Opinion issued June 18, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00211-CR

KEITH A. ROBINSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1579720

MEMORANDUM OPINION

A jury found Keith A. Robinson guilty of the offense of possession of a controlled substance, namely methamphetamine, weighing more than 4 grams and

less than 200 grams.[1] Robinson pleaded true to an enhancement allegation, and the jury assessed Robinson's sentence as seven years in prison. In two issues, (1) Robinson asserts that the evidence was insufficient to support the judgment of conviction, and (2) he contends that the State's closing argument contained a misstatement of the law.

We affirm.

Background

Sergeant K. Jensen and Officer M. Skillern of the Houston Police Department initiated a traffic stop of Robinson's car for expired registration. Robinson was driving the car and was its only occupant.

Robinson verbally consented to allow the officers to search the vehicle. During the search, Sergeant Jensen found a sunglasses case on the floorboard behind the driver's seat. The sunglasses case contained two glass pipes, a straw, 20 plastic baggies, and a crystalline-like substance that Sergeant Jensen recognized as crystal meth, a form of methamphetamine. Robinson told the officers that he had purchased the car three weeks earlier and claimed that the narcotics were not his.

The officers arrested Robinson and seized the items in the sunglasses case. Laboratory testing confirmed that the crystalline-like substance found in the sunglasses case was methamphetamine, weighing a little over six grams.

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[1] *See* TEX. HEALTH & SAFETY CODE §§ 481.115(a), (d); *see also id.* § 481.002(5), § 481.102(6).

Robinson was indicted for the offense of possession of a controlled substance, namely methamphetamine, weighing more than 4 grams and less than 200 grams. The indictment also contained an enhancement paragraph, alleging that, before the commission of the instant offense, Robinson had been convicted of the offense of burglary of a habitation.

At trial, the State called Sergeant Jensen and Officer Skillern to testify. They described the stop and consensual search of Robinson's car. The officers stated that Robinson was the driver and only occupant of the vehicle. Officer Skillern said that there was trash in the back of the car, but Sergeant Jensen confirmed that the sunglasses case was in plain view on the floorboard behind the driver's seat. Sergeant Jensen testified that the sunglasses case was within arm's reach of the driver's seat.

The officers also testified that, based on their training and experience, they recognized the substance in the sunglasses case as methamphetamine. The officers also testified that the other items found with the methamphetamine, specifically the glass pipes and the straw, are items indicative of narcotics use, and the plastic baggies are indicative of narcotics sale. The officers recalled that Robinson told them that he had purchased the car three weeks earlier but denied knowing the methamphetamine was in the car, saying that the drugs were not his.

The State also presented the testimony of forensic analyst, M. Kane, who had tested the crystalline substance found in the sunglasses case. Kane testified that her analysis of the substance determined that it contained methamphetamine and that it weighed 6.23 grams.

The defense called Robinson's wife, Maria, to testify. Maria testified that Robinson did not use methamphetamine. She also testified that one of Robinson's hobbies was to buy cars that did not work and fix them. Maria confirmed that the car in which the methamphetamine was found was a car that Robinson had purchased three weeks earlier to fix.

Maria testified that the car, an Integra, did not run when Robinson purchased it, but he had fixed the motor and had gotten it working. She said that the Integra was not the car that Robinson drove on a daily basis.

Maria testified that the cars Robinson bought to fix usually had trash in them. She confirmed that the Integra had trash in it when it was purchased. She said that the last time she had seen the Integra was the day before the methamphetamine was found. She testified that Robinson had not cleaned the trash out of the car, and the car still had the trash in it.

Maria stated that most of the work Robinson did on the cars he bought was on the cars' exterior not the interior. But she acknowledged that Robinson had worked on the inside and the outside of the Integra. She testified that the Integra

did not have a driver's seat in it when she last saw it. She said that, the day before the traffic stop, Robinson had installed the driver's seat in the Integra. Maria responded affirmatively when the State asked, "So that means if he were to put a seat in, that he would have to essentially move some of the contents in the car, right?"

The jury found Robinson guilty of the charged offense of possession of methamphetamine weighing more than 4 grams but less than 200 grams. During the punishment phase, Robinson testified in his own defense, and he pleaded true to the enhancement allegation regarding his past conviction for the offense of burglary of a habitation. The jury assessed Robinson's punishment at seven years in prison. This appeal followed.

