Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00524-CR

GREGORY EARL FULLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 817,254

O P I N I O N

Appellant, Gregory Earl Fuller, appeals from his conviction for the possession of 4 to 200 grams of cocaine with intent to deliver. He pled not guilty to the charge and not true to the enhancement paragraph contained in the indictment. A jury found him guilty, found the enhancement allegation to be true, and assessed punishment at seventy-five years' imprisonment and a $10,000 fine. On appeal, appellant contends the evidence is legally and factually insufficient to sustain the conviction. We affirm.

The Evidence

The State presented the testimony of two Houston police officers and a chemist from the Harris County Medical Examiner's Office. Officer M.R. Burdick testified that he led a raid on a Houston convenience store after observation of the store revealed what he believed to be "narcotics activity." Burdick said that he entered the store first and saw six to eight people standing in the pool table area and several others in other parts of the store. He observed appellant moving nervously back and forth in an aisle to the far right. He could only see the appellant's head and shoulders at first, and he became suspicious appellant might have a weapon. Burdick ordered appellant to stay where he was and to put his hands up. When appellant disregarded the instructions, Burdick went to the corner of the store, from where he had a clear and unobstructed view of the appellant. He then saw the appellant discard a bag to the bottom shelf. Burdick said he was standing approximately ten feet away from appellant when he saw him discard the bag. Burdick further said he immediately handcuffed appellant, patted him down for weapons, and then retrieved the discarded bag. Burdick field tested the substance in the bag, and it tested positive for cocaine. The State's chemist testified that the substance tested positive for cocaine in the laboratory.

Officer E.L. Newman testified that he participated in the raid and that he, too, saw appellant moving in a hurried, nervous manner along the aisle. He further observed Officer Burdick standing at the beginning of the aisle and directing appellant to stop. At that time, Officer Burdick was ten to fifteen feet from the appellant, and he had a clear, unobstructed view of the appellant.

The defense called two witnesses. Marvin Johnson testified that he was in the convenience store at the time of the raid. According to Johnson, it was a female officer who arrested appellant, and Burdick never went near appellant. Johnson admitted, however, that he could not see appellant's hands from his vantage point and that he would not have been able to see if appellant had discarded a bag of cocaine.

The defense also called Officer Belinda Null. She testified that she was involved in the convenience store raid but that it was Burdick who approached and arrested appellant. Null further stated, however, that she thought it was she who handcuffed appellant and not Burdick. She said that she was not absolutely sure about this because of the number of people arrested that night. Null also testified that it appeared to her that Burdick had a clear and unobstructed view of appellant when he dropped the bag.

Standards of Review

In reviewing legal sufficiency, we examine the evidence in the light most favorable to the verdict and ask whether any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997). We accord great deference to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences therefrom. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We further presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we must defer to that resolution. *See id.* at 133 n.13. In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but must act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

In reviewing the factual sufficiency of the evidence, we examine all of 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. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). We consider all of the evidence in the record and not just the evidence which supports the verdict. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *Clewis*, 922 S.W.2d at 133. However, a factual sufficiency review must be appropriately

deferential to avoid substituting the appellate court's judgment for that of the fact finder or intruding upon the jury's role as the sole judge of the weight and credibility of testimony. *Johnson*, 23 S.W.3d at 7. Unless the record clearly reveals that a different result is appropriate, we must defer to the jury's determination concerning the weight given to contradictory testimony. *Id.* at 8.

Analysis

In order to prove unlawful possession of a controlled substance, the State must show (1) that the defendant exercised actual care, custody, control, or management over the contraband, and (2) that he or she knew the matter possessed was contraband. *Linton v. State*, 15 S.W.3d 615, 618 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Because the knowledge element is subjective in nature, it must always to some extent be proven by inference. *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Therefore, to prove knowing possession, the State must present evidence that affirmatively links the defendant to the controlled substance. *Id*. This evidence may be direct or circumstantial. *See Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). The link between the defendant and the drugs need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *Id*. at 748.

In the present case, the testimony of Officer Burdick that he observed appellant discard a bag that the officer shortly thereafter retrieved and field-tested for cocaine is direct evidence establishing an affirmative link between appellant and the contraband. Such testimony is far from a novelty in drug cases. In fact, a number of cases in Texas have upheld the sufficiency of the evidence when an officer testified that he saw the defendant drop or throw an object in an area from which cocaine was then retrieved. *See, e.g.*, *Ortega v. State*, 861 S.W.2d 91, 95 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd); *Blackmon v. State*, 830 S.W.2d 711, 714 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd); *Edwards v. State*, 807 S.W.2d 338, 339 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). Burdick's testimony is a direct eyewitness account of the appellant's link to the contraband, and it was

well within the discretion of the fact finder to believe the testimony. *See Johnson*, 23 S.W.3d at 7 (jury is sole judge of the weight and credibility of testimony).

Furthermore, in this case, Burdick's testimony is directly supported in several aspects by the testimony of officers Newman and Null. Appellant contends, however, that the inconsistency between Burdick's testimony and the testimony of Officer Null, wherein she stated she believed she handcuffed appellant, and bystander Johnson reduces the quality of the evidence below the level of legal or factual sufficiency. Inconsistencies in testimony are generally a matter for the jury to evaluate. *Johnson*, 23 S.W.3d at 8 (unless the record clearly dictates a different result, reviewing court must defer to the jury on contradictory testimony). Here, Null merely testified that she thought she had handcuffed appellant, and she admitted she was not sure about it. All three officers who testified agreed that Burdick was the one who initially confronted and arrested appellant. The jury was free to believe the officers' testimony over that of bystander Johnson, who was an acknowledged acquaintance of appellant.

Appellant additionally argues that it was simply not credible for the jury to conclude that he held onto the contraband from the time it took Officer Burdick to enter the premises, order everyone to freeze, and then "run over to a distant part of the establishment." This argument ignores the testimony suggesting that the convenience store was not very big—it had only four aisles, each about twenty feet long. It also ignores the testimony suggesting that the raid occurred rather quickly, with Burdick entering first, pausing only briefly, bypassing people at the pool tables, and heading toward appellant. Furthermore, the officers each testified that appellant acted nervously and moved back and forth along the aisle before Burdick went to the aisle and visually observed him. The jury may have reasonably concluded that appellant was attempting to find a hiding place for the contraband, but failed to do so before Burdick was in a position to see him do it. Appellant's arguments are without merit. The evidence is legally and factually sufficient to demonstrate knowing possession of a controlled substance. Accordingly, we overrule appellant's issues.

The judgment of the trial court is affirmed.

/s/ Eva M. Guzman
Justice

Judgment rendered and Opinion filed February 14, 2002.

Panel consists of Justices Yates, Seymore and Guzman.

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