Affirmed; Majority, Concurring and Dissenting Opinions filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00944-CR

CURTIS BAILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 9421251

MAJORITY OPINION

A jury found Curtis Bailey guilty of the offense of possession of a controlled substance with intent to deliver. The court assessed punishment at twenty years confinement and a $10,000 fine. Appellant asserts four points of error: (1) that the evidence is legally insufficient to support the verdict that appellant is guilty of possession with intent to deliver a controlled substance; (2) that the evidence is factually insufficient to support the verdict that appellant is guilty of possession with intent to deliver a controlled substance; (3) that the trial court erred in admitting into evidence State's exhibit eight, i.e., the bus ticket; and (4) that appellant's trial counsel failed to provide him with effective assistance of counsel in that he

failed to properly object to the introduction into evidence of State's exhibit eight, i.e., the bus ticket. We affirm.

Officer H.M. Herbert of the Houston Police Department observed appellant and another man enter the downtown Greyhound Bus Station on September 8, 1994 at 7:00 p.m. The unidentified man, who accompanied appellant, was walking slightly behind appellant and carrying a suitcase. The two men walked past Officer Herbert and three other officers and proceeded to gate number fifteen. The unidentified man always walked three to six feet behind appellant. When they arrived at gate number fifteen, the unidentified man set the suitcase down between the two of them and looked around. There was no bus driver, so the unidentified man picked up the suitcase and he and appellant walked away. About that time, the bus driver approached the gate, and had a conversation with appellant. The unidentified man carrying the suitcase stood beside appellant during this conversation. The two men then followed the bus driver up to the gate, and when they reached the gate, appellant had another conversation with the bus driver. The man carrying the suitcase set it down between him and appellant. After more conversation, appellant and the unidentified man walked away, and the bus driver called out, "Let me get this straight, you're not going out on the bus." Both men stopped, and said, "No, we're not traveling — just the suitcase." The men then left the bus station.

Two of the officers followed the men out of the bus station. Appellant and the unidentified man kept looking back to see if the officers were following them. The unidentified man started running. Appellant stopped outside the bus station and leaned against the wall. Officer Rodriguez chased the unidentified man, but lost him. Officer Herbert showed appellant his identification and asked if he had just checked the bag on the bus. Appellant responded that he did not know anything about the bag. Officer Herbert told appellant that they were conducting an investigation and asked if he would step into the station.

In the meantime, Officer Rodriguez had picked up the suitcase and approached appellant and asked if the suitcase belonged to him. Appellant denied possession or any knowledge of the suitcase. The officer opened the suitcase and found two large bricks of cocaine. After finding cocaine, the officers placed appellant under arrest. Pursuant to the arrest, Officer Rodriguez searched appellant and found a bus ticket in appellant's pocket. The officers also found attached to the suitcase an identification claim tag, which matched the ticket found on appellant. Both the identification claim tag and the bus ticket bore the

name "James Moore," and indicated a Houston, Texas departure and a Jackson, Mississippi destination.

After Officer Rodriguez gave appellant *Miranda* warnings, he asked why appellant was at the bus station. Appellant said he was brought to the bus station by a friend in a Ford Escort. Sometime before, appellant had told Officer Rodriguez that he brought a friend to the station in his Cadillac. Officer Rodriguez asked appellant if he had gone to gate nine and gate fifteen. Appellant denied that he went to either gate.

Officer Rodriguez testified that appellant appeared to be hiding when he left the bus station. Officer Rodriguez further testified that the actions of the two men, based on his years of experience with the narcotics division, are common with narcotics couriers. Drug couriers commonly travel in pairs and deny ownership of the bags containing narcotics.

Appellant testified that on September 8, 1994, he was going to the bus station to pick up his cousin who was coming in from Baton Rouge, Louisiana. He arrived at the bus station at 6:55 p.m. in a Lincoln Town Car. He parked the car directly in front of the bus station, left the engine running, and went into the bus station. Once inside the bus station, he was approached by a young man who asked the time. He pointed to the clock in the station and went to the ticket counter to inquire about the bus's arrival. The ticket agent directed him to gate number fifteen and said the bus was at the gate. When appellant walked up to gate fifteen, the man who had asked him for the time was talking with the bus driver. Appellant asked the driver if the bus was from Baton Rouge, and the driver said it was. Appellant described who he was looking for, but the bus driver had not seen him. Appellant then turned and walked away. The man with the suitcase was still standing at the gate. Appellant proceeded to the front door of the bus station and saw the man who was at the gate run past him. He then walked over and leaned against the wall.