Sufficiency of the Evidence

In his first issue, Robinson challenges the sufficiency of the evidence to support his conviction for the offense of possession of methamphetamine. Robinson contends that the State failed to prove that he knowingly or intentionally possessed the methamphetamine, an element of the charged offense. *See* TEX. HEALTH & SAFETY CODE § 481.115(a). Robinson asserts that there were insufficient links between himself and the methamphetamine found in his car.

A. Standard of Review

We review a challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Brooks v. State*, 323 S.W.3d 893, 894–913 (Tex. Crim. App. 2010). Pursuant to the *Jackson* standard, we determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) (citing *Jackson*, 443 U.S. at 319). We can hold evidence to be insufficient under the *Jackson* standard when (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 320; *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013).

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326.

In our review of the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. Finally, "[e]ach fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

B. Law of the Offense

A person commits the offense of possession of a controlled substance if he knowingly or intentionally possesses a controlled substance, including methamphetamine TEX. HEALTH & SAFETY CODE §§481.115(a), (d); *see also id.* § 481.002(5), § 481.102(6). To prove that Robinson possessed methamphetamine, the State was required to show that he (1) exercised control, management, or care over the methamphetamine, and (2) he knew that it was contraband. *See Blackman v. State*, 350 S.W.3d 588, 594 (Tex. Crim. App. 2011); *see also* TEX. HEALTH & SAFETY CODE § 481.002(38) ("'Possession'" means "actual care, custody, control or management.").

The State was not required to show Robinson's exclusive possession of the methamphetamine, but it was required to establish that Robinson's connection with the methamphetamine was more than fortuitous. *See Evans v. State*, 202 S.W.3d

158, 161–62 (Tex. Crim. App. 2006); *Wiley v. State*, 388 S.W.3d 807, 813–14 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). Mere presence in the same place as contraband is insufficient, by itself, to establish actual care, custody, or control. *Evans*, 202 S.W.3d at 162. But the link between the defendant and the illegal drugs need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *See Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995). Presence or proximity to contraband, when combined with other direct or circumstantial evidence, may be sufficient to establish possession. *Evans*, 202 S.W.3d at 162.

In *Evans*, the Court of Criminal Appeals summarized a non-exclusive list of 14 factors that may indicate a link connecting the defendant to the knowing possession of contraband:

> (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.

Id. at 162 n.12.

C. Analysis

To support his sufficiency challenge, Robinson points out that the State presented no evidence regarding some of the link factors. However, the absence of affirmative links does not constitute evidence of innocence to be weighed against the affirmative links that are present. *James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). The number of factors present is not as important as the logical force or the degree to which the factors, alone or in combination, tend to affirmatively link the defendant to the contraband. *See Espino-Cruz v. State*, 586 S.W.3d 538, 544 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd). As the Court of Criminal Appeals clarified, "Although [the] factors can help guide a court's analysis, ultimately the inquiry remains that set forth in *Jackson*: Based on the combined and cumulative force of the evidence and any reasonable inferences therefrom, was a jury rationally justified in finding guilt beyond a reasonable doubt?" *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 318–19).

Robinson relies on evidence that he asserts shows that he did not know the methamphetamine was in his car. He points to evidence supporting his defensive theory that he had not discovered the methamphetamine because he had purchased the car three weeks earlier as a repair project, the car had trash in it when he purchased it, he had not yet cleaned out the car, and he usually drove another

vehicle as his transportation. He also cites Maria's testimony that he did not use methamphetamine.

Robinson points out that the methamphetamine was found inside a sunglasses case on the floor behind him. It was not in the front compartment of the car. Robinson also points out that he consented to the search and told the officers that the drugs were not his, indicating that he did not know that the drugs were in the car. Finally, Robinson points to the officers' testimony that none of the items recovered from the car were tested for fingerprints, and no photographs were taken of the interior of the car.

From the evidence cited by Robinson, the jury could have possibly inferred that Robinson did not know the methamphetamine was in his car; however, the State was not required to exclude every other alternate hypothesis except Robinson's guilt. *See Cantu v. State*, 395 S.W.3d 202, 208 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *Stoutner v. State*, 36 S.W.3d 716, 722 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). As the fact finder, the jury was free to reject Robinson's version of the facts. *See Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018) (reiterating that factfinder may accept one version of the facts and reject another, and it may reject any part of a witness's testimony).

