NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1335

STATE OF LOUISIANA

VERSUS

DANITA TATE JOSEPH

DATE OF JUDGMENT: MAR 25 2013

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 07-09-0659, SEC. 6, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE RICHARD "CHIP" MOORE, JUDGE

* * * * * *

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

KUHN, J.

Defendant, Danita Joseph, was charged by bill of information with possession with intent to distribute marijuana, a Schedule I controlled dangerous substance, in violation of La. R.S. 40:966(A)(1). See La. R.S. 40:964. She entered a plea of not guilty and was found guilty as charged after a trial by jury. The trial court sentenced defendant to six years imprisonment at hard labor. The State filed a habitual offender bill of information, and the trial court adjudicated defendant a fourth-felony habitual offender, resentencing her to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.[1] Defendant appeals and assigns as error the sufficiency of the evidence. For the following reasons, we affirm the conviction and habitual offender adjudication, vacate the sentence, and remand for resentencing.

STATEMENT OF FACTS

On May 26, 2009, Detective Drew White of the Narcotics Division of the Baton Rouge Police Department (BRPD) received a telephone call from an anonymous concerned citizen reporting drug trafficking at 710 North 32nd Street in Baton Rouge. Two days later, May 28, Detective White and Detective Jeff Pittman, also of BRPD's Narcotics Division, went to the reported location wearing street clothes and traveling in an unmarked vehicle. They arrived at approximately 2:30 p.m., and Detective White conducted surveillance behind bushes in a vacant wooded lot located just north of the location in question. As Detective White stood within view of the residence at an estimated distance of fifteen to twenty feet

[1] The habitual offender adjudication is based on the following predicate convictions: forgery, theft of goods, and theft.

away, Detective Pittman waited in the vicinity. Both detectives were equipped with communication devices.

Approximately ten minutes into the surveillance, Detective White observed a vehicle pull into the driveway at the residence in question. According to Detective White, the driver, identified as defendant, stepped out of the vehicle with a white grocery bag in her hand. She walked north, across the vacant lot to an abandoned house and placed the garbage bag in a crevice underneath the front porch of the abandoned house and walked back to the residence where she initially parked. Detective White reported his observations to Detective Pittman. According to Detective White, shortly thereafter, another vehicle pulled up, defendant made contact with the passenger(s), walked back to the abandoned house, retrieved the bag and appeared to remove something from the bag, walked back to the vehicle, made "a handing motion with the person inside" and the driver drove away.

Several minutes later, another vehicle pulled up to the residence and defendant repeated the exact conduct and transaction, again going back to the bag and making contact specifically described as a "hand-to-hand transaction" with the passenger(s) of this vehicle. After making the observations regarding the second transaction, Detective White radioed Detective Pittman with instructions to make contact with defendant. At that point, Detective Pittman drove to the front of the residence in his unmarked vehicle, Detective White came out of his hiding spot, and they approached defendant. After defendant was given her ***Miranda*** rights and questioned, she denied any knowledge of the bag. Detective White walked over to the abandoned house and retrieved the white grocery bag while Detective

Pittman held defendant. The bag contained loose marijuana, and a plastic baggie containing a smaller amount of suspected marijuana. Detective White found no other items in the crevice of the abandoned house. After she was shown the contents of the bag, defendant again denied any knowledge of it or its contents and was placed under arrest.

ASSIGNMENT OF ERROR

Defendant contends that the evidence in support of the conviction of possession with intent to distribute marijuana is insufficient, initially disputing proof of the element of possession. She asserts that the uncorroborated testimony of Detective White was the only evidence that she knew the marijuana had been stashed under the porch of the abandoned house. She also notes a lack of any evidence that she had recently used drugs.

Defendant further disputes the element of specific intent to distribute marijuana. While conceding that Detective White gave uncorroborated testimony of his observations of what appeared to him to be hand-to-hand transactions, she points out that he did not see what was exchanged. She additionally contends that the quantity of marijuana was not large enough to infer intent to distribute and could have been indicative of personal use.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting La. C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational

trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. ***State v. Brown***, 2003-0897 (La. 4/12/05), 907 So.2d 1, 18, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006). The ***Jackson*** standard of review is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. ***State v. Graham***, 2002-1492 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. 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 that raises a reasonable doubt. ***State v. Captville***, 448 So.2d 676, 680 (La. 1984).

