

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1578

STATE OF LOUISIANA

VERSUS

MARVIN L. LEWIS

Judgment Rendered: March 23, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 500,164

Honorable Peter J. Garcia, Judge

Walter P. Reed, District Attorney
Covington, LA
and
Kathryn W. Landry
Baton Rouge, LA

Attorneys for
State – Appellee

Bertha M. Hillman
Thibodaux, LA

Attorney for
Defendant – Appellant
Marvin L. Lewis

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

The defendant, Marvin L. Lewis, was charged by bill of information with one count of possession of a Schedule II controlled dangerous substance, cocaine, a violation of La. R.S. 40:967(C). The defendant pled not guilty. Following a May 2, 2011 jury trial, the defendant was found guilty as charged. The State filed a habitual offender petition, alleging the defendant had three prior felony convictions for possession of cocaine and one prior felony conviction for possession with intent to distribute marijuana. On May 26, 2011, the defendant admitted to three of the predicate felony offenses. The trial court adjudicated the defendant a fourth-felony habitual offender and sentenced him to twenty years.¹ The defendant now appeals. As his sole assignment of error, the defendant urges the evidence was insufficient to support his conviction. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On November 21, 2010, at approximately 11:00 a.m., Deputy Jordan Hollenbeck of the St. Tammany Parish Sheriff's Office was on regular criminal patrol in an area of Slidell that is known for its high crime and narcotic sales. While doing so, Deputy Hollenbeck observed the defendant near a broken window of an abandoned house located on East Hillcrest. Not knowing whether the defendant was attempting to break into the house or what was going on, the deputy, who was in full uniform and driving a marked police vehicle, stopped to investigate.

After Deputy Hollenbeck identified himself, he asked the defendant to walk to the rear of his police car. The defendant did not immediately comply.

¹ On May 26, 2011, the defendant also entered guilty pleas for possession of cocaine brought under two separate bills of information and on two second-felony habitual offender bills of information filed for those charges. The defendant was sentenced to ten years for each of those offenses to run concurrently with each other and concurrently with the twenty-year sentence imposed in the instant matter.

Ultimately, the defendant walked to the rear of the deputy's police car. Deputy Hollenbeck requested additional back-up units. He then handcuffed the defendant's hands behind his back.

Several seconds later, Jessica Bell showed up at the abandoned house. Deputy Hollenbeck knew her to have an extensive criminal history that included drug use. Deputy Hollenbeck placed her in handcuffs, finger-spaced and double-locked. Bell then walked straight to a responding officer's police car that was parked approximately two car lengths behind Deputy Hollenbeck's police unit.

Deputy Florian Lizana also responded to the scene. When he arrived, the defendant and Bell were already in handcuffs. Deputy Hollenbeck instructed Deputy Lizana to stay with the defendant, while he and another officer canvassed the area outside the abandoned house for possible evidence.

After the other officers stepped away, the defendant attempted to divert Deputy Lizana's attention to a party going on down the street. Believing it was an attempt to distract him, Deputy Lizana turned his head slightly but continued to visually observe the defendant. During those moments, Deputy Lizana directly observed the defendant kick a small plastic bag out from under his left foot toward a ditch that was behind the defendant. Deputy Lizana then observed the defendant kick some dirt and grass toward the small bag, in what appeared to the deputy to be an attempt to conceal the small bag.

Due to safety concerns, Deputy Lizana did not immediately retrieve the small bag. However, he continually kept visual contact of the small bag until the other deputies returned to the area. After Deputy Hollenbeck returned, Deputy Lizana knelt down and retrieved the plastic bag.

Deputy Lizana described the bag as a small, clear, plastic bag that looked like it was cut from the non-zipper corner of a Zip-lock style bag. The small corner bag was tied closed and contained an unknown white, powdery substance,

which Deputy Lizana suspected to be cocaine. Deputy Lizana turned the plastic bag over to Deputy Hollenbeck and informed Deputy Hollenbeck of what he observed. Subsequent testing revealed the white powdery substance was cocaine.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends the evidence was insufficient to support his conviction of possession of cocaine. Specifically, the defendant asserts the evidence shows that when he was handcuffed behind his back and patted down, Deputy Hollenbeck did not find any drugs on him. Neither deputy saw the defendant throw the bag of cocaine down. The defendant argues it would have been impossible for him to throw down the drugs with his hands cuffed behind his back. Considering the area is a high-crime area known for drug sales, the defendant urges a more reasonable theory is that the drugs had been thrown down by Bell or some other drug user who was previously in the area.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. 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 have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in La. C.Cr.P. art. 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In the instant matter, the State's case-in-chief is built on circumstantial evidence. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585

(La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

To support a conviction of possession of a controlled dangerous substance, the State must prove the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed the drug. Guilty knowledge therefore is an essential element of the crime of possession. A determination of whether there is “possession” sufficient to convict depends on the peculiar facts of each case. **State v. Harris**, 94-0696 (La. App. 1st Cir. 6/23/95), 657 So.2d 1072, 1074-75, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477; see also La. R.S. 40:967(C).

To be guilty of the crime of possession of a controlled dangerous substance, one need not physically possess the substance. Constructive possession is sufficient. **State v. Guirlando**, 491 So.2d 38, 40 (La. App. 1st Cir. 1986). To prove constructive possession of the substance, the State must prove that the defendant had dominion and control over the controlled dangerous substance. **State v. Bell**, 566 So.2d 959, 959-60 (La. 1990) (*per curiam*).

