Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00622-CR
NO. 14-99-00623-CR

SAMMY RAY MOY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause Nos. 712,380 and 732,916

O P I N I O N

Appellant, Sammy Ray Moy, files this consolidated appeal to challenge his convictions for possession of a controlled substance with intent to deliver and aggravated assault of a peace officer. The offenses were tried together in the same proceeding, and the jury convicted appellant of both crimes, sentencing appellant to 35 years for the possession and life imprisonment for the aggravated assault. Appellant raises three points of error, but finding no merit in his claims, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

The consolidated charges brought against appellant stem from an attempt by Houston Police Department officers to execute a warrant at a motel room occupied by appellant and his girlfriend. The officers obtained the warrant after a confidential informant bought drugs from appellant at the hotel room. The officers went to the motel to execute the warrant around 10:30 PM.

Dressed in raid gear that clearly identified them as police officers, the five HPD officers went to the door of appellant's motel room, taking positions around the door. When everyone was ready, Officer Burdick, the officer designated to be the first to enter the room, shouted "Police! Search Warrant!" During Officer Burdick's warning, Officer McNaul used a battering ram to break down the door, likewise announcing the fact that they were police officers. Because the door was hollow, however, the battering ram went through the door without opening it. As Officer McNaul was pulling the ram back through the door to strike it again, a shot was fired from inside the room. The bullet exited the window near the door and struck Officer Kwiatkowski between the eyes. Officer Kwiatkowski fell to the ground and, once the door was opened, he and officer McNaul began firing into the room. They saw appellant, armed with a handgun, running for the bathroom.

As the officers attempted to persuade appellant to come out, a female exited the bathroom. Eventually, appellant exited as well with blood flowing from a gunshot wound to his hand. After appellant and his female companion were placed in handcuffs, the officers searched the room. Their search yielded a baggie of crack cocaine in the toilet, two other baggies of crack cocaine sequestered in various areas around the room, and a .25 caliber handgun. The officers also found small, empty plastic baggies which they testified were usually used to package the cocaine for sale.

Officer Kwiatkowski was taken to the hospital where the bullet was removed for ballistics testing.[1] The tests revealed that the bullet had been fired from the .25 caliber handgun appellant was carrying when the officers opened the door.

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[1] The bullet did not strike Officer Kwiatkowski with enough force to penetrate his skull.

APPELLANT'S LEGAL SUFFICIENCY CHALLENGE TO HIS POSSESSION CONVICTION

In his first point of error, appellant challenges the legal sufficiency of the evidence supporting his possession conviction. In reviewing such a challenge, we must consider all of the evidence in the light most favorable to the verdict. *See Geesa v. State*, 820 S.W.2d 154, 160 n. 8 (Tex. Crim. App.1991), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319 n. 12, 99 S.Ct. at 2789 n. 12. To convict a defendant of possession with intent to deliver the State must prove he intentionally or knowingly possess a controlled substance with intent to deliver. *See Moss v. State*, 850 S.W.2d 788, 796 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

Appellant claims that the State did not establish sufficient evidence to show that he intentionally or knowingly possessed all of the contraband recovered from the room, although he admits to possessing the crack cocaine found in the toilet. Appellant bases his argument on *Bryant v. State*, in which the Court of Criminal Appeals stated that a possession conviction based on circumstantial evidence cannot be sustained unless the State excludes every other reasonable hypothesis except the defendant's guilt. *See* 574 S.W.2d 109, 111 (Tex. Crim. App. 1978). Appellant argues that since the evidence presented by the State created only a strong suspicion that his possession was knowing or intentional, the evidence was insufficient under *Bryant* to support his conviction.

Appellant's argument, however, ignores *Geesa v. State* in which the Court of Criminal Appeals overruled the rule elucidated in *Bryant*. *See* 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991). Rather, the appropriate analytical focal point is whether or not the State established sufficient affirmative links between appellant and the contraband to show that he was conscious of his connection with the contraband and knew what it was. *See Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1996). Though mere presence at the scene is not enough to prove conscious possession of the controlled substance, any evidence that affirmatively links the appellant to the contraband suffices as proof that he possessed it knowingly. *See Harris v. State*, 994 S.W.2d 927, 933 (Tex. App.—Waco 1999, no pet.). The logical

force of the links is more important than the number of links that are present. *See id*.