Appellant saw Officer Rodriguez run after the man and then turn and come back to him. Officer Rodriguez asked appellant who the man was, and appellant replied that he did not know. Officer Herbert asked appellant to step back into the bus station and appellant said, "Why. What's going on?" Appellant testified that the officer grabbed him by the arm and forced him into the bus station. At that moment, appellant did not feel free to leave. Officer Herbert asked him what kind of car he owned. Appellant told

them he owned a Cadillac. Appellant denied ownership of the suitcase. Appellant testified that before Officer Rodriguez opened the suitcase, another officer had already put one handcuff on him.

In his first and second points of error, appellant asserts the evidence is legally and factually insufficient to support the verdict. The standard of review for a challenge to the legal sufficiency of the evidence "is whether, 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." *Thomas v. State*, 915 S.W.2d 597, 599 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

To conduct a factual sufficiency review, we do not view the evidence through the prism of "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The jury is the judge of the facts. TEX. CODE CRIM. PROC. ANN. art. 36.13; *Cain*, 958 S.W.2d at 407.

As the exclusive judge of the credibility of the witnesses and the weight to be given their testimony, the jury is free to reject appellant's version of the facts whether contradicted or not. *Wilkerson v. State*, 881 S.W.2d 321, 324 (Tex. Crim. App. 1994). It was within the province of the jury to reconcile the conflicts and contradictions in the evidence. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982).

Appellant contends the evidence is legally and factually insufficient to establish that he (1) exercised actual care, control and management over the contraband, (2) knew that the matter possessed was contraband, and (3) that such possession was intentional and knowing. Proof of the culpable state of mind is almost always proved by circumstantial evidence. *Warren v. State*, 797 S.W.2d 161, 164 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd). An accused's intent can be inferred from his acts, words, and conduct. *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982). To determine culpability for an offense, the jury was entitled to consider events that occurred before, during, and after the commission of the offense. *Barron v. State*, 566 S.W.2d 929, 931 (Tex. Crim. App. 1978).

An extensive review of the evidence reveals that appellant's claim that there was no evidence affirmatively linking him to the contraband is without merit. The linking evidence must merely establish that appellant's connection with the controlled substance is more than just fortuitous; however, it does not have

to be so strong that it excludes every other outstanding reasonable hypothesis except appellant's guilt. *Brown v. State*, 911 S.W.2d 744, 747-48 (Tex. Crim. App. 1995). Possession of a controlled substance need not be exclusive, rather, it is sufficient to show that appellant jointly possessed it with another. *See Gutierrez v. State*, 628 S.W.2d 57, 60 (Tex. Crim. App. 1980), *overruled on other grounds by Chambers v. State*, 711 S.W.2d 240 (Tex. Crim. App. 1986).

Appellant claims the unknown individual acted alone. It is true the officers did not see appellant physically touch the suitcase. Both Officers Herbert and Rodriguez, based on their observations and experience, believed that appellant and the unknown man were traveling together transporting narcotics. They walked close to one another throughout the terminal. Even when there were a number of directional changes, the unknown man continuously followed closely behind appellant. The officers testified as to the continual eye contact and recognition between the two men. Further, when the bus driver asked them a question, they responded in unison.

The evidence supports the jury's implicit conclusion that appellant intentionally and knowingly possessed at least four hundred grams of cocaine with intent to deliver. Although the unknown man carried the suitcase, appellant was his constant companion and maintained eye contact and involvement with him during the time he was in the terminal. They were within a few feet of each other at all times. The officers testified that such conduct was common to narcotics traffickers. The officers noted that appellant acted suspicious inside the terminal by constantly looking around and attempting to check the suitcase without traveling with it. When the officers followed him out of the terminal, he attempted to hide behind a brick wall. He gave conflicting stories to the officers concerning his presence at the terminal. He possessed a bus ticket reflecting the same name and destination as the baggage claim and identification tickets found attached to the suitcase containing the cocaine.

