Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00200-CR

JOHN F. BOGANY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 763,869

O P I N I O N

Appellant, John F. Bogany, pleaded not guilty to the charge of possession of between one and four grams of cocaine and true to two enhancement paragraphs. A jury found him guilty and sentenced him to thirty years' confinement in the Texas Department of Criminal Justice—Institutional Division. In four points of error, appellant claims the evidence is legally and factually insufficient to support his conviction. We affirm.

BACKGROUND

Houston Police Officers Smith and Rothman were on patrol one evening. As they approached Mr. J's Lounge, they observed several patrons standing in the parking lot drinking alcohol. The officers drove into the parking lot and observed appellant throw down a beer can and start walking away. After observing that appellant's eyes were extremely bloodshot and detecting the odor of alcohol on his breath, Smith arrested appellant for public intoxication. After arresting appellant, Smith patted appellant down, searching for weapons, narcotics, or contraband. Smith found a small piece of paper bag in appellant's front left pants pocket. Inside the bag were six rocks that appeared to be cocaine. By use of a field test, Smith positively identified the rocks as cocaine. Smith then transported the cocaine to the Houston Police Department Narcotics Division.

James Price, a chemist in the Houston Police Department Crime Laboratory, testified that he tested the six rocks and determined that, in the aggregate, they were 92.8 percent cocaine and weighed approximately 1.2 grams.

Andrea Utz, a bookkeeper for Tejas Materials testified that appellant had been employed by the company for approximately two years. Appellant also testified at trial. He testified that when Officer Smith pulled the cocaine out of his pocket he told the officer the cocaine did not belong to him. Appellant testified that he does not use drugs.

LEGAL AND FACTUAL SUFFICIENCY

Standards of Review

In conducting a legal sufficiency review of the evidence, an appellate court must view the evidence in the light most favorable to the verdict and determine if any rational fact finder could have found the crime's essential elements to have been proved beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979). If any evidence establishes guilt beyond a reasonable doubt, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency. *See id.*

In reviewing the factual sufficiency of the evidence, 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 v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). An appellate court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996).

In *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997), the court stressed the importance of the three principles that must guide a court of appeals when conducting a factual sufficiency review. The first principle is deference to the jury. A court of appeals may not reverse a jury's decision simply because it disagrees with the result. Rather the court of appeals must defer to the jury and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *See id.* at 407. The second principle requires the court of appeals to provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the conviction is manifestly unjust, shocks the conscience or clearly demonstrates bias, and the court should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *See id.* at 407. The third principle requires the court of appeals to review all of the evidence. The court must consider the evidence as a whole, not viewing it in the light most favorable to either party. *See id.* at 408.

The jury is the sole judge of the facts, the witnesses' credibility, and the weight to be given the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Banda v. State,* 890 S.W.2d 42, 50 (Tex. Crim. App. 1994). Accordingly, the jury may choose to believe or not believe any portion of the witnesses' testimony. *See Sharp v. State,* 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

Possession

In his first and second points of error, appellant complains that the evidence was legally and factually insufficient to establish that he was aware of the cocaine concealed inside the portion of the small paper bag. He asserts that his close proximity to the cocaine is not, without more, sufficient to establish his knowledge that the small paper bag concealed cocaine. He further argues that he was never seen exercising care, custody, or control over the bag.

The elements of the crime alleged in the indictment are that appellant intentionally and knowingly, possessed cocaine in an amount weighing more than one gram and less than four grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a)(c) (Vernon Supp. 1999). To sustain a conviction, the State needed to prove that appellant exercised care, custody, and control over the cocaine, and that appellant knew that the matter possessed was contraband. *See Harris v. State,* 905 S.W.2d 708, 711 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). "Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control." TEX. PENAL CODE ANN. § 6.01 (Vernon 1994). At trial, Officer Smith testified that he found a small piece of paper bag containing six rocks of crack cocaine in appellant's front left pants pocket. When viewed in the light most favorable to the verdict, the evidence of appellant's exclusive possession of the substance was sufficient to establish beyond a reasonable doubt that appellant exercised care, control and management over the cocaine at the time of its discovery by Officer Smith. *See Moore v. State,* 855 S.W.2d 123, 126 (Tex. App.—Tyler 1993, no pet.) (match box containing cocaine found in defendant's pocket sufficient to show knowing possession). Further, the facts produce more than a reasonable inference that appellant knew that cocaine was an illegal and controlled substance at the time. *See McGoldrick v. State,* 682 S.W.2d 573, 578 (Tex. Crim. App. 1985). Appellant's first point of error is overruled.

We now turn to the factual sufficiency challenge. Officer Smith testified that he discovered the cocaine in appellant's pocket. Appellant testified that he did not know how the cocaine came to be in his pocket. Appellant further testified that he had been employed for the past two years and that he did not use drugs. Appellant called Andrea Utz to substantiate his employment. The test for factual sufficiency is

whether the jury finding of guilt was "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at 129. Under this standard, we cannot conclude that in light of the foregoing record evidence, the finding of guilt was clearly wrong or unjust. Consequently, we hold the evidence is factually sufficient to support the jury's verdict. Appellant's second point of error is overruled.

Weight of Cocaine

In his third and fourth points of error, appellant claims the evidence was legally and factually insufficient to establish that the amount of cocaine possessed weighed more than one gram as alleged. Appellant complains that James Price, the crime lab chemist who analyzed the cocaine rocks, did not give an exact measure when he testified to the weight of the cocaine.

Price testified that he weighed the six rocks on an analytical balance and that they weighed approximately 1.2 grams. Price further testified that the term "approximate" meant that a very small amount of error was involved. Appellant contends the margin of error could be as high as two-tenths of a gram, which would mean that the cocaine could weigh less than one gram. Price testified, however, that the margin of error could not be as high as two-tenths of a gram, which would be 200 milligrams. When asked whether it was possible the cocaine weighed less than one gram, Price stated, "No sir, it's not." Appellant offered no evidence to refute Price's testimony.

Based on Price's uncontroverted testimony, a rational trier of fact could have found beyond a reasonable doubt that the six rocks of cocaine weighed more than one gram and less than four grams as alleged in the indictment. Further, applying the standard announced in *Clewis*, we cannot conclude the jury's verdict is contrary to the overwhelming weight of the evidence. *See Clewis,* 922 S.W.2d at 129. Appellant's third and fourth points of error are overruled.

The trial court's judgment is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Yates, Fowler, and Frost.

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