

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * NO. 2000-KA-0962
VERSUS * COURT OF APPEAL
ANTONIO EXPOSE, CAREY * FOURTH CIRCUIT
EXPOSE AND BRUCE * STATE OF LOUISIANA
CARTER *

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 397-070, SECTION "A"
Honorable Charles L. Elloie, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

On April 15, 1998, the defendants, Antonio Expose, Corey Expose, and Bruce Carter, were charged by bill of information with possession of cocaine with the intent to distribute. They filed a motion to suppress evidence, which was denied. After a trial on August 11, 1999, a twelve-member jury found them guilty as charged. On September 16, 1999, the trial court sentenced each of the defendants to five years at hard labor without benefit of parole, probation, or suspension of sentence. Defendants subsequently filed this appeal.

FACTS

Detective Ricky Jackson testified at trial that on the morning of March 4, 1998, he and other Narcotics Task Force officers set up surveillance of the 1200 block of Flood Street. Detective Warren Walker, one of the officers in the car, saw four men standing in front of 1216-18 Flood Street, which was an abandoned building. Jackson stated that, using binoculars, he observed pedestrians and people in cars approach one of the four men and engage in a

brief conversation, after which one of the men would go down an alleyway and retrieve an object. The object would then be exchanged for what appeared to be paper currency. Jackson testified that he himself saw two of the four men go into the alleyway, but he admitted that he could not specifically identify who those two men were. They stopped the surveillance after about an hour.

Subsequently, the officers drove to the 1200 block to arrest all four men. One of the men, Bruce Carter, attempted to run away, but was apprehended after a short chase. Currency and beepers were taken from each of the men. In a stack of tires in the alleyway, Walker found a plastic bag containing pieces of a white rock-like substance that was later found to be crack cocaine.

Warren Walker testified he and three other officers conducted surveillance of the 1200 block of Flood Street. Using binoculars, he saw four males separately walk up to either a vehicle or a pedestrian and take what appeared to be paper currency. The man who received the money would then walk down the alleyway, go to a stack of old tires, retrieve an object, and give that object to the person who had given him the money. The men would then talk amongst themselves and divide up the money. Walker stated that after he had seen all four men engage in a transaction, he

and the other officers were given the okay to arrest the four men. They drove to the 1200 block of Flood. One of the four men tried to flee, but Walker and Jackson pursued and arrested him. After all four men were secured, Walker canvassed the area to look for the object they were retrieving. He looked into some old tires, saw a white object wrapped in plastic, and took it.

At trial, Reginald Jacque, an expert in the retail distribution and packaging of drugs, testified that a “stash” was an amount of drugs that was kept hidden. The seller would go to and from the location of the drugs in order to avoid detection by the police. He explained that pagers were for communication by people placing orders for drugs. Jacque further testified that crack cocaine is usually sold loose in small cellophane bags, match boxes, or film canisters.

Sentrell Humble testified that she knew all of the defendants and that Antonio Expose was her boyfriend. She further testified that on the morning of March 4, she and her beautician left her house and turned onto Flood Street. She encountered Antonio, who told her that he and Corey were going to walk to Popeye’s to get some breakfast. She then went into the beauty store. When she emerged, she saw Antonio and Corey being arrested.

Bruce Carter testified that he lived around the corner from the 1200

block of Flood Street. On the morning of March 4, he walked over to the car wash on the corner. He saw Carl Bentley, and they started to walk over to Blake's Store. They encountered Antonio and Corey Expose, who told them about going to Popeye's for breakfast. Carter and Bentley continued walking toward the store when they stopped to talk to someone else. Antonio and Corey then drove up and parked in front of the abandoned house. Carter went into the abandoned house to urinate, and as he left the house, he saw the lights of the police car. Because he did not want to be arrested for trespassing, he fled, but was caught by the police. He denied selling crack cocaine.

ERRORS PATENT

A review of the record reveals no errors patent.

ANTONIO AND COREY EXPOSE'S ASSIGNMENT OF ERROR NO.

1

Antonio and Corey Expose complain that the trial court erred in

excluding photographs taken of the scene. They argue that these pictures show that the officers were lying about being able to see defendants in the alleyway.

When Detective Ricky Jackson was shown the pictures, he testified that the scene on the day of the offense was different in that there was no vegetation on the abandoned house. The photographs show a great deal of vegetation growing over the house, and it appears from these pictures that it would have been difficult for anyone to have seen anything taking place in the alley. The State objected to the introduction of the pictures, arguing, “opposing counsel hasn’t laid proper foundation as to when the pictures were taken, who took the pictures, [and] under what conditions the pictures were taken.” The trial court repeatedly sustained the State’s objection.

The environment depicted in the photographs is vastly different from the conditions existing at the time of the offense. It does not appear that the trial court erred in refusing to admit the photographs into evidence. This assignment of error is without merit.

ANTONIO EXPOSE’S ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, Antonio Expose complains that the State failed to present sufficient evidence of his guilt. He refers to the

testimony of Detective Jackson, who stated that he saw two of the four men in front of the abandoned house selling drugs, but was unable to identify anyone specifically. He also points to the testimony of Detective Walker, who said that he saw each of the four men selling drugs, but who could not state particularly what he had seen Antonio Expose do that morning.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Rosiere, 488 So. 2d 965 (La. 1986). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So. 2d 13405 (La. 1988). Also, the 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. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So. 2d 1268 (La. App. 4 Cir. 1989).

