informant had a conversation the preceding day with a "female on the phone" involving negotiations for cocaine. Officer Florido did not know the female's name and did not see appellant at the house on Deluxe Street when he followed the informant and Baltrip to that location. The informant talked to the female and Officer Florido only heard the informant's side of the conversation.

The informant did not testify, did not appear at the trial, and was last known to be in Ohio. Appellant and Baltrip did not testify or give any statement. There is evidence in the record to show that appellant arrived at the motel with the twenty plus pounds of marijuana, but there is no evidence in the record to show how or when it came into her custody. Further, there is no evidence connecting the twenty plus pounds of marijuana in appellant's possession with the thirty pounds Baltrip brought to the motel with him. The State merely presented evidence of a relationship between Baltrip and appellant, but there is simply no evidence that appellant promoted or assisted Baltrip in the commission of the offense of possession of more than fifty pounds of marijuana. *See Beardsley*, 738 S.W.2d at 685; *Harris*, 781 S.W.2d at 367. We find that no rational trier of fact could have found that appellant possessed more than fifty pounds of marijuana as charged in the indictment, or that appellant was a party with Baltrip to the offense of possession of more than fifty pounds of marijuana. *See Jackson*, 443 U.S. at 319. Consequently, we hold the evidence is legally insufficient to sustain the verdict.

We sustain point of error one. We must next address the disposition of this appeal.

The charge to the jury included options to find appellant guilty of possession of marijuana in an amount weighing more than five pounds and less than fifty pounds. The jury instructions on the lesser included offense (in the event acquittal was appropriate on the indicted offense of possession of marijuana weighing more than fifty pounds and less than two thousand pounds) permitted conviction of the third degree felony offense either as an actor or under the law of parties. The evidence in this case is legally and factually sufficient to support conviction under either or both theories where the amount of marijuana involved is more than five pounds but less than fifty pounds. By finding appellant guilty of the greater

offense, the jury necessarily found appellant guilty of the lesser offense. *See Collier v. State*, No. 1081-98, 1999 WL 391091, at *3 (Tex. Crim. App. June 16, 1999). For this reason, we reform the judgment of the trial court to reflect that appellant was guilty of possessing more than five pounds and less that fifty pounds of marijuana. *See* TEX. R. APP. P. 43.2(b), (c); *see also Collier v. State*, 1999 WL 391091, at *3. We remand the case to the trial court for a second degree felony punishment trial in light of the enhancement finding of the jury and appellant's plea of true to the enhancement paragraph of the indictment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed October 21, 1999.

Panel consists of Justices Yates, Fowler, and Starr.[1]

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

[1] Senior Justice Larry Starr sitting by assignment.

Reversed and Remanded and Opinion filed July 8, 1999 Withdrawn; Majority and Concurring Opinions filed October 21, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00169-CR

TAMEKA SHAKMEEN FOXX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 717,256

CONCURRING OPINION ON MOTION FOR REHEARING

I respectfully concur. This is a marijuana case involving two separate "busts" occurring at least twenty minutes apart. Appellant was arrested with twenty plus pounds of marijuana in her car twenty minutes after Baltrip was arrested with thirty pounds of marijuana in his car. The only evidence in the record showing quantities is the laboratory weight determinations from these separate arrests. The record does not reveal anything about appellant's twenty plus pounds of marijuana before she drove into the motel parking lot and was arrested. We simply do not know from the evidence whether she had it five minutes or five days. The record reflects that she was expected to bring it, but the record is silent as to

when she got it or whether she had it when Baltrip was arrested twenty minutes earlier. We know from statements attributed to the informant (and received in evidence without objection) that appellant was involved in Baltrip's deal to deliver more than fifty pounds of marijuana, but there is simply no evidence showing that appellant and/or Baltrip, together or separately, actually possessed more than fifty pounds of marijuana at any one time. I would hold that the evidence is legally insufficient to convict appellant of possession of more than fifty pounds of marijuana.

The State presents the argument in its Motion for Rehearing that Baltrip "not only possessed the 30 pounds of marijuana in his own car, but was a party to appellant's possession of the 20 (plus) pounds of marijuana in her car. In that manner, Baltrip possessed the entire 50 (plus) pounds of marijuana, and appellant assisted him in the offense" making her a party to possession of all of the 50 plus pounds of marijuana. No authority is cited in support of this theory. In my view the argument fails because of the twenty minute hiatus in time of possession. I would reform the judgment to convict appellant on the lesser offense and remand the case for trial on punishment.

/s/ Larry Starr
Justice

Judgment rendered and Opinion filed October 21, 1999.
Panel consists of Justices Yates, Fowler, and Starr.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Larry Starr sitting by assignment.