NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1577

STATE OF LOUISIANA

VERSUS

RANDY R. CARSON

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 433,690, Division "E"
Honorable William J. Burris, Judge Presiding

Walter P. Reed **District Attorney** **Covington, LA**	**Attorneys for** **State of Louisiana**
and	
Kathryn Landry **Special Appeals Counsel** **Baton Rouge, LA**	
Prentice L. White **Louisiana Appellate Project** **Baton Rouge, LA**	**Attorney for** **Defendant-Appellant** **Randy R. Carson**
Randy R. Carson **St. Gabriel, LA**	**Defendant-Appellant** **In Proper Person**

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered February 12, 2010

PARRO, J.

The defendant, Randy R. Carson, was charged by amended bill of information with one count of possession of cocaine (Count 1), a violation of LSA-R.S. 40:967(C); one count of possession of hydrocodone (Count 2), a violation of LSA-R.S. 40:968(C); one count of possession of oxycodone (Count 3), a violation of LSA-R.S. 40:967(C); and one count of possession of clonazepam (Count 4), a violation of LSA-R.S. 40:969(C). He initially pled not guilty on all charges. He moved for appointment of a sanity commission, and a sanity commission was appointed. Following a sanity hearing, he was found competent to proceed. Thereafter, he withdrew his former pleas and, on all counts, pled not guilty and not guilty by reason of insanity. Following a jury trial on all counts, he was found guilty as charged by unanimous verdicts. On each count, he was sentenced to five years of imprisonment at hard labor, sentences to run concurrently with each other.

He now appeals, contending that the trial court erred in accepting the verdicts because the defendant did not understand the difference between right and wrong and because the verdicts were against the weight of the evidence. He also contends that the trial court erred in denying the motion for new trial because the defendant presented evidence that he was a diagnosed paranoid schizophrenic who began having hallucinations as a result of not receiving his medications. In a pro se brief, he contends he received ineffective assistance of counsel at the hearing on the motions for new trial. For the following reasons, we affirm the convictions and sentences on Counts 1, 2, 3, and 4.

FACTS

On June 10, 2007, Brandie Peyton was driving a vehicle occupied by her infant daughter, her sisters, Chanelle and Priscilla, and their friends, Virginia and Olivia, on Collins Boulevard, off of U.S. Highway 190 in St. Tammany Parish. While Peyton was stopped at a red light, waiting to turn, she was rammed from

behind by a vehicle driven by the defendant. Peyton indicated she was sure the defendant was driving the vehicle. She did not see anyone run from the defendant's vehicle.

The defendant exited his vehicle and told Peyton to move the vehicle to the parking lot of a nearby Walgreens. He repeatedly asked Peyton not to call the police. He offered to pay her for the damages to her vehicle. He claimed he did not have his license and did not want to get into trouble for not having it with him. Peyton alerted her husband, Terry Peyton, a firefighter, to the defendant's actions. Terry Peyton was unable to respond to the scene because he was in another area, but he alerted a local firefighter to the car accident.

David Bordes, Captain of Fire Patrol at the Northpark Station of Fire District 12, responded to the scene. When Captain Bordes went to check on the defendant, the defendant stated, "Look, there's no damage to any of the cars; can we leave?" Captain Bordes told the defendant that he would have to wait for the police to arrive and file a report. The defendant claimed that he had not been driving the vehicle during the accident. Captain Bordes told the defendant that he would still have to wait for the police. The defendant then claimed he needed to go to Walgreens to get water. Captain Bordes told the defendant that the District Chief was on his way to the scene, and he had drinks in his truck. Captain Bordes also told the defendant that police officers were on their way to the scene. The defendant responded by moving certain items from the front passenger-side of the car into the trunk.

Covington Police Department Officer Shane Maricelli responded to the scene of the accident. A check of the vehicle's registration indicated that it was registered to the defendant. Officer Maricelli saw the defendant rummaging through his car. He was nervous and anxious. Officer Maricelli ordered the defendant to step away from the vehicle and stand near the trunk, and the defendant complied with the order. Officer Maricelli advised the defendant of his

Miranda[1] rights, and the defendant indicated that he understood those rights. Officer Maricelli asked the defendant if he had anything illegal in the car, and the defendant replied, "No, sir; I don't do drugs." Thereafter, the defendant stated that he had been driving around town and had accidentally run into the rear of Peyton's vehicle.

The defendant consented to a search of his vehicle. A search of the trunk revealed a small black zipper bag containing eight crack pipes, rolling papers, a Brillo pad, a condom, and a film canister. The film canister contained approximately ten pills.[2] A box of Kool cigarettes, containing some cigarettes and two rocks of crack cocaine, was under the passenger seat. The defendant claimed that the film canister belonged to his mother. He denied any knowledge of the crack pipes.

