Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01290-CR

BEN ROBERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 844,441

O P I N I O N

Following a bench trial, appellant, Ben Roberson, was convicted for possession of less than one gram of cocaine. The trial court assessed punishment at two years' confinement, enhanced by two prior convictions. In three points of error, appellant contends (1) the evidence is legally and factually insufficient to sustain his conviction, (2) the trial court erred by admitting into evidence the appellant's crack pipe without proof of proper chain of custody, and (3) the trial court erred by overruling appellant's objection to the admission of his co-defendant's crack pipe. We affirm.

Background and Procedural History

On May 12, 2000, at about 1:00 p.m., Officers Jones and Green of the Houston Police Department were investigating store owners' complaints of narcotics being sold and smoked behind their stores in a strip mall at 1500 Blodgett. The officers observed appellant and Roger Langham (also known as Rodney Mooring) sitting behind a four by eight foot sheet of plywood board smoking crack cocaine. Officer Jones identified himself as a police officer and told appellant and Langham to show their hands. Appellant ignored the officers' warnings, moved to his right and put his crack pipe into a hole in a small shed. Officer Jones grabbed appellant by his shirt, ordered him to put his hands on the wall, then retrieved appellant's still-warm crack pipe from the hole in the shed. Jones also retrieved a crack pipe from behind Langham.

Appellant testified that he was on his way to his aunt's house when he saw Langham and that they visited in front of the stores for about forty-five minutes. Langham said he had to go behind the stores to clean up the area. Appellant stated that he and Langham were just sitting and talking behind the board when the officers came up with their guns drawn. Appellant denied having a crack pipe and stated he was not smoking cocaine when the officers approached him. He testified that after he and Langham sat in the police car for three hours with the windows rolled up, the officers told them they had found the crack pipes. On cross-examination, appellant testified that Langham wasn't smoking crack cocaine. When the prosecutor told appellant that Langham had pleaded guilty to possession of narcotics, appellant stated that he did not recall seeing Langham smoking crack cocaine. Langham testified he had three felony convictions for possession of narcotics, that he did not have a crack pipe, and that he did not smoke crack cocaine. He claimed he pleaded guilty to the charges stemming from this incident to avoid going to trial.

In addition to Officer Jones' testimony, the State presented the testimony of Officer Green, who testified that he also observed appellant smoking a crack pipe while appellant and Langham were sitting behind the board. The State's chemist testified that both pipes

tested positive for cocaine; Sx-2 (appellant's crack pipe) contained 2.1 milligrams of pure cocaine and Sx-3 (Langham's crack pipe) contained 7.4 milligrams of pure cocaine.

Appellant was found guilty, and the trial court assessed punishment at two years' confinement. This appeal followed.

Legal and Factual Sufficiency

Appellant contends the evidence is both legally and factually insufficient to support a finding that he knowingly possessed a controlled substance. When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89 (1979); *Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). If a reviewing court determines the evidence is insufficient under the *Jackson* standard, it must render a judgment of acquittal because if the evidence is insufficient under *Jackson*, the case should never have been submitted to the jury. *See Jackson*, 443 U.S. 307. In a legal sufficiency challenge, we do not re-weigh the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

In reviewing factual sufficiency, we do not view the evidence "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). Rather, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). 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. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

A person commits an offense if that person knowingly or intentionally possesses less

than one gram of cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (Vernon Supp. 2001). When an accused is charged with unlawful possession of cocaine, the State must prove (1) the defendant exercised actual care, custody, control, or management over the contraband and (2) the accused knew the object he possessed was contraband. *See Linton v. State*, 15 S.W.3d 615, 619 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). While the element of possession may be proved by circumstantial evidence, such evidence must affirmatively link the defendant to the offense so that one may reasonably infer the defendant knew of the contraband's existence and exercised control over it. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985).

In this case, both officers observed appellant smoking a crack pipe, which later tested positive for cocaine. With Officer Jones watching, appellant attempted to hide the crack pipe in a hole in a shed to appellant's immediate right. Officer Jones immediately went to the hole and retrieved appellant's still-warm crack pipe. Similar facts have been found sufficient to establish unlawful possession. *See Blackmon v. State*, 830 S.W.2d 711, 714 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). Further, the act of discarding the crack pipe is "conduct indicating knowledge of the illegal nature of said contraband and thus a clear indication of appellant's consciousness of guilt." *Davis v. State*, 862 S.W.2d 817, 819 (Tex. App.—Beaumont 1993, no pet.). We find the evidence was sufficient for a rational trier of fact to have found the elements of possession of a controlled substance beyond a reasonable doubt.