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. ***State v. Richardson***, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where 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. ***Richardson***, 459 So.2d at 38. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. ***State v. Smith***, 600 So.2d 1319, 1324 (La. 1992). In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. ***State v. Thomas***, 2005-2210 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683.

La. R.S. 40:966(A)(1) provides, in pertinent part, that it shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled dangerous substance classified in Schedule I. A determination of whether there is possession sufficient to convict depends on the peculiar facts of each case. One need not physically possess the controlled dangerous substance to violate the prohibition against possession; constructive possession is sufficient. A person not in physical possession of the drug is considered to be in constructive possession of a drug when the drug is under that person's dominion and control. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute constructive possession include: (1) his knowledge that illegal drugs were in the area; (2) his relationship with the person, if any, found to be in actual possession; (3) his access to the area where the drugs were found; (4) evidence of recent drug use by the defendant; and (5) his physical proximity to the drugs. ***State v. Gordon***, 93-1922 (La. App. 1st Cir. 11/10/94), 646 So.2d 995, 1002. It is well settled that the mere presence in an area where drugs are located or the mere association with one possessing drugs does not constitute constructive possession. ***State v. Toups***, 2001-1875 (La. 10/15/02), 833 So.2d 910, 913. Nonetheless, a person found in the area of the contraband can be considered in constructive possession if the illegal substance is subject to his dominion and control. ***State v. Trahan***, 425 So.2d 1222, 1226 (La. 1983). A person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. ***State v. Gordon***, 646 So.2d at 1002.

A defendant is guilty of distribution when he transfers possession or control of a controlled dangerous substance to intended recipients. See La. R.S.

40:961(14); see ***State v. Cummings***, 95-1377 (La. 2/28/96), 668 So.2d 1132, 1135. To support a conviction for possession with intent to distribute a controlled dangerous substance, the State was required to prove both possession and specific intent to distribute. See La. R.S. 40:966(A)(1). In order to prove the element of intent to distribute, the State must prove the defendant's specific intent to possess in order to distribute. Specific intent is a state of mind. It need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. ***State v. Gordon***, 646 So.2d at 1003. In cases where the intent to distribute a controlled dangerous substance is an issue, a court may look to various facts: (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of the drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as bags or scales, evidencing an intent to distribute. ***State v. House***, 325 So.2d 222, 225 (La. 1975).

At the time of the trial, June 1, 2011, Detective White had been in the narcotics division for seven years while Detective Pittman had been in the division for nine years. Both had attended several narcotics training seminars. Detective White estimated that he had been involved in the investigation of somewhere between one hundred and five hundred distribution of marijuana cases. Detective Pittman testified that his daily routine included street level narcotics sales, executing warrants, and responding to drug trafficking complaints.

Detective White testified that based on his experience, distributors often stored drugs somewhere outside of the home to avoid being caught in possession. Detective White was familiar with and had been to the residence in question for other marijuana distribution cases before receiving the anonymous tip leading to the instant offense. Detective Pittman was also familiar with the residence and testified that the occupants were related to the Tate family.[2] The tipster did not mention the nearby abandoned house but described "drive-through activity of weed sales" being conducted at 710 North 32nd Street. Detective White specifically testified that he not only observed defendant leave the white grocery bag under the porch of the abandoned house, but each time she walked back to that front porch she appeared to retrieve something from the bag, then she walked back to each vehicle in front of 710 North 32nd Street and made a hand-to-hand transaction. The first vehicle that defendant approached was headed north as it pulled in front of the residence and the defendant approached at the passenger side, while the second vehicle was traveling south as it pulled up and defendant approached the driver side. As to each transaction, brief verbal exchanges took place before defendant walked to the abandoned house and returned to the vehicles to conduct the transaction. Detective White could not discern the content of the conversations. As to the hand-to-hand transactions, Detective White specifically observed defendant and the other individual give and take something though he could not see the objects of the exchange.