Chanelle Poche claimed to have seen a man run from the passenger side of the defendant's vehicle after the accident. She indicated that the defendant asked that the police not be called. She also saw the defendant moving items from the inside of the car to the trunk before the police arrived.

Olivia Schurb also claimed to have seen someone run from the passenger side of the defendant's vehicle after the accident. She also heard the defendant ask that the police not be called.

Kenneth Brian Carson, the defendant's brother, testified that the defendant had suffered from mental illness since he was sixteen years old. He claimed that, whenever the defendant had transportation, he would give rides to people. Kenneth also claimed that although the vehicle was registered to the defendant, it really belonged to their mother. Additionally, he claimed that their mother always mixed her pills together and kept them in the trunk of her car. He conceded, however, that he had no evidence concerning the medications prescribed to his

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[1] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] The state and the defense stipulated that two of the pills tested positive for hydrocodone combined with another ingredient, six of the pills tested positive for oxycodone, and one pill tested positive for clonazepam.

mother. He also conceded that the defendant had the opportunity to remove their mother's pills for his personal use.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues the state failed to establish that he was in possession of the drugs in the car and failed to establish that he was not insane at the time of the offenses. He argues that the jury verdicts were contrary to the testimony that he welcomed strangers into his vehicle, that his mother welcomed strangers into the home, that a person was seen running from his car, and the absence of testimony that he moved the drug-bag to the trunk.

Insanity at the time of the offense

Insanity at the time of the offense requires a showing that because of mental disease or mental defect, the offender was incapable of distinguishing between right and wrong with reference to the conduct in question. See LSA-R.S. 14:14.

The law presumes a defendant is sane and responsible for his actions. See LSA-R.S. 15:432. The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence. LSA-C.Cr.P. art. 652. The state is not required to offer any proof of the defendant's sanity or to offer evidence to rebut the defendant's evidence. Instead, the determination of whether the defendant's evidence successfully rebuts the presumption of sanity is made by the trier of fact viewing all the evidence, including lay and expert testimony, the conduct of the defendant, and the defendant's actions in committing the particular crime. The issue of insanity is a factual question for the jury to decide. Lay testimony concerning defendant's actions, both before and after the crime, may provide the jury with a rational basis for rejecting even unanimous medical opinion that a defendant was legally insane at the time of the offense. **State v. Thames**, 95-2105 (La. App. 1st Cir.

9/27/96), 681 So.2d 480, 486, writ denied, 96-2563 (La. 3/21/97), 691 So.2d 80.

In reviewing a claim of sufficiency of evidence in regard to a defense of insanity, we must apply the test set forth in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant had not proven by a preponderance of the evidence he was insane at the time of the offense. **Thames**, 681 So.2d at 486.

At trial, Dr. Rafael Salcedo was accepted as an expert in forensic clinical psychology. He indicated he had reviewed the police report concerning the incident, had reviewed the statements of witnesses at the scene, had listened to testimony at trial concerning the incident, and had encountered the defendant in connection with the case on at least three different occasions. On the basis of the defendant's self-report, Dr. Salcedo was persuaded that the defendant suffered from bipolar disorder and had a significant substance abuse problem. Dr. Salcedo indicated, however, that, in his view, the defendant was capable of distinguishing right from wrong at the time of the alleged offenses. Dr. Salcedo noted that the defendant's efforts to avoid police involvement with the accident, his efforts to leave the scene, and his claim that someone else was driving the vehicle, showed attempted concealment in an effort to avoid apprehension, and were indicative of the defendant's ability to distinguish right from wrong. When questioned about the defendant's moving items from the passenger area of his vehicle to the trunk, once he realized the police were on their way, Dr. Salcedo stated, "Yes, that would support that he could distinguish right from wrong. And there is nothing psychotic or bipolar about that kind of behavior. It was an attempt to conceal evidence at face value."

After a thorough review of the record, we are convinced a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the defendant failed to rebut, by a preponderance of the

evidence, his presumed sanity at the time of the offenses.

Possession of drugs

The standard of review for 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 the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

As applicable here, it is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II, Schedule III, or Schedule IV. LSA-R.S. 40:967(C), 40:968(C), and 40:969(C). Cocaine is a controlled dangerous substance as classified in Schedule II. See LSA-R.S. 40:964, Schedule II(A)(4). Hydrocodone is a controlled dangerous substance as classified in Schedule III. See LSA-R.S.40:964, Schedule III(D)(1)(c) and Schedule III(D)(1)(d). Oxycodone is a controlled dangerous substance as classified in Schedule II. See LSA-R.S. 40:964, Schedule II (A)(1)(o) (prior to amendment by

2008 La. Acts, No. 67, § 1). Clonazepam is a controlled dangerous substance as classified in Schedule IV. See LSA-R.S. 40:964, Schedule IV(B)(9).

