Affirmed and Opinion filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00475-CR

JOHNNY DRAYTON SMALL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 784,777

O P I N I O N

Johnny Drayton Small (Appellant) was indicted for the first degree felony offense of possession of four grams or more but less than 200 grams of cocaine, with intent to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d) (Vernon Supp. 2000). Appellant pled not guilty. Following a jury trial, Appellant was convicted. The trial court sentenced Appellant to eight years' confinement in the Institutional Division of the Texas Department of Criminal Justice. On appeal to this Court, Appellant assigns fours points of error, contending that the evidence was legally and factually insufficient to support his conviction and that he received ineffective assistance of trial counsel. We affirm.

BACKGROUND

Officer M. R. Burdick is an undercover officer for the Houston Police Department, assigned to the narcotics division. Officer Burdick received information that a black male who drives a maroon automobile was delivering narcotics to a residence located on Kashmere Street. Early in the evening, Officer Burdick arrived near the residence where he believed the narcotics activity was taking place. He parked his unmarked unit on the side of the street and observed Appellant sitting inside a maroon automobile, which was parked in the driveway of the residence on Kashmere Street where the narcotics activity was allegedly occurring.

Moments after Officer Burdick began his surveillance, Appellant backed his automobile out of the driveway and began driving southbound on Kashmere Street. Officer Burdick followed; he believed that Appellant was aware that he was being watched by a police officer. Appellant drove to a location near the intersection of Loop 610 and Kashmere Street and entered an open field. Officer Burdick stopped his unit about seventy-five yards away and watched Appellant through binoculars. The officer observed Appellant exit his automobile and walk to the northwest corner of the field. Officer Burdick could see that Appellant was "cupping" an object in one of his hands. He saw Appellant bend down in the northwest corner of the field and release the object on the ground. Officer Burdick immediately contacted a marked patrol unit and a canine unit and requested their presence at the scene. After Appellant returned to his vehicle, he began to drive away but was stopped by a marked patrol unit. Officer Burdick maintained his surveillance of the field to be sure no one contaminated the area where Appellant dropped the object he was previously holding in his hand.

After the canine unit arrived, the identified area of the field was searched. The canine, "Yarco," immediately alerted the canine unit police officers to the exact location where Officer Burdick saw Appellant drop something. After the substance was recovered, Appellant was arrested and transported to the Harris County Jail. Later, it was confirmed that the substance recovered was approximately 4.9 grams of crack cocaine. Its estimated street value was determined to be $500.

DISCUSSION

Sufficiency of the Evidence

In his first two points of error, Appellant contends that the evidence was legally and factually insufficient to support his conviction for possession of a controlled substance with intent to deliver.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the jury's verdict to determine if any rational trier of fact could have found against Appellants on the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Clewis v. State*, 922 S.W.2d 126, 132-33 (Tex. Crim. App. 1996). The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *See Clewis*, 922 S.W.2d at 133. If a reviewing court determines that the evidence is insufficient under the *Jackson* standard, however, it must render a judgment of acquittal. *See id.* This is because if the evidence is insufficient under *Jackson*, the case should have never been submitted to the jury. *See id.* Section 481.112 of the Health & Safety Code provides that a person commits an offense "if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance . . . ." TEX. HEALTH & SAFETY CODE ANN. § 481.112(d) (Vernon Supp. 2000). To prove unlawful possession of a controlled substance, the State must prove the following essential elements: (1) that a defendant exercised actual care, control and management over the contraband; and (2) that a defendant had knowledge that the substance in his possession was contraband. *See King v. State,* 895 S.W.2d 701, 703 (Tex. Crim. App.1995). The issue is whether the evidence will support a reasonable inference that a defendant knowingly possessed the contraband. *See Victor v. State,* 995 S.W.2d 216, 220 (Tex.App.–Houston [14th Dist.] 1999, no pet. h.). We observe that a defendant's mere presence at a place where narcotics are found is not sufficient to convict him of possession. *See Moss v. State,* 850 S.W.2d 788, 794 (Tex.App.–Houston [14th Dist.] 1993, pet. ref'd). The State has the burden to affirmatively link a defendant to the possession of the narcotic. *See id.* The State can meet this burden by introducing facts and circumstances that indicate a defendant's knowledge and control of the controlled substance. *See id.* These facts and circumstances must create a reasonable inference that the defendant knew of the controlled substance's existence and exercised control over it. *See id.* Finally, we note that

a defendant's intent to deliver a controlled substance may be proved by circumstantial evidence. *See id.* at 797.