A variety of factors are considered in determining whether a defendant exercised “dominion and control” over a drug. Such factors include the defendant’s access to the area where the drugs were found, the defendant’s physical proximity to the drugs, and any evidence that the particular area was frequented by drug users. The mere presence in the area where narcotics are discovered, however, is insufficient to support a finding of possession. See Harris, 657 So.2d at 1075.

At trial, the parties stipulated that the substance in the small plastic bag was cocaine. Thus, the question in this appeal is whether, under a **Jackson** analysis, a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, including the hypotheses the defense offered at trial, the defendant had dominion and control over the small corner bag

of cocaine and that he knowingly or intentionally possessed the cocaine.

Deputy Lizana testified that when he arrived at the scene he stood guard over the defendant and was never more than three or four feet away from the defendant. It was daylight and the deputy's view of the defendant was unobstructed. Deputy Lizana was present when Deputy Hollenbeck conducted a pat down on the defendant. Prior to being patted down, the defendant had been moving around and volunteered to take off his shoes. The defendant kicked off his shoes. Deputy Lizana testified that there was no plastic bag on the ground before the defendant moved around and kicked off his shoes. It was only after the defendant attempted to divert Deputy Lizana's attention to the party down the street that Deputy Lizana first observed the plastic bag as the defendant lifted his left foot, kicked the plastic bag toward the ditch, and then attempted to conceal the plastic bag by kicking debris over it. The trial court allowed Deputy Lizana to step down from the witness stand and demonstrate to the jury exactly what he observed the defendant doing. Deputy Lizana further testified that he kept the bag in his line of vision until he was able to retrieve it after Deputy Hollenbeck returned.

During cross-examination, the defense asked Deputy Lizana if the "dope" could have belonged to Bell since she was not patted down. The deputy answered that "from what [he] saw, it was under Mr. Lewis's foot." On redirect, Deputy Lizana testified that Bell was not in the vicinity of the bag when he saw the defendant kick the bag from under the defendant's foot or when the defendant kicked debris over it.

The jury also heard Deputy Hollenbeck's testimony that he instructed Deputy Lizana to wait with the defendant while he and another officer canvassed the area around the abandoned house for evidence. Deputy Lizana was still within two feet of the defendant when Deputy Hollenbeck returned. While he was reading the defendant his **Miranda** rights, Deputy Hollenbeck saw Deputy Lizana

kneel down near the ditch directly behind the defendant and retrieve the small plastic bag.

On cross-examination, the defense asked Deputy Hollenbeck if drugs were always found in a pat down. The deputy replied, "not always," explaining that they are found during a pat down if the drugs are in a large enough quantity. The defense asked the deputy why Bell was not patted down. Deputy Hollenbeck explained that Bell was wearing tight-fitting clothing that did not reveal any weapons. In light of that observation and considering that no female officers were at the scene, Deputy Hollenbeck made the determination not to conduct a pat down on Bell.

When asked if the drugs could have belonged to Bell because she walked in the area between the ditch and the patrol car, Deputy Hollenbeck testified that Bell did not walk to his police car. Instead, she walked straight to his corporal's police unit which was parked two car lengths behind his vehicle. He further testified that he did not believe the cocaine was Bell's because Bell was nowhere near the area where the corner bag of cocaine was retrieved.

The record also reveals that, during opening arguments, the defense told the jury that the evidence would show that it was physically impossible for the defendant to have had and dropped the cocaine because he was handcuffed behind his back and patted down. The defense also argued that the evidence would show that another handcuffed person was there, who had a "terrible criminal record" and was let go. During closing arguments, the defense attacked the credibility of the deputies' testimony, including their testimony that Bell did not walk in the area where the bag was found. The defense argued that it was possible that the drugs belonged to Bell and she threw the drugs down. Thus, the defense's cross-examination of the State's witnesses and its opening and closing arguments presented, for the jury's consideration, its theory of alternative hypotheses of

innocence, including the possibility that the drugs belonged to Bell.

We find that the record, in its entirety, supports a finding that the defendant had dominion and control over, and thus, constructive possession of the cocaine, and that the defendant's actions show he knowingly and intentionally possessed the drug. We further find the guilty verdict returned in this case indicates that, after considering the defense's credibility attack on the State's witnesses during cross-examination and in closing argument, the jury accepted the testimony of Deputies Hollenbeck and Lizana. This court will not address the credibility of witnesses. See Harris, 657 So.2d at 1079.

Furthermore, the guilty verdict indicates the jury also rejected the hypotheses of innocence presented by the defense that the drugs could have belonged to and been dropped by Bell, or some other drug user. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypotheses of innocence presented by the defense, those hypotheses fail, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). In reviewing the evidence, we find that the jury reasonably rejected the defendant's hypotheses of innocence. Moreover, 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**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*).

CONCLUSION

After a careful review of the record, we find that a rational trier of fact, viewing all of the evidence as favorable to the prosecution as any rational fact finder can, could have concluded that the State proved beyond a reasonable doubt that the defendant was guilty of possession of cocaine. For all of the reasons set

forth above, the defendant's conviction, adjudication as a fourth-felony habitual offender, and sentence are affirmed.

**CONVICTION, ADJUDICATION AS A FOURTH-FELONY
HABITUAL OFFENDER, AND SENTENCE AFFIRMED.**