Affirmed and Opinion filed April 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00150-CR

FREDDY AGUAYO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 770,557

O P I N I O N

A jury convicted the appellant, Freddy Aguayo, for possession of cocaine weighing at least 400 grams with intent to deliver. The trial court assessed punishment at twenty-eight years' confinement and a $1000 fine. Appealing on one point of error, the appellant asserts the evidence is legally insufficient to support the jury's verdict because there are insufficient factors to affirmatively link him to the contraband. We affirm.

FACTUAL BACKGROUND

Officer Darren Bush of the Houston Police Department narcotics squad was working an undercover operation, acting as a buyer in a drug sale. While undercover, Officer Bush met with two men in a parking lot on Richmond Avenue. The men identified themselves as "Prince" and "Thomas." When Officer Bush indicated his interest in buying three kilos of cocaine, they told him they would check with their supplier. A few hours later, the three met again. Prince directed Officer Bush to a gas station on the Gulf Freeway. When Officer Bush arrived, he saw Thomas and Prince with a man later identified as "Gutierrez." After some discussion, he followed Gutierrez to a residence at 7542 Thurow. Gutierrez went up to the house while he waited by the car. On the front porch, Gutierrez met with two other men, the appellant and a man named either "Flores" or "Rodriguez."[1] After a brief conversation, Gutierrez went back out to the curb to talk to Officer Bush, and the appellant and Flores went into the house. Moments later, Flores came out of the house carrying a shoe box containing one kilo of cocaine; the appellant was right behind him. Flores went to Officer Bush's car while the appellant remained in the yard. While Officer Bush was inspecting the cocaine near his car, parked in front of the driveway of the house, the appellant was in the front yard acting as a lookout. According to Officer Bush, the appellant was looking up and down the street in the posture of a military guard. The appellant acted as if he had a pistol in his pants.

After inspecting the cocaine, Officer Bush signaled his fellow officers. When the uniformed officers arrived on the scene, Gutierrez, Flores, and the appellant fled. In racing from the scene, the appellant jumped a fence, falling on the other side. The police later recovered a .9 millimeter Baretta pistol from the exact spot where the appellant fell.

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[1] For the remainder of this opinion, we will refer to him as "Flores."

LEGAL SUFFICIENCY

In the appellant's sole point of error, he alleges the evidence is legally insufficient to support the jury's verdict because there are insufficient factors affirmatively linking him to the cocaine he was convicted of possessing. Because the trial court authorized the jury to convict the appellant under the law of parties, the evidence need only be legally sufficient to show the appellant was a party.

In determining if the evidence is legally sufficient, we must decide "whether, after viewing 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." *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review applies to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 156-61 (Tex. Crim. App. 1991). In our review, we do not re-evaluate the weight and credibility of the evidence but assess only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

The law of parties provides:

> (A) A person is criminally responsible for an offense committed by the conduct of another if: . . .
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> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

TEX. PEN. CODE ANN. § 7.02 (Vernon 1974). Under the law of parties, the evidence supports a conviction when the actor (1) was physically present at the commission of the offense and (2) encouraged the commission of the offense either by words or other agreement. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). "'[T]he evidence must show that at the time of the offense, the parties were acting together, each

contributing some part towards the execution of their common purpose.'" *Marvis v. State*, 3 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 1999, pet. granted) (quoting *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986) (en banc)). To determine whether the defendant was a party, we may examine the events occurring before, during, and after the commission of the offense and rely on the actions of the defendant which show an understanding of a common design to commit the offense. *See Ransom*, 920 S.W.2d at 302. The State can present circumstantial evidence to show that the defendant is a party to an offense. *See Wilkerson v. State*, 874 S.W.2d 127, 130 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (citing *Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987)). "Although mere presence at the scene of an offense alone is not sufficient to support a conviction, it is a circumstance tending to prove guilt which may be combined with other facts to show that appellant was a participant." *Id*. Additionally, if the appellant flees the scene, a jury can infer guilt. *See Burks v. State*, 876 S.W.2d 877, 903 (Tex. Crim. App. 1994) (citing *Foster v. State*, 779 S.W.2d 845 (Tex. Crim. App. 1989); *Rumbaugh v. State*, 629 S.W.2d 747 (Tex. Crim. App. 1982); *Valdez v. State*, 623 S.W.2d 317 (Tex. Crim. App. 1981)).

