Affirmed and Opinion filed November 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00975-CR

STEPHEN CHRISTOPHER MCCARTHY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 811,788

O P I N I O N

Over his plea of not guilty, a jury convicted appellant Stephen Christopher McCarthy of possession, with intent to deliver, a controlled substance, i.e., cocaine, weighing more than 200 grams and less than 400 grams. Appellant pleaded true to one enhancement paragraph and was sentenced to 27 years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant brings three issues on appeal: that the evidence against him is legally and factually insufficient, and that the trial court erred in denying his motion to suppress the evidence under both federal and state law. We affirm the judgment of the trial court.

Factual Background

At trial on the merits, Harris County Deputy Sheriff Michael Anthony Harvey testified that while he was patrolling an area east of downtown Houston at about 11:00 p.m., he saw appellant make an illegal turn without signaling and head the wrong way down a one-way street. Harvey pulled appellant's car over and asked him for his driver's license and proof of insurance. Appellant was the only occupant in the car. When asked where he was going and where he had been, appellant did not respond. Instead, appellant was mumbling and sweating heavily. He avoided eye contact, and refused to answer any direct questions, including whether he owned the car. Appellant rambled on incoherently and claimed to be a drug informant for the Houston Police Department. Appellant repeatedly offered to lead Harvey to a place where drugs were being sold: a "dope house [where] I can get you some drugs."

Harvey radioed Harris County Deputy Sheriff Ronald Earl Hoyt to assist him at the scene. Hoyt testified that when he arrived at the scene, he too heard appellant claim to be an informant who could lead the officers to a place where drugs were being sold. Harvey then asked appellant to get out of the car, conducted a weapons search, and detained appellant in the back seat of Harvey's police cruiser. At that time, Hoyt did an inventory search of appellant's car, and, in the trunk, inside a shopping bag, he found a white-colored substance in small plastic baggies and a scale. Hoyt field tested the substance, and it tested positive for cocaine. A later search of appellant's person recovered $4,970.00 in cash.

Sometime after the contraband had been confiscated, a car pulled up behind the police cruisers, and a group of six to eight people, some claiming to be related to the appellant, approached the officers. In an aggressive, hostile manner, the group demanded that appellant and his car be released. Hoyt testified that the group was particularly concerned about the car, however, and less concerned about their purported relative's detainment. Several of the group argued that they should be allowed to take possession of car. The officers refused and instructed the group to leave. Despite a command to disperse, the group continued to

approach the officers, and therefore, Harvey found it necessary to retrieve a shotgun from his cruiser. Quickly thereafter, the group left the scene.

After transporting appellant and his car to the traffic office, Harris County Deputy Sheriff Michael Wayne Fondren of the K-9 division was called to conduct an investigation. Fondren checked appellant's car and the money recovered from his person for drug residue. Rebel, Fondren's drug-detecting dog, indicated the scent of narcotics in the trunk of appellant's car, on the driver's door, the steering wheel, the stereo, the back corner of the back seat, and on the money.

At trial, appellant called his brother, Derrick McCarthy (Derrick), and he testified that he co-owned the car in which the drugs were found. He claimed that he was the "primary" owner of the car and that his brother (appellant) had only "signed for" the car to prevent losing it in a property settlement in Derrick's impending divorce. It was later determined that the car was indeed co-owned by appellant and his brother.

In addition, Derrick testified that on the day of the arrest, he had given access of his car first to a girlfriend identified as only "Gina,"[1] and later to appellant. Specifically, Derrick testified that Gina was having difficulty with her "boyfriend,"and she needed to borrow the car to get some things from her boyfriend's house. That afternoon, however, Derrick instructed Gina to deliver the car to appellant, which apparently, she did. Sometime thereafter, Derrick was told that his brother had been pulled over and arrested. Upon hearing this information, Derrick drove to the scene and tried to retrieve his car, but the officers would not release it to him. Derrick further testified that $4,000 of the $4,970 appellant had was money he had loaned to appellant for a trip to Las Vegas, a trip that the two of them were to take four days later. On cross-examination, Derrick admitted that he had been convicted of possession of cocaine only four months prior and had received deferred

[1] Derrick testified that he met Gina at the "Kappa" beach party in April 1999, and even though Gina stayed at his house for over a week thereafter, and he gave her unbridled access to his car, he could not remember her last name.

adjudication with a ten year probated sentence.

