Affirmed and Opinion filed September 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00099-CR

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HORACE EDWARD CROOKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 743,231

O P I N I O N

Appellant was charged by indictment for the offense of possession with intent to deliver a controlled substance, namely cocaine, in an amount between four and two hundred grams. The indictment also contained two enhancement paragraphs. The appellant waived jury trial, and was subsequently found guilty of the offense by the trial court. Appellant pleaded true to the second enhancement paragraph, and the State abandoned the first enhancement paragraph. The trial court assessed punishment at twenty-five years confinement in the Texas Department of Criminal Justice- Institutional Division. Appellant challenges his conviction on both legal and factual sufficiency grounds. We affirm.

I. BACKGROUND

On January 23, 1997, at approximately 4:00 p.m., Houston Police Narcotics Officer Douglas Hrncir, along with six other officers, executed a search warrant at 8421 Safeguard, a known crack house. As the narcotics raid team pulled up to the residence, individuals in front of the house informed those inside the house that the police had arrived. Appellant and a black female suspect fled from the back of the house, and attempted to cross a four-foot chain link fence surrounding the back of the property. Appellant had difficulty climbing over the fence because the area was muddy and wet. The female suspect quickly crossed the fence five to eight feet to the right of him. Officer Hrncir observed appellant trying to climb over the fence, and noticed something white in appellant's right hand. After at least three tries, appellant released the substance clutched in his right hand in order to grasp the fence, and finally climbed over.

Officer Hrncir scaled the fence behind appellant, and caught up to him when appellant slipped and fell onto the ground. After handcuffing appellant, Officer Hrncir rolled him over and discovered a white rock substance underneath him. After searching for and locating the female suspect, Officer Hrncir returned to search along the fence where appellant crossed and found more chunks and crumbs of the white rock substance. Both collections of this substance were later analyzed and found to be cocaine. The two samples, combined, weighed just over sixteen grams.[1] Appellant was indicted for the offense of possession with intent to deliver a controlled substance. *See* TEX. HEALTH AND SAFETY CODE ANN. §481.112(d) (Vernon Supp. 1999).

II. STANDARD OF REVIEW

[1] Officer Dennis Green testified that the first sample, found under appellant when he was arrested, weighed 583.9 milligrams. The second sample of cocaine, found along the fence where the appellant crossed, weighed 15.5 grams.

A. Legal Sufficiency

A reviewing court, when examining a conviction for legal sufficiency, will look at all the evidence in the light most favorable to the prosecution. The court will then determine whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). The reviewing court may not sit as a thirteenth juror and disregard or reweigh the evidence, replacing the jury's findings with their own. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

B. Factual Sufficiency

When a reviewing court is presented with a question of factual sufficiency, the evidence is reviewed without the prism of "in the light most favorable to the prosecution," which is used in claims of legal sufficiency. Instead, the court will set aside the trial court verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court's review must be appropriately deferential, to avoid substituting its judgment for that of the jury. *See Clewis*, 922 S.W.2d at 133. The State is not required to disprove any alternative hypotheses in order to sustain a conviction on factual sufficiency grounds. *See Geesa v. State*, 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991).

III. ANALYSIS

Appellant contends the evidence is insufficient to support a conviction for possession with intent to deliver. Appellant argues that although the evidence may be sufficient to support a conviction for simple possession, it is inadequate to support the allegation that he had the intent to sell or deliver the cocaine found in his possession. Specifically, appellant points to the fact that the cocaine was not packaged for sale, that there was no evidence he possessed any cash at the time of the arrest, and that there was no testimony at trial regarding the amount of cocaine that a normal user would consume.

A defendant's requisite intent to deliver under section 481.112(d) may be established by circumstantial evidence, including the evidence surrounding its possession. *See Reece v.*

State, 878 S.W.2d 320, 325 (Tex. App--Houston [1st Dist.] 1994, no pet.); *Smith v. State*, 737 S.W.2d 933, 941 (Tex. App.--Dallas 1987, pet. ref'd). Courts have considered several factors in determining whether or not a defendant had the requisite intent, including: (1) the nature of the location where the defendant was arrested, (2) the quantity of the substance in the defendant's possession, (3) the manner of packaging, (4) the presence of drug paraphernalia for either drug use or sale, (5) the defendant's possession of large amounts of cash, and (6) the defendant's status as a drug user. *See Williams v. State*, 902 S.W.2d 505, 507 (Tex. App--Houston [1st Dist.] 1994, pet. ref'd); *Mack v. State*, 859 S.W.2d 526, 529 (Tex. App.--Houston [1st Dist.] 1993, no pet.); *Gabriel v. State*, 842 S.W.2d 328, 331 (Tex. App--Dallas 1992, no pet.). These factors are not required elements of which all must be present before a conviction can result.[2] They are evaluative factors for the court to take into consideration when reviewing the sufficiency of evidence for a conviction of possession with intent to deliver.

In the instant case, several of the evaluative factors are present which support appellant's intent to deliver. Appellant was arrested with more than sixteen grams of cocaine in his possession, outside what he admitted was a known crack house. The female suspect who fled the house with him, whom appellant admits he went to the house to see, was arrested with a crack pipe in her possession. The officers made six to eight drug-related arrests at the house the same day as appellant's arrest. Appellant had previously been convicted on three occasions for possession and delivery offenses.