We have thoroughly examined the record of this case and, viewing it in the light most favorable to the verdict, find the evidence legally sufficient to support the jury's verdict. The evidence showed that Officer Burdick was provided information by an informant indicating that someone matching Appellant's physical description and the description of his automobile was delivering narcotics to a specific residence located on Kashmere Street. Having executed prior warrants at that residence relating to narcotics offenses, Officer Burdick knew that illegal narcotics were routinely sold from that location. After Officer Burdick arrived at a location near the targeted residence where he was to conduct surveillance for narcotics activity, he saw Appellant sitting inside a maroon automobile, parked in the driveway of the residence. The evidence showed that after Appellant's attention was drawn toward Officer Burdick's surveillance position, he backed his automobile out of the driveway and drove a short distance to an open field. Officer Burdick followed Appellant. After Appellant stopped his automobile and exited it, Officer Burdick closely monitored Appellant and his actions through binoculars. Officer Burdick could see that Appellant was "cupping" an object in the palm of one of his hands as he walked toward the northwest corner of the field. Officer Burdick testified that he clearly saw Appellant bend over and drop the object he was holding on the ground. Officer Burdick testified that he then maintained constant surveillance of the exact location where Appellant dropped the object until a canine unit arrived to search the area. After the substance was found and recovered by the canine unit police officers, it was determined to be 4.9 grams of cocaine.

The State met its burden to affirmatively link Appellant to the recovered cocaine. The evidence showed that Appellant maintained care, control and management over the recovered cocaine, both inside his automobile and then on his person while he was walking through the open field. The canine unit recovered the object Appellant dropped in the field at the exact location where Officer Burdick saw Appellant drop it. A reasonable inference can be drawn from the evidence that the cocaine recovered by the canine unit was the same substance that Officer Burdick observed Appellant drop in the field. Further, the evidence that showed Appellant left the targeted residence and ultimately discarded a substance in his possession upon realizing that Officer Burdick was watching him strongly indicates that he knew the

substance was cocaine. Finally, the testimony showing that 4.9 grams of cocaine would not be for personal use but, rather, would be cut into approximately fifty small "rocks" for individual sale was sufficient to show that Appellant possessed the intent to deliver. We conclude that the jury's guilty verdict is based upon legally sufficient evidence.

In reviewing the factual sufficiency of the evidence, we view all the evidence in the record without the prism of "in the light most favorable to the prosecution . . . ." *See Clewis*, 922 S.W.2d at 134. However, a reviewing court is "not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *See id.* at 135. We will set aside a verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See id.* at 134. This Court must also determine that the jury's verdict shocks the conscience or clearly demonstrate bias before reversing on factual insufficiency grounds. *See id.* at 135.

Appellant begins by contending that the evidence was factually insufficient because there were other people in the area who had access and may have placed the cocaine in the field where it was discovered by police. However, the testimony clearly shows that Officer Burdick maintained continuous surveillance over the location where he saw Appellant drop the substance until it was recovered by police. There is nothing in the record to suggest that any other person was even close to the location in the field where Appellant walked and dropped the substance he was carrying. He also argues that the State's evidence of his close proximity to the cocaine "alone" is insufficient to show he was in possession of it. However, the State did not *only* present evidence showing that Appellant was in close proximity to the cocaine. There was other evidence presented that showed: Appellant was at a residence where narcotics activity was occurring, that Appellant and his automobile matched the description provided by an informant, who stated the person was routinely delivering narcotics to the residence, and that Appellant discarded a substance upon learning that he was being watched by a police officer.

Accordingly, we conclude that the jury's verdict in this case is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Nor does the jury's verdict shock the conscience or clearly demonstrate bias. Points of error one and two are respectively overruled.

Ineffective Assistance of Trial Counsel

In his third and fourth points of error, Appellant contends that he received ineffective assistance of trial counsel.

After devoting three and a half pages of his brief detailing the standard of review, Appellant contends "there were many errors by his trial counsel and that while any one of them might not amount to constitutionally ineffective assistance of counsel, when considered together they clearly demonstrate that [his] trial counsel was constitutionally ineffective, and that the incompetence prejudiced [him] to the extent that a reasonable person would lose faith in the confidence of the outcome." Outside of this abstract statement, Appellant does not identify any act or omission on the part his trial counsel that was deficient. It is not the duty of an appellate court to seine the record in search of error; rather, it is an appellate's to duty to specifically identify any errors in his brief and where they can be found in the record. *See* TEX. R. APP. P. 38.1(h). Further, no argument is presented to support Appellant's third and fourth points of error. *See id.* Appellant does, however, *conclude* his third and fourth points of error by averring that his "counsel was constitutionally deficient for failing to properly identify in the record the prospective juror s [sic] numbers so on review it could be checked whether those that were objectionable were excluded from the jury." Other than this single speculative statement, no argument or authorities are presented to support Appellant's contention. *See id.* As Appellant's third and fourth points of error present nothing for review, they are overruled.

The judgment is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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