The state is not required to show actual possession of drugs 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. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. 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. **State v. Smith**, 03-0917 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

A determination of whether or not there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. **Smith**, 868 So.2d at 799.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession of cocaine, hydrocodone, oxycodone, and clonazepam, and the defendant's identity as the perpetrator of those offenses. The jury rejected the defendant's theory that the drugs in the trunk belonged to his mother, and the crack pipes and cocaine belonged to a stranger who fled the scene. This court will not assess the credibility of witnesses or reweigh the

evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. 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 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, we cannot say that the jury's determinations were irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207 (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 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

MOTIONS FOR NEW TRIAL

In assignment of error number 2, the defendant argues that the trial court erred in denying the motions for new trial because he was denied his psychiatric medications, resulting in him being unable to assist his attorney in preparing a defense.

Prior to sentencing, the defendant, pro se, and defense counsel moved for a new trial, arguing that the defendant had been denied his daily medication of the antipsychotic drug Risperdal for six days before trial.

The defendant testified at the hearing on the motions. He claimed that he had been on Risperdal for over a year prior to trial, but was denied the medication during the week of trial. He claimed that as a result of not receiving his medication, he was angry at trial, raised his voice, and was unable to assist his attorney in his defense because he did not trust him. He offered a two-page

document, which he claimed he had filed during trial, alerting the court to the denial of his medication.

Dr. Richard Demory Inglese, St. Tammany Parish Sheriff's Office Medical Director, also testified at the hearing. Dr. Inglese was very familiar with the defendant because the defendant had completed a "profusion" of sick call requests. Dr. Inglese indicated that for the period covering the defendant's trial, approximately the last week of October 2008, a review of the defendant's file did not reveal that he had filed any sick calls related to any mental health issues. Further, the medication administration record for the defendant indicated that he had been given Risperdal during the time period at issue. Additionally, Dr. Inglese indicated that when he had seen the defendant in connection with other complaints he had made before, during, and after trial, the defendant's thoughts were clear, ordered, and organized. Dr. Inglese indicated that the defendant showed absolutely no evidence that he was psychotic or manic in any way, shape, or form.

Dr. Salcedo also testified at the hearing. He indicated that while he was present at the defendant's trial on October 31, 2008, the defendant did not display any nonverbal behavior suggestive of any psychiatric issues.

The court denied the motions for new trial. The court noted that the second page of the two-page document offered by the defendant, which stated that the defendant was not on his medications, was not part of, but had been added to, page one at some later time. The court also noted that Dr. Inglese had pointed out that one of the documents offered by the defense, which if authentic, would have been signed by him, was not in fact signed by him. The court found that the defendant had a propensity not only to have the ability to assist counsel, but to manufacture documents, manufacture records, to malinger, and to manufacture his psychiatric stance.

Initially, we note the claim at issue was filed under the provisions of LSA-

C.Cr.P. art. 851(5). However, an assertion that the trial court erred by not granting a new trial, on the basis that the ends of justice would be served thereby (LSA-C.Cr.P. art. 851(5)), presents nothing for this court to review. **State v. Walder**, 504 So.2d 991, 994 (La. App. 1st Cir.), writ denied, 506 So.2d 1223 (La. 1987).

Moreover, the trial court did not abuse its discretion in denying the motions for new trial. The defendant's claim that he was denied medication was contradicted by his medical records, was inconsistent with the testimony of Dr. Inglese and Dr. Salcedo, and was rendered suspect by the defendant's attempt to manufacture documents to support the claim.

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his pro se brief, the defendant claims that defense counsel, at the hearing on the motions for new trial, did not have the defendant's medical records, and thus, inadequately cross-examined Dr. Inglese.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a

fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

The decision of which questions to ask, if any, on cross-examination of Dr. Inglese, was a strategy decision. Allegations of ineffectiveness relating to the choice made by counsel to pursue one line of defense as opposed to another, constitute an attack upon a strategy decision made by trial counsel. **State v. Allen**, 94-1941 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. The investigation of strategy decisions requires an evidentiary hearing[3] and, therefore, cannot possibly be reviewed on appeal. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1st Cir. 1993).

This assignment of error is without merit or otherwise not subject to appellate review.

CONVICTIONS AND SENTENCES ON COUNTS 1, 2, 3, AND 4 AFFIRMED.

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[3] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq., in order to receive such a hearing.