Appellant testified in his own defense. He also testified that Gina delivered the car that evening and that his brother had loaned him most of the money. But appellant denied that the drugs were his, that he put the drugs in the car, that he knew the drugs were in the trunk of the car, that he offered to take the officers to a drug house, or that he was nervous or sweating when he was pulled over. Appellant also argued that he was not responsible for the drug residue on the money, that by happenstance, he probably obtained tainted money while doing legitimate business at a retail store.

Furthermore, appellant admitted that prior to the current charge, he pleaded guilty to two counts of assault on a police officer. Appellant testified, however, that he never struck anyone. Rather, he only so pleaded to get probation. In fact, probation was later revoked for failure to perform community service and because a urinalysis drug test registered positive for cocaine. Nonetheless, appellant testified that the sample used in the urinalysis was not his, and that the probation officer had simply made up the allegations so that appellant's probation would be revoked. Appellant further offered that he had never been involved with cocaine.

Standard of Review

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 prosecution and determine 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, 319, 99 S.Ct. 2789, 61 L.Ed.2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *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 we consider only whether the jury reached a rational decision. *Muniz v. State*,

851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). That is, a factual sufficiency review dictates that the evidence be viewed in a neutral light, favoring neither party. *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). In this neutral light, the appellate court reviews the jury's weighing of the evidence and is authorized to disagree with the jury's determination. *Id*. at 133. Evidence is factually insufficient if, (1) it is so weak as to be clearly wrong and manifestly unjust; or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Johnson*, 23 S.W.3d at 11. The *Johnson* Court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9. We are mindful, however, that due deference is not absolute deference. *Id*. at 7.

Legal Background

To support a conviction for unlawful possession of a controlled substance, the State must show (1) that the defendant exercised care, control, and management over the substance; and (2) that the defendant knew that what he possessed was contraband. *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988); *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985). The state is not required to provide direct evidence, rather, the elements may be proved by circumstantial evidence. *Sewell v. State*, 578 S.W.2d 131, 135 (Tex. Crim. App. 1979).

Additionally, the State must provide evidence of affirmative links between the defendant and the controlled substance. *Brown v. State,* 911 S.W.2d 744, 748 (Tex. Crim.

App. 1995). Although the defendant must be affirmatively linked with the drugs, the link need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *Id*. All facts do not necessarily need to point directly or indirectly to the defendant's guilt; the evidence is legally sufficient if the combined and cumulative effect of all the incriminating circumstances point to the defendant's guilt. *Russell v. State*, 665 S.W.2d 771, 776 (Tex. Crim. App. 1983). If the defendant merely presents a different version of the events, that does not render the evidence insufficient to support his conviction. *Sosa v. State*, 845 S.W.2d 479, 483 (Tex. App.–Houston [1 st Dist.] 1993, pet. ref'd). Affirmative links may be established by facts and circumstances that indicate the accused's knowledge of and control over the contraband, including the fact that the contraband was in close proximity to the accused. *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (reasoning that in the absence of an admission by the accused, the knowledge element of the crime of possession must always be inferred to some extent).

The fact that a person is the sole occupant of a vehicle is sufficient evidence to establish the element of control over the vehicle. *Id.* And, an inference may be drawn from a person's control over a vehicle to show knowledge of the contraband concealed therein. *Id*. The inference of knowledge has been extended to include knowledge of contraband found in the trunk of a driver's car. *Id.* at 433-34.