Some of the affirmative links to consider in possession cases are: (1) the defendant's presence when the search warrant was executed; (2) the defendant being under the influence of narcotics when arrested; (3) the defendant's possession of other contraband when arrested; (4) the defendant's incriminating statements when arrested; (5) the defendant's proximity and accessibility to the narcotic; (6) the defendant's attempted flight; (7) the defendant's furtive gestures; (8) the defendant's ownership or right to possession of the place where the controlled substance was found; (9) the presence of odor of the contraband; (10) the presence of other contraband or drug paraphernalia not included in the charge; (11) the presence of contraband in plain view; and (12) the presence of the contraband in an enclosed place. *See Williams v. State*, 859 S.W.2d 99, 101 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

Here, appellant was present when the search warrant was executed. He admitted that he had purchased and been using drugs immediately prior to arrest. Appellant also admitted ownership of the crack cocaine found in the toilet. Defendant also stated after his arrest that his female companion had nothing to do with the drugs found in the motel room, a statement which undermines his argument that the drugs may have belonged to her. The motel room where the narcotics were found was rented to appellant. Further, the defendant used force to fight off the police officers as they tried to enter his motel room. Appellant admitted owning the crack pipe found in plain view at the scene. Finally, some of the contraband was found in plain view. Based on the strengths of these links between appellant and the contraband, we find this evidence legally sufficient to support appellant's possession conviction and overrule his first point of error.

APPELLANT'S LEGAL SUFFICIENCY CHALLENGE TO THE AGGRAVATED ASSAULT CONVICTION

Appellant argues in his second point of error that the evidence supporting his conviction of aggravated assault of a peace officer is likewise legally insufficient. He complains that the State failed to prove at least one of the elements of the offense beyond a reasonable doubt, making it error to convict him of that offense. We apply a *Jackson* standard of review to this point as well. *See Jackson*, 443 U.S.

307, 99 S.Ct. 2781, 61 L.Ed.2d 560. The elements of the offense of aggravated assault of a peace officer are: (1) the defendant intentionally, knowingly, or recklessly caused bodily injury; (2) to a person whom he knew was a peace officer; (3) while the peace officer was lawfully discharging an official duty. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994); *Lacy v. State*, 899 S.W.2d 284, 285-86 (Tex. App.—Tyler 1995, no pet.).

Here, the only element at issue is whether the State proved that appellant knew he was firing his gun at a police officer. Appellant claimed that the officers did not announce they were police officers until after they had broken the door and appellant had fired his gun in their direction. Appellant presented one other witness who verified this version of what occurred. All of the police officers who testified, however, claimed that they announced that they were police officers prior to the use of the battering ram on the door and prior to the time appellant shot at them. Appellant also claims that there was no evidence he heard the warnings until after he fired his gun, even though the officers testified that the warnings were shouted.

In reviewing legal sufficiency of the evidence, we must show deference to the jury since they are the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given to any testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury is entitled to reject one version of the facts and accept another. *See Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1994); *Alvarado v. State*, 822 S.W.2d 236 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). The jury is also entitled make reasonable inferences from the evidence before it. *See Bruno v. State*, 922 S.W.2d 292, 293 (Tex. App.—Amarillo 1996, no pet.). Based on this standard of review, we find legally sufficient evidence for the jury to find that appellant knew he was firing his gun at a police officer. Appellant's second point of error is overruled.

APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Appellant's final argument on appeal is that he was deprived of effective assistance of counsel. In support of this contention appellant points out that his trial counsel failed to object to misstatements of facts in the prosecutor's opening argument, failed to argue these misstatements, failed to argue conflicts in the evidence and failed to make an opening statement. Appellant, however, failed to file a motion for new trial

raising these issues.

The standard of review for ineffective assistance of counsel during the guilt-innocence phase is the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). First, the appellant must demonstrate counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *McFarland*, 928 S.W.2d at 500. Under this analysis, there exists a strong presumption of trial counsel's effectiveness. *See id*. Appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged to be ineffective and affirmatively prove that these acts fell below the norm of professional reasonableness. *See id*. An ineffectiveness claim cannot be demonstrated by isolating any portion of counsel's representation, but must rather be judged on the totality of the representation. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

Since we do not have a motion for new trial or any other method of determining the defense counsel's trial strategy, we find appellant has not shown that his trial counsel was ineffective. Under the Texas Court of Criminal Appeals' recent decision in *Thompson v. State*, unless an appellant provides a record explaining his counsel's actions at trial, presumably through a motion for new trial, he cannot prevail on her claim of ineffective assistance. *See Thompson v. State*, No. 1532-98, slip op. at 13, 1999 WL 812394 at *5 (Tex. Crim. App. October 13, 1999). Appellant has provided no evidence to overcome the first prong of the *Strickland* analysis. Because we must presume appellant's trial counsel to be effective until this presumption is rebutted, we find that appellant's failure to provide evidence regarding how these errors were professionally unreasonable falls far below what is necessary to overcome the *Strickland* presumption.

Accordingly, we overrule appellant's third point of error and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed March 30, 2000.

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

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