We find the evidence, when viewed in its entirety, and in the light most favorable to the verdict, is legally sufficient to support appellant's conviction beyond a reasonable doubt. Further, we find that when viewed without the prism of "in the light most favorable to the prosecution" the evidence is factually sufficient, supports appellant's conviction, and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. Appellant's first and second points of error are overruled.

Appellant claims in his third point of error that the court erred in admitting State's Exhibit No. 8, a bus ticket, because the search of appellant was not justified as a search incident to his lawful arrest. He contends the police officers lacked probable cause to arrest him; therefore, the bus ticket is the fruit of an illegal arrest. He argues that there are no objective facts and circumstances "sufficient to occasion a person of reasonable prudence to believe that appellant had participated with the unknown individual in the offense committed."

In reviewing probable cause for arrest pursuant to a motion to suppress, the appellate court reviews the evidence in the light most favorable to the trial court's ruling. *State v. Hamlin*, 871 S.W.2d 796, 798 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). Reasonable inferences arising from the evidence may be considered in determining whether probable cause existed. *Farmah v. State*, 883 S.W.2d 674, 678 (Tex. Crim. App. 1994). The trial court is the sole fact-finder and judge of the credibility of the witnesses, as well as the weight to be given their testimony. *Villareal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). On appeal, the trial court's ruling should not be disturbed absent an abuse of discretion. *Etheridge v. State*, 903 S.W.2d 1, 15 (Tex. Crim. App. 1994).

Appellant agrees that because he has denied ownership of the suitcase, he has no standing to challenge the seizure or search of the suitcase and its contents. He further agrees that when Officer Rodriguez opened the suitcase, there were sufficient facts to suspect criminal activity. He urges, however, that there was no probable cause for the officers to believe appellant was engaging in any criminal activity together with the unknown person. Therefore, the search was not justified and the bus ticket was the fruit of an illegal arrest and should have been excluded.

A police officer is authorized to make an arrest without a warrant provided he has probable cause to believe an offense has been committed, or is being committed, within his view. TEX. CODE CRIM. PROC. ANN. art. 14.01(b); *DeJesus v. State*, 917 S.W.2d 458, 461 (Tex. App.—Houston [14th Dist.] pet. ref'd). To justify such an arrest, the State must show probable cause existed at the time of the arrest. *Brown v. State*, 481 S.W.2d 106, 109 (Tex. Crim. App. 1972). The State must prove that the facts and circumstances within the officer's knowledge, when viewed from the totality of the circumstances, were sufficient in themselves to warrant a man of reasonable caution to believe that the detainee was committing, or had committed, an offense. *Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997). When

there had been cooperation between officers, the sum of the information known to the officers at the time of the arrest or search by any of the officers involved is to be considered in determining whether there was sufficient probable cause. *Woodward v. State,* 668 S.W.2d 337, 344 (Tex. Crim. App. 1982).

The facts in this case demonstrate that Officer Rodriguez had sufficient probable cause to arrest appellant. Both Officers' Herbert and Rodriguez, based on their observations and experience, believed that appellant and the unknown man were traveling together transporting narcotics. Appellant and the unknown man walked close to one another throughout the terminal. When there were directional changes, appellant and the unknown man continued to remain close together. There was eye contact and recognition between the two and when asked a question, they responded in unison. Appellant acted suspicious inside and outside the terminal by constantly checking the suitcase without traveling with it, and attempting to hide outside the terminal when he realized the officers were aware of his actions. In light of those facts and others more extensively set out in the statement of facts above, we find the court did not abuse its discretion in determining there was sufficient probable cause to arrest appellant and to search him incident to that arrest. The bus ticket was not the product of an illegal arrest and was admissible. *See Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969). Appellant's third point of error is overruled.