In addition to the physical evidence, Officer Hrncir testified that in his opinion, based on his seven years experience, three of which were as a narcotics officer, the combined amount of cocaine discovered in appellant's possession was not solely for personal use. Police

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[2] The intent to deliver has been found where one or more of the evaluative factors are missing. *See Reece*, 878 S.W.2d at 325-26 (defendant not arrested in known drug area; no money or drug paraphernalia found on the defendant); *Branch v. State*, 599 S.W.2d 324, 324-25 (Tex. Crim. App. 1979) (no paraphernalia found on the defendant, and no apparent testimony as to the street value of the substance confiscated); *Mack v. State*, 859 S.W.2d at 528-29 (substance found on defendant was not packaged for sale; no money or paraphernalia located); *Castillo v. State*, 867 S.W.2d 817, 821 (Tex. App--Dallas 1993) (no money or drug paraphernalia found on defendant), *rev'd on other grounds*, 913 S.W.2d 529 (Tex. Crim. App. 1995).

officers may testify, based on their training and experience, that a defendant's actions are consistent with someone selling cocaine. *See Reece*, 878 S.W.2d at 325. Evidence of a large quantity of a controlled substance, combined with a police officer's expert testimony establishing whether that amount would be more than for personal use, is sufficient to show possession with intent to deliver. *See Pitts v. State*, 731 S.W.2d 687, 692 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd).

Further, no drug paraphernalia of any kind was found in appellant's possession upon his arrest. The absence of "drug use" paraphernalia, coupled with the possession of a large amount of a controlled substance, has been found to indicate an intent to sell-- even without the presence of "dealing paraphernalia." *See Reece*, 878 S.W.2d at 325; *Castillo*, 867 S.W.2d at 821.

A. Conclusion- Legal Sufficiency

Looking at the combined evidence surrounding appellant's arrest, and viewing this evidence in the light most favorable to the prosecution, appellant's conviction for possession with intent to deliver is clearly supported by legally sufficient evidence.[3] A rational trier of fact could have examined the physical and testimonial evidence and found appellant guilty beyond a reasonable doubt. A reasonable person could have found that a defendant with several drug convictions, who was found in possession of more than sixteen grams of cocaine in a known crack house, without any drug use paraphernalia, was in possession of the cocaine with the intent to sell it.

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[3] Appellant cites two cases to support his argument that the evidence in his case indicates the drugs in his possession were for his own personal use. In *Turner v. State*, 681 S.W.2d 849 (Tex. App.--Dallas 1984, pet. ref'd), the Court of Appeals held that the evidence was factually insufficient to support a conviction where, "the facts are as consistent with the inference that the appellant had just purchased drugs for personal use, as they are with the inference that he possessed the drugs with the intent to deliver." A similar holding was handed down in *Greer v. State*, 783 S.W.2d 222 (Tex. App.--Dallas 1989, no pet.). However, these cases are easily distinguished from the instant case in that, unlike *Turner* and *Greer*, testimonial evidence was offered by an expert police officer that the amount of drugs confiscated from appellant constituted more than an amount for personal consumption. *See Mack v. State*, 859 S.W.2d 526, 529 (Tex. App.--Houston [1st Dist.] 1993, no pet.).

Accordingly, appellant's first point of error, challenging the legal sufficiency of the evidence to support his conviction, is overruled.

B. Conclusion- Factual Sufficiency

The existence of alternative hypotheses do not have to be disproved by the State when reviewing appellant's conviction on factual sufficiency grounds. In this case, appellant argues the evidence indicates he was in possession of the cocaine for his personal use, and the contention that he intended to sell or deliver the cocaine is unsupported. Our examination of appellant's theory must be appropriately deferential, and we must avoid substituting our judgment, in hindsight, for that of the trier of fact, who heard all the evidence firsthand. This court can set aside the trial verdict below only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

As noted above, a reasonable person could have found beyond a reasonable doubt that the evidence in appellant's case supported a conviction for possession with intent to deliver. Appellant points out deficiencies in the evidence, which he argues support a conviction for possession, and not for possession with intent to deliver. Appellant argues there was no large amount of cash found on him, the drugs were not packaged for resale, and there was no testimony establishing how much cocaine a typical user would consume for his own personal use. These potential deficiencies, however, do not overcome the overwhelming weight of the evidence which supports appellant's conviction.[4] As previously noted, convictions have been upheld with each of these elements missing from the six evaluative factors.

Accordingly, appellant's second point of error, challenging the factual sufficiency of the evidence to support his conviction, is also overruled.

Having overruled both of the appellant's points of error, we affirm the judgment of the trial court below.

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[4] This court acknowledges that the evidence would have been even more compelling if Officer Hrncir, or another expert witness, was questioned to establish the street value of the cocaine seized, the amount a typical user consumes, and exactly what amount of cocaine would be considered to be above the amount intended only for personal use.

PER CURIAM

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Justices Yates, Fowler, and Frost.

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