In the midst of this conduct, Detective White lost sight of defendant for

[2] In various portions of the record, defendant is identified as Danita Tate Joseph although we note that the bill of information does not include a middle name

seconds -- even up to two minutes at a time -- as she entered the driveway area and walked in front of the residence. Detective White testified in that regard that the edge of the house "sticks out" and specifically stated, "If I'm behind the house a little bit, I can only see a certain portion of this driveway. She was hanging out in the driveway area and so she would come in and out of my sight just from walking around in front of the house." Insofar as the lack of money on defendant's person at the time of her arrest, Detective White testified that based on his experience with drug trafficking, some distributors did not keep money on themselves for fear of being robbed or that it might be used as evidence against them. The detectives testified that they did not search the residence or defendant's vehicle after the arrest. The detectives did not recall anyone else in the area when they first made contact with defendant although onlookers appeared later when defendant was detained. When specifically asked about defense witness Kendrick Bell, Detective White stated that he did not know whether Bell, who had been among those previously arrested on marijuana charges at the residence, was there on the night of the instant offense. Detective White added, "Well, like I said, a bunch of people showed up. You know, every time the police show up, people show up[.] [R]andom people were standing around. I don't know who all they were."

Detective White testified that marijuana was typically sold packaged in small plastic baggies. In this case, according to the Louisiana State Police Crime Laboratory report, the loose marijuana in the white plastic store bag weighed 213.45 grams while the marijuana in the small plastic baggie, also recovered from the white plastic store bag, weighed 3.02 grams. Detective White described the smaller bag as a "dime" bag, meaning the street value was ten dollars. Detective

Pittman testified that the amount of marijuana in this case was inconsistent with personal use based on the quantity and consistent with distribution. He specifically added, that based on his experience, the common user would only purchase an ounce (28 grams) or less of marijuana for consumption, not half a pound.

Defendant's sister, Robin Michelle Tate, and son-in-law, Justin Lavergne, testified as defense witnesses. Tate testified that she lived at the residence and that defendant did not live there but visited everyday. Defendant stated that she used the address since it was a family residence but that she did not live there. According to their testimony, defendant and Lavergne arrived at the residence on the day in question about the same time that Tate arrived home from work. Tate invited defendant and Lavergne to sit outside with her and they walked around to the back of the house. Tate went into the house to change her shoes and use the restroom. Lavergne and defendant were sitting under a tent when the police approached.[3] Tate testified that when she raised the garage door, one of the officers was standing in front of defendant at the tent, and the other, Detective White, was at the abandoned house. They observed Detective White reach under the porch of the abandoned house and pull out the white plastic bag before he arrested defendant and Lavergne. Defendant testified that the police searched her vehicle before she and Lavergne were taken to the police station.

Tate initially testified that her past criminal offenses, including "drugs [possession of cocaine], stealing, armed robbery," took place when she lived in

[3] The detectives could not recall whether a tent was set up that day but Detective White testified that there was often a tailgating-type tent set up outside of the residence in the middle of the driveway in front of the garage doors. He recalled having arrested other individuals who used the tent for shade from the sun, presumably as drug transactions were conducted.

Chicago and that she did not have any Baton Rouge arrests. But during cross-examination she was again asked if she had any East Baton Rouge Parish offenses and stated, "I don't have -- I don't -- it['s] been so long. The only thing I have is a simple marijuana thing ... I fell in the car with a friend girl [who] had a blunt or something in the car and they ... sent me to a decision making class." Lavergne had a prior conviction for possession of marijuana in 2009. Defendant admitted that she used to smoke marijuana and testified that her prior convictions included possession of marijuana. Lavergne, Tate, and defendant all denied any knowledge of the marijuana stashed under the abandoned house. Defendant specifically testified that the bag was never in her possession and that she never distributed drugs or observed any drug transactions.

Defense witness Kendrick Bell (who had a child with the defendant's niece) testified that he had prior misdemeanor convictions for possession of marijuana and that he placed some marijuana under an abandoned house on 32nd street on the day in question. He further stated that he left when he heard the police coming. He estimated that he had about 200 grams of marijuana and identified the white plastic bag in evidence as the one he stashed that day. Bell confirmed that he initially indicated that he got the marijuana from defendant but testified that he lied in that regard because he did not want to go to jail. Bell further testified that he had the marijuana for personal use and routinely purchased that amount.