Appellant asserts in his fourth point of error that he was denied effective assistance of counsel because counsel failed to object to the admission of the bus ticket into evidence as well as to testimony regarding the bus ticket. The standard of review for evaluating claims of ineffective assistance of counsel during the guilt-innocence phase of the trial is set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *See Hernandez v. State,* 726 S.W.2d 53, 54-5 (Tex. Crim. App. 1986). Appellant must show both (1) that counsel's performance was so deficient that he was not functioning as acceptable counsel under the Sixth Amendment, and (2) that but for counsel's error, the result of the proceedings would have been different. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

Appellant bears the burden to prove ineffective assistance of counsel. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*

Appellant filed a motion for new trial based only on the discovery of new evidence. The record is silent as to why appellant's trial counsel failed to object during the guilt-innocence phase of the trial in the complained-of circumstances. Assertions of ineffective assistance must be firmly founded in the record. *Harrison v. State*, 552 S.W.2d 151, 152 (Tex. Crim. App. 1977), *overruled on other grounds by Hurley v. State*, 606 S.W.2d 887 (Tex. Crim. App. 1980). This court will not engage in speculation. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1984).

Further, because we have found, in appellant's third point of error, that there was probable cause to justify appellant's arrest and search of appellant's person, and that the bus ticket found during the search was properly admissible, appellant's counsel's failure to object to the admission of the bus ticket would have been to no avail. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). Therefore, appellant fails to satisfy the second prong of the *Strickland* test. Appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Fowler, Wittig, and Hutson-Dunn[1].

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

[1] Senior Justice D. Camille Hutson-Dunn sitting by assignment.

Affirmed and Majority and Dissenting and Opinion filed October 14, 1999.

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C O N C U R R I N G A N D D I S S E N T I N G O P I N I O N S

I concur with the majority's handling of the effectiveness of counsel issue but dissent regarding the legal and factual sufficiency issues as well as the suppression issue.

The majority correctly states the legal standards which I will amplify. The factual delineation, while generally correct, overly favors the Government. The majority states appellant "maintained eye contact and involvement with him (the unidentified man carrying the drugs) during the time in the terminal." In truth, appellant came in the terminal on his own, bought his own hot dog and drink and went to one or two of the gates. After appellant's entry on the scene, the unidentified one came from out of nowhere and

followed behind appellant out of eye sight from 3 to 6 feet back, and then only to the gates. The appellant exited and the unidentified bag keeper ran. The majority, perhaps indulging toward the narcotics officer's observation that Jackson, Mississippi is a major narcotics demand city, indicates the bus ticket destination is Jackson. Actually, the ticket goes to Lafayette, Louisiana, and then Jackson and is not remotely connected with appellant. Are we to seriously believe that Lafayette or Houston are not also major narcotics demand cities? Wrong ticket. Wrong man? In the terminal, appellant had no control of either the drug containing suitcase or the unidentified man, who trailed appellant, not vice versa. Somehow this conduct of this unidentified clear culprit, is implied by pure opinion and conjecture of the Government agents, to be the conduct of appellant. The police and majority argue that appellant is responsible for not only the unknown's conduct but also the intent and knowledge of this unidentified tag along. This is like saying that a WWII US P-51 being chased by a Japanese Zero has knowing possession of the Zero, or that a civilian plane being followed by an armed military plane has knowing possession of the latter's nuclear armaments. Nowhere to be found, is a matching bus ticket with the same numbers as a baggage claim ticket. There is no matching claim ticket. There are surprisingly no fingerprints, even of the handling Government agents. Appellant was not seen purchasing any ticket, touching or placing any bag, talking to the unidentified one, running, or any other nefarious conduct, unless eating a hot dog and drinking a soft drink is now hard evidence.

The Government's witnesses heard nothing in the populated bus terminal save the phrase appellant and the unidentified one, purportedly remarked "We're not traveling–just the suitcase." True neither traveled, although the unidentified one ran; appellant stayed but traveled to the penitentiary where he has been over five years based on this paltry evidence. While at once claiming the drug baggage was "abandoned" probably in order to avoid the needless hassle of a search warrant, simultaneously the Government postures appellant had knowing possession of the contents of the self same "abandoned" bag. After what I view as an illegal arrest without probably cause, the Government says they found a bus ticket for James Moore. The unidentified man's bag had a name tag with equally unidentifiable scribble, save the scratched name "James Moore." Appellant is not James Moore, however he was left "holding the bag" he never touched.