In proving possession of cocaine with intent to deliver, the State must prove beyond a reasonable doubt that the accused (1) exercised care, control, or custody over the contraband, (2) knew the matter was contraband, and (3) intended to deliver the contraband. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (f) (Vernon Supp. 2000); *Ortiz v. State*, 999 S.W.2d 600, 603 (Tex. App.—Houston [14th Dist.] 1999, no pet.). To show the second element (the accused knew what the substance was), the State can present evidence which affirmatively links him to it. *See Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). The links "must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous." *Id*. To show the third element (intent to deliver), the State may produce circumstantial evidence, such as: (a) the

nature of the place where the defendant was arrested; (b) the quantity of controlled substance possessed by the defendant; (c) the manner of packaging; (d) the presence of drug paraphernalia; (e) the defendant's possession of a large amount of cash; and (f) the defendant's status as a drug user. *See Bryant v. State*, 997 S.W.2d 673, 675 (Tex. App.—Texarkana 1999, no pet.) (citing *Williams v. State*, 902 S.W.2d 505, 506 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)).

Before determining whether the evidence was legally sufficient to find the appellant was a party to the offense of possession, the evidence must show another person possessed the controlled substance either exclusively or jointly. *See Howell v. State*, 906 S.W.2d 248, 253 (Tex. App.—Fort Worth 1995, pet. ref'd) (citing *Segura v. State*, 850 S.W.2d 681, 685 (Tex. App.—Corpus Christi 1993, no pet.)). Similarly, before determining whether the evidence was legally sufficient to find the appellant was a party to the offense of possession of a controlled substance *with intent to deliver*, the evidence must show another person possessed the controlled substance with intent to deliver. Here, Officer Bush made a deal with Gutierrez to buy three kilos of cocaine. Gutierrez led him to a house at 7542 Thurow Street to get the cocaine. As Gutierrez approached the house, the appellant and Flores[2] came out of the house. After a brief conversation, Gutierrez came back to the car and told Officer Bush that he would be allowed to see the cocaine before making the purchase. The appellant and Flores went into the house, and shortly thereafter, Flores came out with a shoe box containing one kilo of cocaine. Flores brought the box to Officer Bush, who then inspected the cocaine. The evidence is sufficient to show Flores (1) exercised care, control, and custody over the cocaine, (2) knew the substance was cocaine, and (3) intended to deliver the cocaine.

Having found that Flores possessed the cocaine with intent to deliver, we now

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[2] The record is unclear as to what this man's name is Flores or Rodriguez. For the remainder of this opinion, we will refer to him as "Flores."

address whether the appellant was a party to the offense, i.e., whether the appellant was acting with the intent to promote or assist in the offense of possession of cocaine with intent to deliver, when the appellant solicited, encouraged, directed, aided, or attempted to aid Flores in committing the offense. Even though a defendant may not be in possession of the contraband, a rational jury can find beyond a reasonable doubt that he was guilty as a party to the offense because of his constant presence and closeness throughout nearly the entire drug sale. *See Estrada v. State*, 824 S.W.2d 770, 774 (Tex. App.–Houston [14th Dist.] 1992), *pet. improvidently granted*, 846 S.W.2d 332 (Tex. Crim. App. 1993). While Officer Bush waited by his car on Thurow Street, Gutierrez met the appellant and Flores on the front porch of the house. Gutierrez talked briefly to them. The appellant and Flores went back inside the house, and when they came out again, Flores was carrying a shoe box containing one kilo of cocaine. While Flores took the shoe box to Officer Bush, the appellant diligently surveyed the street and the yard, keeping an intense watch. The appellant had an aggressive stance and appeared to be acting as a look-out. The appellant had his shirt pulled over his pants and acted as if he had a pistol in the front of his pants. When the arrest team arrived, the appellant and his companions fled the scene. The police found a .9 millimeter Baretta pistol, containing live ammunition, in the exact spot where the appellant had jumped over a fence and fallen to the ground in his flight from the scene.

The evidence presented at trial clearly shows the appellant was present at the scene and encouraged, aided and assisted in the commission of the offense by keeping a look-out during the intended delivery of cocaine. After viewing these facts in the light most favorable to the prosecution, we find that a rational jury could have believed beyond a reasonable doubt that the appellant was a party to the offense of possession of a controlled substance with intent to deliver. Therefore, the evidence is sufficient to support the appellant's conviction. Accordingly, we overrule the appellant’s sole point of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed April 13, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[3]

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

[3] Senior Justice Norman R. Lee sitting by assignment.