We find that the evidence presented was sufficient to support the jury's finding that defendant was aware of the presence of the marijuana and that she exercised dominion and control sufficient to constitute constructive possession. Detective White was certain that it was defendant who drove up and exited her

vehicle, placed the white grocery bag under the porch of the abandoned house, and made contact with the occupants as the other two vehicles drove up before and after returning to the bag and appearing to remove something from the bag. These facts are sufficient to convince a rational trier of fact beyond a reasonable doubt that defendant stashed the marijuana, thereby having knowledge of its presence, and had full access to the area where the marijuana was recovered. Through defendant's own testimony and that of other defense witnesses, the jury was made aware of the hypothesis of innocence urged by defendant, i.e., that she was unaware of the presence of the marijuana under the porch and Bell or someone else stashed it in that location. The guilty verdict indicates that the jury rejected this hypothesis. We find no error in the jury's conclusion on this issue. Based on the evidence before us, it was entirely reasonable for the jury, relying on the testimony of Detective White, to conclude defendant had the requisite guilty knowledge in the commission of the offense. Analyzing the facts of the instant case and applying the ***House*** factors, the jury's finding of specific intent to distribute marijuana was sufficiently supported by the evidence presented. The State presented testimony by experienced narcotics detectives to show that the large amount of marijuana was inconsistent with personal use. Detective Pittman testified that based on his experience, the common user would only purchase 28 grams or less of marijuana for consumption, not half a pound. And Detective White indicated that the conduct, including two hand-to-hand exchanges, was consistent with a marijuana transaction as described in the anonymous complaint, and noted that the smaller baggie in evidence had a street transaction value of ten dollars.

Based on a thorough review of the record, we are convinced that any rational trier of fact could have concluded beyond a reasonable doubt that the evidence was sufficient to exclude every reasonable hypothesis of innocence. The jury reasonably rejected the defendant's testimony that she was unaware of the presence of the drugs. See ***State v. Ordodi***, 2006-0207 (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 trier of fact. See ***State v. Calloway***, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Based on a thorough review of the evidence, in the light most favorable to the prosecution, we are convinced that any rational trier of fact could have concluded beyond a reasonable doubt that the evidence was sufficient to exclude defendant's hypothesis of innocence and to support a conviction for possession of marijuana with intent to distribute. The assignment of error lacks merit.

SENTENCING ERROR

Under La. C.Cr.P. art. 920(2), we are limited in our routine review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error. According to the commitment order, the trial court imposed defendant's thirty-year habitual offender sentence without the benefit of parole. According to the penalty provision of the substantive statute and the habitual offender law, the sentencing range was thirty years to life imprisonment, and a parole restriction is not authorized. See La. R.S. 40:966(B)(3) & La. R.S.

15:529.1(A)(1)(c)(i) (prior to the 2010 amendments). Thus, the inclusion of the parole restriction rendered the sentence illegal. Because of the sentencing discretion involved, we vacate the sentence and remand for resentencing. See ***State v. Haynes***, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam).[4] After a careful review of the record in these proceedings, other than the illegal parole restriction on the sentence, we have found no reversible errors. See ***State v. Price***, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

DECREE

For these reasons, we affirm the conviction and habitual offender adjudication of defendant-appellant, Danita Joseph. The sentence is vacated and the matter is remanded for resentencing.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

[4] We note that the sentencing minute entry, in conflict with the commitment order, does not include a parole restriction, and the habitual offender sentencing transcript is not a part of the instant record. Out of an abundance of caution, this court will remand for resentencing as indicated herein. In further conflict with the commitment order, the minutes do not reflect that the original sentence was vacated before the habitual offender sentencing though it is apparent from the trial court's actions that it intended to do so. If it has not already done so, the trial court shall vacate the original sentence pursuant to La. R.S. 15:529.1(D)(3) prior to resentencing the defendant. See ***State v. Meneses***, 98-0699 (La. App. 1st Cir. 2/23/99), 731 So.2d 375, 376 n.1.