

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0563



STATE OF LOUISIANA

VERSUS

HERBERT GIBSON, III

Judgment Rendered: OCT 29 2010

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On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket No. 900208

Honorable Robert H. Morrison, III, Judge Presiding

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Herbert Gibson, III

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Herbert Gibson, III, was charged by bill of information with second degree kidnapping (count one), a violation of LSA-R.S. 14:44.1, second degree battery (count two), a violation of LSA-R.S. 14:34.1, possession of a Schedule II controlled dangerous substance, cocaine, (count three), a violation of LSA-R.S. 40:967C(2) and possession of a Schedule I controlled dangerous substance, heroin, (count four), a violation of LSA-R.S. 40:966C(1). He entered a plea of not guilty. Defendant was tried by a jury and convicted as charged on counts three and four. He was found not guilty on counts one and two. Defendant was sentenced to imprisonment at hard labor for five years on count three and ten years at hard labor on count four. The trial court ordered the sentences to run concurrently. Defendant now appeals, urging in a single assignment of error that the evidence presented at the trial was insufficient to support the possession convictions.

Finding no merit in the assignment of error, we affirm defendant's convictions and sentences.

FACTS

On September 30, 2008, Sherry Stevens contacted the Ponchatoula Police Department and advised that she had been abducted, held captive, and brutally beaten by defendant, her ex-boyfriend. Detective Gary Baham, of the Tangipahoa Parish Sheriff's Office, reported to North Oaks Medical Center to speak with Stevens regarding the incident. Stevens had gone to North Oaks seeking treatment for injuries she claimed she sustained during the incident. At the hospital, Detective Baham observed several areas of bruising and swelling on Stevens's face. After taking a written statement from Stevens regarding the alleged incident, Detective Baham secured a warrant for defendant's arrest for false imprisonment and second degree battery. Several hours later, at approximately 7:45 p.m., Detective Baham and several other officers, including a canine patrol officer, went to defendant's residence on South Range Road in Tangipahoa Parish to execute the warrant. When they arrived at the property

where defendant's residence was located, the officers parked their vehicles at the road and proceeded on the driveway leading to the house on foot. Detective Baham observed defendant and another individual, later identified as Bradley Jones, standing outside near a pickup truck. Defendant was standing on the driver's side of the vehicle and Jones was positioned on the passenger side. There were two other individuals in the area, but they were positioned near another vehicle and were not in the same vicinity as the defendant and Jones.

From a distance of approximately twenty yards away, the officers announced their presence and ordered the individuals to refrain from movement. According to Detective Baham, Jones immediately dropped to the ground and defendant ran away towards the house. As Detective Baham chased defendant, he observed defendant reach into his pockets with both hands and throw something onto the ground. Shortly thereafter, Detective Baham forcefully tackled defendant to the ground. Defendant traveled approximately ten feet from his original position near the pickup truck before being brought down. Detective Baham observed several packages of suspected narcotics on the ground in the area where he observed defendant discard the objects. Detective Baham secured the area and waited for narcotics detectives to arrive.

Agent Heath Martin, of the Tri-Parish Narcotics Division of the Tangipahoa Sheriff's Office, recovered several small, clear plastic packages and a small aluminum foil package from the area through which defendant ran. Field testing confirmed that the white powdery substance found in the plastic packages was cocaine and the substance inside the aluminum foil packaging was heroin. Defendant was arrested.

At the trial, defendant testified and denied ever abducting and/or beating Stevens. He claimed Stevens, who was then his girlfriend (not his ex-girlfriend), voluntarily accompanied him to his residence the day before and agreed to spend the night. Defendant denied ever holding Stevens at the residence against her will. He claimed Stevens, an admitted drug addict, became enraged and fabricated the story because she believed that he was cheating on her with

his newborn daughter's mother. Defendant also denied possessing and/or discarding any of the illegal drugs found outside his residence.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant contends the evidence presented at the trial of this matter was insufficient to support the convictions for possession of the illegal drugs in question. He argues the state failed to prove actual or constructive possession. More specifically, he asserts the evidence failed to prove that the drugs were not discarded by one of the other individuals in the area.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821B. The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. **State v. Smith**, 03-0917, pp. 4-5 (La.App. 1 Cir. 12/31/03), 868 So.2d 794, 798-99.

On the issue of whether the evidence sufficiently proved possession, the state is not required to show actual possession of the narcotics by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical

possession. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **Smith**, 03-0917 at pp. 5-6, 868 So.2d at 799.

In the instant matter, the state presented testimony from Detective Baham describing what transpired when the officers approached to execute the warrant. Detective Baham testified that defendant immediately attempted to run away once the officers announced their presence. Detective Baham further testified that he personally observed defendant discard some small objects as he ran. He explained that, although it was dark outside, the area was highly illuminated by a hanging halogen light. Detective Baham acknowledged that there were other individuals present in the general area; however, no one else was in the area through which defendant ran. The illegal drugs were found in the exact area where defendant ran and discarded the objects.

Viewing the evidence in the light most favorable to the prosecution, we find the jury had a reasonable basis to conclude that defendant possessed the cocaine and heroin in question. Although defendant did not have the drugs on his person when he was brought to the ground, it is obvious from the guilty verdicts on the possession charges that the jury believed Detective Baham's testimony regarding his personal observations and his description of the scene. As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 98-1407, p. 6 (La.App. 1 Cir. 4/1/99), 734 So.2d 800, 805, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439. Detective Baham's testimony was sufficient to support the conclusion that defendant had been in actual possession of the cocaine and heroin up until the time that he discarded the packages in an attempt to avoid drug charges. Clearly, the jury rejected the defense theory that the illegal drugs had been thrown down by someone other than defendant who had been in the area. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. Moreover, when there is

conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Lofton**, 96-1429, p. 5 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, when a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). No such hypothesis exists in the instant case. We also cannot say that the jury's determination on the possession charges was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

For the foregoing reasons, defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.