Robinson's argument views the evidence in a manner favorable to his defense rather than viewing the evidence in the light most favorable to the verdict,

and he improperly discounts circumstantial evidence linking him to the methamphetamine. *See Jackson*, 443 U.S. at 319. When the evidence admitted at trial is viewed in the light most favorable to the jury's verdict, a rational jury could have found that Robinson knowingly or intentionally possessed the methamphetamine. *See id.*

Robinson was driving the car at the time of the search, and he was the vehicle's sole occupant. He told the police that he had owned the car for three weeks. During that time, the evidence showed that he had been working on the exterior and the interior of the car. Maria testified that Robinson had installed the driver's seat in the car the day before the methamphetamine was found on the floorboard behind the seat. *See Ly v. State*, 273 S.W.3d 778, 782 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (considering appellant's possession and ownership of vehicle as link to illegal drugs recovered from console); *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding evidence was legally sufficient to support conviction for marijuana possession when evidence showed (1) appellant was sole occupant and driver of car; (2) marijuana was found under driver's seat; (3) appellant had only set of keys to car; (4) appellant had been driving car for couple of days; and (5) closed bag containing marijuana could be seen by anyone opening rear passenger door); *see also Stout v. State*, 426 S.W.3d 214 (Tex. App.—Houston [1st Dist.] 2012, no pet.)

(relying, in part, on appellant's status as driver of vehicle to link him to firearm concealed behind radio's faceplate).

The evidence also showed that the methamphetamine was accessible to Robinson at the time of the traffic stop because it was located behind the driver's seat on the floor. Sergeant Jensen testified that the sunglasses case was not hidden but was in plain view on the floorboard and within arm's reach of the driver's seat. *See Ly*, 273 S.W.3d at 782 (determining that cocaine was accessible to appellant because it was in center console next to driver's seat); *see also Robinson v. State*, 174 S.W.3d 320, 326 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (determining that contraband was "conveniently accessible" to defendant when it was "within the close vicinity of the accused and easily accessible while in the vehicle so as to suggest that the accused had knowledge of the contraband and exercised control over it").

The circumstantial evidence outlined above, when viewed in combination, constitutes evidence connecting Robinson to the actual care, custody, control or management of the methamphetamine such that a jury could have reasonably inferred that Robinson knowingly possessed it. *See Evans*, 202 S.W.3d at 166. Although Robinson cites link factors on which the State presented no evidence, as well as evidence that weighs in his favor, "[i]t is the logical force of the

circumstantial evidence, not the number of links, that supports a jury's verdict." *See id.*

Robinson also asserts that "the State failed to prove [he] knew the substance was contraband." *See Blackman*, 350 S.W.3d at 594. We disagree.

The evidence showed that in addition to 6.23 grams of crystalline substance, which lab testing confirmed was methamphetamine, the sunglasses case contained two glass pipes, a straw, and plastic baggies. The methamphetamine and the sunglasses case with the glass pipes, straw, and plastic baggies were admitted into evidence as exhibits during trial.

Sergeant Jensen and Officer Skillern testified that the glass pipes and the straw are indicative of drug use. Officer Skillern stated that the glass pipes are specifically indicative of methamphetamine use. Both officers testified that the plastic baggies are indicative of narcotic sales. Officer Skillern viewed the glass pipes during his testimony and stated that they appeared not to be new but to have been previously used. From the evidence presented, the jury could have reasonably inferred and rationally determined that Robinson knew the methamphetamine was contraband. *See Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995) (holding that drug paraphernalia in home with contraband supported conclusion defendant knew he possessed cocaine); *Ashley v. State*, No. 01-19-00344-CR, 2020 WL 894422, at *4 (Tex. App.—Houston [1st Dist.] Feb. 25, 2020, not pet. h.)

(mem. op., not designated for publication) (holding that evidence showing that syringes, spoons, rolling papers, and herb grinder were found in duffle bag along with cocaine was sufficient evidence to support jury's finding that appellant knew cocaine was contraband); *see also Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014) (recognizing that jurors may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs of life when drawing inferences from evidence).

Viewing the evidence in a light most favorable to the verdict, we conclude that a rational fact finder could have found beyond a reasonable doubt that Appellant knowingly or intentionally possessed the methamphetamine. *See* TEX. HEALTH & SAFETY CODE §§ 481.115(a), (d); *see also id.* § 481.002(5), § 481.102(6). We hold that the evidence is legally sufficient to support the judgment of conviction. *See Jackson*, 443 U.S. at 319.

We overrule Robinson's first issue.

Jury Argument

In his second issue, Robinson contends that, in the guilt-innocence phase of trial, the State misstated the law during its closing argument. He points to the following three remarks by the prosecutor:

- "We just have to prove that he possessed the drugs. They were in his car."
- "It's not about ownership of the drugs; it's about possession."