The only contrary evidence presented by appellant was his and Langham's testimony that they were not smoking crack that day. Appellant contends that the officers' testimony is not credible. However, in a trial before the court, the judge is the sole judge of the credibility of the witnesses and may accept or reject all or any part of the testimony given by any State or defense witness. *Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. [Panel Op.] 1978); *Collins v. State*, 901 S.W.2d 503, 505 (Tex. App.—Waco 1994, pet. ref'd). Further, what weight to give contradictory testimonial evidence is within the sole

province of the fact finder, because it turns on an evaluation of credibility and demeanor. *Cain v. State,* 958 S.W.2d 404, 408-409 (Tex. Crim. App. 1997). Here, the trial court, as the fact finder in a bench trial, found the officers' testimony to be credible and appellant's and Langham's testimony not credible. Having reviewed the evidence "in a neutral light, favoring neither party," we find the evidence is not so weak as to be clearly wrong and manifestly unjust. *See Johnson*, 23 S.W.3d at 6. We hold that the evidence is factually sufficient to sustain appellant's conviction.

Appellant's first point of error is overruled.

Chain of Custody

Appellant next contends the trial court erred in admitting Sx-2 (appellant's crack pipe) into evidence because the State failed to prove a proper chain of custody. We review a trial court's decision to admit evidence under an abuse of discretion standard. *See Garner v. State*, 848 S.W.2d 799, 803 (Tex. App.—Corpus Christi 1993, no pet.); *see also Silva v. State*, 989 S.W.2d 64, 67-68 (Tex. App.—San Antonio 1998, pet. ref'd).

Officer Jones testified that he put appellant's and Langham's crack pipes into one baggie. Jones then put the baggie containing both crack pipes into the narcotic's lock-box at the police station and, on the date of trial, picked up the two crack pipes in a sealed bag. Appellant's crack pipe was identified as State's exhibit 2 (Sx-2) and Officer Jones stated that this crack pipe was "the same exact one" that he put in the baggie (Sx-1) at the scene of the arrest. The officer further identified Langham's crack pipe as State's exhibit 3 (Sx-3). He stated Langham's crack pipe was in the "same baggie" (Sx-1) and he recognized the crack pipe "by sight." Officer Jones further stated he had written "Suspect 1" on appellant's crack pipe, and "Suspect 2" on Langham's crack pipe but the writing had rubbed off. The State's chemist testified that he received the sealed envelope (Sx-1) containing Sx-2 (appellant's crack pipe), and Sx-3 (Langham's crack pipe) at the crime lab.

Rule 901(a) of the Texas Rules of Evidence provides that the requirement of

authentication and identification of evidence is satisfied by a showing sufficient to support a finding that the matter in question is what its proponent claims. TEX. R. EVID. 901. Here, the State identified appellant's crack pipe by the testimony of a witness with knowledge. *See* TEX. R. EVID. 901(b)(1). Absent evidence of tampering or commingling, theoretical breaches in the chain of custody do not affect admissibility. *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997); *Cuba v. State*, 905 S.W.2d 729, 735 (Tex. App.—Texarkana 1995, no pet.). Because there was no evidence of tampering, we hold that the trial court did not abuse its discretion by admitting appellant's crack pipe into evidence. *See Garner*, 848 S.W.2d at 803; s*ee also Silva*, 989 S.W.2d at 67-68. Accordingly, appellant's second point of error is overruled.

Admission of Co-Defendant's Evidence

In point three, appellant contends that the trial court erred in admitting into evidence Sx-3, Langham's crack pipe. Appellant's trial counsel made the following objection: "State's No. 3 is irrelevant as to Mr. Roberson. Officer Jones testified that this was the crack pipe that was recovered from the co-defendant. So it's defense's position it's irrelevant in Mr. Robertson's trial." On appeal, appellant contends the admission of Langham's crack pipe was prejudicial and harmed him and thus should have been excluded under rule 404(b). *See* TEX. R. EVID. 404(b).

Appellant did not object to Langham's crack pipe until the State offered it into evidence after the chemist testified as to his findings of cocaine. Prior to this, Officer Jones testified that he recovered Langham's crack pipe and placed it in Sx-1 (the baggie containing both crack pipes). He stated that he observed Langham smoking crack cocaine. The prosecutor showed Officer Jones the crack pipe and asked him if he knew what it was, and the officer replied that it was the "crack pipe that was recovered from the other gentleman that was at the location." On cross-examination, appellant's counsel asked Officer Jones where he found Langham's crack pipe and he stated that it "had fallen in a crack in between the building." Appellant's counsel further asked where this crack pipe was found in relation

to where he saw "the gentleman." Officer Jones said he found it behind "Mr. Mooring," who was later identified as being Roger Langham.

Appellant's objection was untimely. To be timely, an objection must be raised at the earliest opportunity or as soon as the grounds for the objection become apparent. *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993). Appellant did not object until after Officer Jones had testified extensively about the cocaine. *See Laurant v. State*, 926 S.W.2d 782, 783 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd).

Moreover, appellant's complaint on appeal that admission of the crack pipe was prejudicial, harmful, and that it thus should have been excluded under rule 404(b) of the Texas Rules of Evidence, differs from his trial objection. An objection stating one legal theory may not be used to support a different legal theory on appeal. *See Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Crim. App. 1993). Accordingly, appellant has not preserved this issue for our review and his third point if error is overruled.

We affirm the judgment of the trial court.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 20, 2001.
Panel consists of Justices Yates, Edelman, and Wittig[1].
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Wittig sitting by assignment.