Analysis

Legal Sufficiency

In his first and second issues, appellant contends the evidence was legally and factually insufficient to support his conviction because the evidence fails to affirmatively link him to the cocaine. I address appellant's legal sufficiency point first. When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995). The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996), *cert. denied*, 118 S.Ct. 100 (1997). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the fact finder. *Id*. This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

In the present case, the State was required to prove beyond a reasonable doubt that appellant (1) knowingly or intentionally (2) possessed (3) cocaine (4) in an amount of at least four hundred grams (5) with the intent to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (f). The evidence must affirmatively link appellant to the cocaine. Stated another way, the evidence must establish appellant exercised care, control, and management over the contraband and knew the matter possessed was contraband. *See Washington v. State*, 902 S.W.2d 649, 652 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). However, when appellant is not in exclusive control of the place where the contraband is found, there must be independent facts and circumstances linking the accused to the contraband in such a manner that a reasonable inference may arise that the accused knew of its existence and exercised control over it. *Dickey v. State*, 693 S.W.2d 386, 389 (Tex. Crim. App. 1984); *Washington*, 902 S.W.2d at 652.

Appellant challenges that the State failed to show that he was in exclusive possession of the baggage where the cocaine was found and that he had the intent to deliver. The evidence described both by the majority and above hardly reveal any indicia of knowing or intentional possession. The reviewing court must look at all evidence. *See Bodo v. State*, 843 S.W.2d 572, 575–76 (Tex. Crim. App. 1992).

Our sister courts in an exposition of the *Jackson* factors, delineate numerous affirmative links: (1) appellant's presence at execution of the search; (2) plain view *vel non* of contraband; (3) proximity and accessibility to contraband; (4) was appellant under influence of narcotics; (5) possession of other contraband when arrested; (6) incriminating statements; (7) attempts to flee; (8) furtive gestures; (9) contraband odor; (10) presents of other drug paraphernalia or contraband; (11) appellant's ownership and possession rights in premises searched; (12) were drugs enclosed; (13) guilty conduct; (14) special connections with contraband; and (15) conflicting stories. *See Kyte v. State*, 944 S.W.2d 29, 31 (Tex. App.–Texarkana 1997, no pet.); *Nixon v State*, 928 S.W.2d 212, 215 (Tex. App.–Beaumont, 1996, no pet.). Other affirmative links include (1) familiarity of appellant with type of contraband found and (2) attempts to conceal contraband or paraphernalia. *See Brazier v. State*, 748 S.W.2d 505, 508 (Tex. App.–Houston [1st Dist.] 1988, pet. ref'd). Only the remarks to the bus driver and the ticket link appellant to the baggage. Not even these marginal factors, and the "following too closely" by the unknown one, demonstrate knowing or intentional possession of 400 grams of cocaine with intent to sell. From the evidence, appellant never touched the bag. I will not needlessly reiterate the total lack of evidence of the listed affirmative link considerations above.

Reviewing the evidence in the light most favorable to the verdict, I wound not find sufficient evidence to allow a rational jury to find infer that appellant knew of the cocaine and exercised control over it. *See Mason*, 905 S.W.2d at 574; *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Accordingly, I would find the evidence was not legally sufficient.

Factual Sufficiency

In appellant's second issue, he claims the evidence was factually insufficient to support his conviction. When reviewing the factual sufficiency of the evidence, we review all 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." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although we are authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential so as to avoid substituting our judgment for that of the trier of fact. *Id*.

Appellant contends the State failed to prove he had exclusive possession or control over the cocaine and that he had the intent to deliver it. I agree.

The trier of fact is charged with judging the credibility of the witnesses and the weight to be given their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Clewis*, 922 S.W.2d at 135. From the facts and reasonable inferences presented by both the majority and recitals *supra*, I would find the jury's verdict was so contrary to the other evidence to make their verdict wrong and unjust.

After arresting appellant, the Government claims to have seized the bus ticket from appellant. This warrantless arrest required probably cause. *Simpson v. State*, 886 S.W.2d 449, 454 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). Notwithstanding appellant's motion to suppress, the State simply did not nor could they justify the arrest or the search. The disputed bus ticket, being the only true physical link between appellant and the bag, the harm is patent. Accordingly, I believe the sufficiency issues require us to reverse and render and alternatively the suppression issue requires us to reverse and remand.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed October 14, 1999.
Panel consists of Justices Fowler, Wittig and Hutson-Dunn.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice D. Camille Hutson-Dunn sitting by assignment.