Discussion

In appellant's first point of error, he contends the evidence is legally insufficient to prove he knowingly possessed the cocaine. However, the evidence affirmatively links appellant to the offense and indicates appellant had control over the contraband. Appellant was driving the car and was the sole occupant of the car where the cocaine was found. Appellant was sweating profusely and acting unusually nervous when questioned by Harvey and Hoyt. When asked direct questions about where he was going and where he had been, appellant could not respond. Instead, he offered to take the officers to a place where they

could make a drug bust. Appellant's brother Derrick rushed to the scene when notified that appellant had been stopped by police. Derrick arrived simultaneously with several other people and demanded that the officers release the car to them. Appellant was carrying an unusually large amount of cash, which is common with one dealing drugs. Furthermore, cocaine was detected on the cash, the steering wheel, the stereo controls, and the driver's side door. Moreover, appellant's name was listed as co-owner on the car's bill of sale.

Both elements of the crime of possession of cocaine–control over the contraband and knowledge of the contraband–may be inferred from this evidence. *Id*. (explaining that the element of control is established by the sole occupancy of a vehicle in which drugs are found and knowledge may be inferred from such control); *United States v. Richardson*, 848 F.2d 509, 512-13 (5th Cir.1988). After viewing the evidence in the light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of the offense of possession of cocaine. Accordingly, we overrule appellant's first point of error.

In his second point of error, appellant contends that the evidence is factually insufficient to support his conviction for possession of cocaine. In response to the State's evidence pointing toward appellant's knowledge of the contraband, appellant offered that he did not know about the drugs, that he did not put the drugs in the trunk, that a unidentified woman known only as Gina had the car prior to the arrest, that his brother was the "primary" owner of the car, that $4,000 of the cash was a loan from his brother for a trip to Las Vegas, that the drug laden money may have innocently come into his possession through an unfortunate and arbitrary accident of circulation, that he was not acting nervous at the scene, that his sweating was not unusual given the temperature outside, and that he never told the officers that he could lead them to a place where drugs could be found.

A neutral review of all the evidence, both for and against the finding, demonstrates that evidence in the record does not greatly outweigh the evidence supporting the trial court's judgment. It was the jury's responsibility to determine what in this record they

thought was true. It would not have been unreasonable for the jury to disbelieve (1) the claim that a woman named Gina, whose last name was unknown but who apparently was dating his brother, had the car just before appellant, (2) appellant's denial of culpability in his prior convictions over his plea of guilty, and (3) his suggestion that his urine sample had been tampered with by his probation officer. These things may have harmed appellant's credibility in the eyes of the jury, and we do not find such a conclusion unreasonable. We give due deference to the jury's determination; thus, the jury is free to believe or disbelieve testimony in favor of appellant. *Muniz*, 851 S.W.2d at 246 (stating that an appellate court does not reevaluate the weight and credibility of the evidence, but acts only to ensure the factfinder reached a rational decision); *Richardson*, 848 F.2d at 513 (pointing out that defendant's less-than-credible testimony is part of the overall circumstantial evidence from which possession and knowledge may be inferred).

Similarly, the fact that Derrick, appellant's brother, was on probation for possession of cocaine at the time of trial may have further detracted from the credibility of his testimony about Gina, the money, and the trip to Las Vegas. *Alexander v. State*, 740 S.W.2d 749, 763 (Tex. Crim. App. 1987). Whether someone else was driving the car, or may have put the drugs in the trunk, are issues for the jury to decide. *Solomon v. State*, 49 S.W.3d 356, 362 (Tex. Crim. App. 2001). The jury may have chosen to ignore this testimony, and they were entitled to do so. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (stating that the jury is the sole trier of fact and may judge the credibility of witnesses, reconcile conflict in testimony, and accept or reject any evidence presented by either side to the case). We find that the jury's decision was not so contrary to the weight of the evidence as to be clearly wrong and unjust. We conclude that the evidence is factually sufficient to support appellant's conviction for possession of cocaine and overrule appellant's second point of error.

In appellant's third issue on appeal, he challenges the trial court's denial of his motion to suppress. Appellant, however, did not preserve a record of the suppression

hearing. Consequently, we are unable to review appellant's third point of error. The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Justices Yates, Fowler and Wittig.[2]

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[2] Senior Justice Wittig sitting by assignment.