Affirmed and Opinion filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01244-CR

RAY MCKINLEY WELCH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 757,769

O P I N I O N

Appellant, Ray McKinley Welch, appeals his conviction for possession of crack cocaine on four points of error: (1-2) the evidence was legally and factually insufficient to establish his possession of the crack pipe found on the floor near where he was standing at the time of his arrest; and (3-4) the evidence was legally and factually insufficient to establish that appellant was aware of the existence of the pipe for a sufficient time to have terminated his control over it. We overrule appellant's points of error and affirm the judgment of the trial court.

FACTUAL BACKGROUND

Houston Police Officers Rex Gates and Richard Corrales worked extra jobs as security officers at the Falcon Wing Apartments. Both officers were on duty when Officer Gates observed a woman, Wanda Sanders, walking through a row of parked cars. She appeared nervous, and one of her hands was clenched shut. The officers approached her and discovered she was carrying a rock of crack cocaine. They arrested her on a charge of possession. As the officers prepared to take Ms. Sanders into custody, she asked them if they would allow her to return to her apartment to make arrangements for the care of her minor child.

The officers accompanied Ms. Sanders back to her apartment, where they found appellant and another man seated at a table. The apartment was full of a thick white smoke that smelled like cocaine. As Officer Gates approached the table, both men stood up. Officer Corrales saw appellant drop a crack pipe onto the floor. Officer Gates performed a field test, and the pipe tested positive for cocaine. The officers arrested appellant.

Charged with possession of crack cocaine, appellant was tried before a jury. After finding him guilty, the jury sentenced appellant to five years in prison.

LEGAL SUFFICIENCY

In his first and third points of error, appellant claims the evidence was legally insufficient to show possession because the State failed to establish (1) appellant had possession of the pipe and (2) appellant was aware of the existence of the pipe.

In reviewing the legal sufficiency of the evidence, we apply the standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979). That standard mandates that we view the evidence in the light most favorable to the prosecution, and, in so doing, ask if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). Under the

Jackson standard, we consider only the evidence that supports the verdict. *See id*. at 132 n.10.[1] The jury is the sole judge of the credibility of the witnesses and may choose to believe all, some or none of the testimony. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). The reconciliation of conflicts in the evidence lies within the exclusive province of the jury. *See Burns v. State*, 761 S.W.2d 353, 355-56 (Tex. Crim. App. 1988). We only assess whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). This standard applies to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 159 n.6 (Tex. Crim. App. 1991).

In reviewing appellant's challenge to the legal sufficiency of the evidence for his conviction for possession of less than one gram of cocaine, we note that the State was required to prove beyond a reasonable doubt that appellant (1) exercised care, control, and management over the contraband and (2) knew the matter was contraband. *See Martin v. State,* 753 S.W.2d 384, 387 (Tex. Crim. App. 1988). To show appellant exercised care, control, and management over the contraband, the State had to show that either the possessor (1) "knowingly obtains or receives the thing possessed" or (2) "is aware of his control of the thing for a sufficient time to permit him to terminate his control."[2] TEX. PEN. CODE ANN. § 6.01(b) (Vernon 1997). When relying on circumstantial evidence to prove

---

[1] The reviewing court, therefore, presumes that the trier of fact has resolved any conflicts in favor of the prosecution and must defer to that resolution. This is true even where the record does not affirmatively show such a resolution. *Clewis*, 922 S.W.2d at 149 (Clinton, J., concurring).

[2] In his first point of error, appellant seems to be claiming generally that he did not have possession. Because appellant did not make the argument that he did not know the substance was cocaine, we assume appellant is arguing he did not exercise care, control, and management over the cocaine. The use of the word "possession" to describe (1) the offense and (2) the first element the state must show to prove possession is confusing. Nevertheless, it is the language used by the Penal Code and most courts. In the interest of clarity, we will not refer to the first element as possession. In his third point of error, appellant seems to be claiming the State failed to prove one method of proving that he exercised care, control, and management over the cocaine. Thus, appellant argues the same point of error twice--generally in his first point of error and specifically in his third point. In the same way, appellant's argument in his second and fourth points of error is redundant.

a knowing possession case, the State must affirmatively link an accused to the contraband in such a manner that one could reasonably conclude the accused knew of the contraband's existence and exercised control over it. *See Sosa v. State*, 845 S.W.2d 479, 482 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). The evidence is legally sufficient to show a defendant exercised care, control, and management over cocaine by being aware of his control when the cocaine is retrieved from an area where an officer testifies that he saw the defendant throw something. *See, e.g., Noah v. State*, 495 S.W.2d 260, 263 (Tex. Crim. App. 1973) (police officer saw defendant throw a package from a moving car)*; Blackmon v. State*, 830 S.W.2d 711, 714 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (police officer saw defendant throw something into a grassy field); *Edwards v. State*, 807 S.W.2d 338, 339 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (defendant threw object into the car as police were approaching). The testimony of an officer, standing alone, is sufficient to establish unlawful possession. *See Noah*, 495 S.W.2d at 263; *Blackmon*, 830 S.W.2d at 714.

Both officers testified that the room was full of thick white smoke that smelled of cocaine. Officer Gates testified that he saw drug paraphanelia on the table. He also testified that the pipe retrieved from the floor in between appellant's legs field tested positive for crack cocaine. Officer Corrales actually witnessed appellant drop the pipe onto the floor. Finally, a Houston Police Department chemist, Jill Dupre, testified that the pipe recovered by the officers contained 5.2 milligrams of cocaine. We find that based on this evidence, a rational trier of fact could have found that appellant exercised care, control, and management over the cocaine. Therefore, the evidence was legally sufficient. We overrule appellant's first and third points of error.

FACTUAL SUFFICIENCY

In his second and fourth points of error, appellant claims the evidence was factually insufficient to establish possession because the State failed to establish (1) appellant had

possession of the pipe and (2) appellant was aware of the existence of the pipe.

In conducting a factual sufficiency review, we view "all the evidence without the prism of 'in the light most favorable to the prosecution' and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at 134 (quoting *Stone v. State*, 823 S.W2d 375, 381 (Tex. App.—Austin 1992, pet. ref'd, untimely filed)). In conducting this review, we avoid substituting our judgment for that of the jury. *See id*.

As noted, the evidence presented at trial placed appellant in a smoke filled apartment that wreaked of crack cocaine, clutching, then dropping, a pipe that was later determined to contain 5.2 milligrams of crack cocaine. In his testimony, appellant acknowledged that he had smoked crack cocaine before and that the occupants of the apartment were smoking crack cocaine and using a pipe on the date of his arrest, but he denied that he was smoking crack cocaine. Ms. Sanders supported appellant's testimony, denying that appellant was smoking crack cocaine that night and also denying that the pipe the officers retrieved from the apartment floor belonged to appellant. Mindful that it is the sole province of the jury to determine the credibility of the witnesses and the weight to give their testimony, we hold that the jury's finding that appellant was guilty of possession of cocaine is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Therefore, we find the evidence is factually sufficient to support the conviction. We overrule appellant's second and fourth points of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 10, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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