- "And we are confident that if you follow the law, you will find the defendant guilty of possession of a controlled substance."

Robinson asserts that the above remarks were misstatements of the law because they mislead the jury to believe that the State was not required to prove that Robinson knew the substance in the sunglasses case was contraband. He claims this "greatly reduced the State's burden of proof" on one of the elements it was required to prove. Robinson contends this amounted to a violation of his right to due process, which protected him against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." *See In re Winship*, 397 U.S. 358, 364 (1970).

Generally, a party must object to preserve error on appeal. *See* TEX. R. APP. P. 33.1(a). In criminal cases, courts may "take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX. R. EVID. 103(e). Robinson acknowledges that he did not object to the complained-of portions of the State's argument, but he contends that the prosecutor's alleged misstatement of the law is fundamental error, which did not require him to object.

Fundamental error falls into two categories: (1) the denial of absolute, systemic requirements and (2) the violation of rights that are "waivable-only." *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002). "Waivable only" rights include the right to the assistance of counsel and the right to trial by jury. *Id.*

"Absolute, systemic rights" include, among other things, jurisdiction of the person and subject matter, a penal statute's compliance with the separation of powers section of the state constitution, the constitutional prohibition of ex post facto laws, and certain constitutional restraints on the comments of a judge. *Id.* at 888–89.

Appellant does not cite any case authority holding that an improper jury argument that violates a defendant's right to due process constitutes fundamental error. In contrast, the Court of Criminal Appeals has held that a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling on his objection to a jury argument forfeits his right to complain about the argument on appeal. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App 1996). Citing *Cockrell*, the Court of Criminal Appeals held in *Ladd v. State* that the court did not need to address Ladd's complaint that the State's closing argument violated his right to due process because he had not objected in trial court. 3 S.W.3d 547, 569–70 (Tex. Crim. App. 1999).

Most recently, in *Hernandez v. State*, the Court of Criminal Appeals reaffirmed its holding that a defendant must object to improper jury argument in the trial court to preserve his complaint for appeal. 538 S.W.3d 619, 622 (Tex. Crim. App. 2018). There, the prosecutor argued to the jury that Hernandez had called the complainant and his family a particularly inflammatory racial slur; however, no evidence had been presented at trial showing that Hernandez had

made the racial slur. *Id.* at 621. Hernandez objected to the prosecutor's argument but did not pursue his objection to an adverse ruling. *Id.*

On appeal, Hernandez asserted that that "the State's argument was so egregious that the traditional mode of error preservation should not be required of him." *Id.* at 620–21. In a split decision, the majority in the intermediate court of appeals agreed with Hernandez, reversing his conviction. *Hernandez v. State*, 508 S.W.3d 737 (Tex. App.—Fort Worth 2016), *rev'd* 538 S.W.3d 619 (Tex. Crim. App. 2018).

The Court of Criminal Appeals granted the State's petition for discretionary review. *Hernandez*, 538 S.W.3d at 621. Hernandez asked the court "[to] hold that error preservation was not required . . . due to the egregious nature of the prosecutor's argument." The Court of Criminal Appeals declined the request. The court held, "[W]e will not elevate the right to be free of improper jury argument to the status of an absolute requirement like jurisdiction." *Id.* at 623. "Even incurably improper jury argument is forfeitable." *Id.* The court reversed the intermediate court of appeals, holding, "Because defense counsel did not pursue his objection to an adverse ruling, the court of appeals should not have entertained his complaint about the prosecutor's argument." *Id.*

Here, Robinson did not object in the trial court that the State's closing argument violated his right to due process. Therefore, we hold that Robinson did

not preserve his objection to the State's closing argument, and he forfeited his right to raise the complaint on appeal. *See Hernandez*, 538 S.W.3d at 622; *Ladd*, 3 S.W.3d 547, 569–70; *Cockrell*, 933 S.W.2d at 89; *see also Morris v. State*, 460 S.W.3d 190, 196–97 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding, in case in which appellant argued prosecutor's closing argument was "incurable fundamental error," that, "[e]ven if the State's argument [was] incurable and rose to the level that it deprived appellant of his right to due process of law, appellant waived this complaint by failing to object in the trial court"); *Moreno v. State*, 195 S.W.3d 321, 328–29 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (holding that because he did not object in trial court, appellant waived his right to complain on appeal that his due-process rights were violated when prosecutor referred to his status as an illegal immigrant during closing argument in punishment phase and argued that this status warranted more severe punishment than community supervision).

We overrule Robinson's second issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).