When circumstantial evidence forms the basis for the conviction, such

evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact can be inferred according to reason and common sense. State v. Shapiro, 431 So. 2d 372 (La. 1982). Such evidence must also exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The court does not determine whether another possible alternative hypothesis suggested by the defendant could afford an exculpatory explanation of the events; rather, when evaluating the evidence in the light most favorable to the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under Jackson v. Virginia. State v. Davis, 92-1623 (La. 5/23/94), 637 So. 2d 1012. This is not a separate test from Jackson v. Virginia, but is instead an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. State v. Wright, 445 So. 2d 1198 (La. 1984); State v. Addison, 94-2431 (La. App. 4 Cir. 11/30/95), 665 So. 2d 1224.

Defendant was convicted of possession of cocaine with the intent to distribute. To support a conviction for possession with intent to distribute a controlled dangerous substance, the State must prove that defendant

knowingly and intentionally possessed the drug with the intent to distribute it. State v. Smith, 94-1502 (La. App. 4 Cir. 1/19/95), 649 So. 2d 1078.

Moreover, the State need only establish constructive possession, rather actual or attempted actual possession of cocaine, to support a conviction.

State v. Trahan, 425 So. 2d 1222 (La. 1983). 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. Id.

Determining whether the defendant had constructive possession depends upon the circumstances of each case. Among the factors to be considered in determining whether the defendant exercised dominion and control sufficient to constitute constructive possession are: whether the defendant knew that illegal drugs were present in the area; the defendant's relationship to the person in actual possession of the drugs; whether there is evidence of recent drug use; the defendant's proximity to the drugs; and, any evidence that the area is frequented by drug users. State v. Allen, 96-0138 (La. App. 4 Cir. 12/27/96), 686 So. 2d 1017. However, the mere presence of the defendant in an area where drugs are found is insufficient to prove constructive possession. State v. Collins, 584 So. 2d 356 (La. App. 4 Cir. 1991).

Factors from which an intent to distribute can be inferred include:

whether the defendant has ever distributed or attempted to distribute the drug; whether the drug was in a form usually associated with possession for distribution to others; whether the amount of the drug possessed created an inference of an intent to distribute; whether expert or other testimony established that the amount of the drug found in the defendant's possession is inconsistent with personal use; and whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. State v. Hearold, 603 So. 2d 731 (La. 1992).

In State v. Allen, 96-0138 (La. App. 4 Cir. 12/27/96), 686 So. 2d 1017, the police seized cocaine and heroin from the trunk of a car and a black waist pouch located in the hallway of a house located at 3510 Desire Parkway. During surveillance of that address, the police observed the brother of the two defendants give the pouch to an unidentified man, who went into the rear hall of the house and subsequently returned without the pouch. The brother was also seen removing small objects from the trunk of the car that he gave to one of the defendants. One of the defendants was observed several times going into the rear hallway, coming back, and exchanging a small object for either money, or on one occasion, a television set. The other defendant was seen entering the rear hallway and returning with small objects, which were then given to people in various vehicles,

while the brother accepted what appeared to be money from them. The defendants were charged with the possession of cocaine and heroin with the intent to distribute, but they were convicted of simple possession of those drugs. This court affirmed their convictions, finding sufficient evidence that they exercised dominion and control over the drugs found in the trunk of the car and in the pouch in the hallway.

In the instant case, Walker testified that he saw all four of the men who stood in front of the abandoned house on Flood Street engage in what appeared to be drug transactions. He observed the men go into the alleyway where the police found a plastic bag containing crack cocaine was found in an old tire. We find that the State presented sufficient evidence that Antonio Expose was guilty of possession of cocaine with the intent to distribute it. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 1 (BRUCE CARTER)

In this assignment of error, Bruce Carter complains that the trial court erred in refusing either to grant a mistrial or to admonish the jury when one of the police officers testified that he knew the defendants because he arrested them before. He points out that the trial court sustained the objection to the reference but did not actually rule on the motion for mistrial

or admonish to the jury.

La. C.Cr.P. art. 771 provides that the trial court shall, upon request of the defendant, promptly admonish the jury to disregard a remark or comment made during trial when the remark is irrelevant or immaterial and is of such a nature that it might create prejudice against the defendant in the mind of the jury when the remark or comment is made by a witness or person other than a court official regardless of whether the comment is within the scope of La. C.Cr.P. art. 770. Article 771 further provides that upon the defendant's motion, the trial court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial. A mistrial based on a remark or comment of a witness is at the discretion of the trial court and should be granted only when the prejudicial remarks of the witness make it impossible for a defendant to obtain a fair trial. State v. Bannister, 97-0048 (La. App. 4 Cir. 1/27/99), 726 So. 2d 1135.

During cross-examination by counsel for Bruce Carter, Detective Jackson was asked what brought the four men in front of the abandoned house to his attention; and he replied that he recognized three of them.

Defense counsel then asked:

Q. You recognized them from –

A. That is correct, from previous arrests and the drug house.

Counsel for Antonio and Corey Expose objected and moved for a mistrial. The trial court sustained the objection but was silent regarding the motion for a mistrial. There was no request for an admonishment. Generally, the failure to request an admonishment precludes the defendant from raising this issue on appeal. State v. Johnson, 99-1117 (La. App. 4 Cir. 5/17/00), 764 So. 2d 1113, writ denied, 2000-2297 (La. 11/17/00), 774 So. 2d 973.

As to the presumed denial of the motion for a mistrial, defendants have not demonstrated that the brief comment made it impossible to receive a fair trial. The trial court did not abuse its discretion in refusing to grant a mistrial. This assignment of error is without merit.

CONCLUSION

Accordingly, for the foregoing reasons, the convictions and sentences of all three defendants are affirmed.

AFFIRMED