

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2000-KA-1235**  
**VERSUS** \* **COURT OF APPEAL**  
**JACKY PATTON** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 409-422, SECTION "F"**  
**Honorable Dennis J. Waldron, Judge**  
\* \* \* \* \*  
**Judge William H. Byrnes III**  
\* \* \* \* \*

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones,  
Judge Dennis R. Bagneris Sr.)

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**AFFIRMED**

Jacky Patton was charged by bill of information on September 1, 1999, with possession of diazepam or Valium, a violation of La. R.S. R.S.40:969(C). Probable cause was found and the motion to suppress the evidence was denied on September 22<sup>nd</sup>. On November 2<sup>nd</sup> a six-member jury found him guilty of attempted possession of diazepam. The State filed a multiple bill, and after a hearing on November 11<sup>th</sup>, Patton was sentenced as a third felony offender under La. R.S. 5:529.1 to serve twenty months at hard labor without benefit of probation or suspension of sentence. The defendant's motion to quash the multiple bill was denied as was his motion for reconsideration of sentence; his motion for an appeal was granted.

At trial Officers Ronnie Stevens and Krekel Eckland testified that on August 21, 1999, they were on patrol in the 1400 block of Eagle Street at about 12:45 a.m., when they noticed the defendant seated on the steps of an abandoned house. Knowing the house was unoccupied and for sale, the officers decided to make an investigatory stop. As they got out of the car, the officers saw the defendant stand and drop a white napkin from his right

hand. The napkin was retrieved and found to contain five small green pills. When asked, the defendant said he did not have a prescription for the pills or a medicine bottle, and consequently he was arrested. The officers picked up the defendant's bicycle and took it to his fiancée. The defendant did not claim that the pills were for her.

The parties stipulated that the pills were tested and proved to be diazepam or Valium.

Ms. Gaynell Osborne testified that she and the defendant were living together at the time he was arrested. Ms. Osborne stated that she had a prescription for Valium, and she had asked Patton to pick up her medication. On the night in question, Ms. Osborne was at Patton's sister's house when the police came by with the defendant's bicycle. However, when the police told her that Patton was being arrested for possession of the pills, she did not tell them the pills were for her and that she had a prescription. Ms. Osborne admitted that she had a prior conviction for possession of a "straight shooter." She did not have her prescription or her pill bottle with her at trial, but she had taken the bottle to a motion hearing a month prior to trial, and the defense attorney had made two Xerox copies of the label on the bottle. Those copies were introduced into evidence.

In a single assignment of error, the defendant argues that the evidence

is insufficient to support the conviction because the testimony proved that Patton was taking the drug to Ms. Gaynell Osborne, who had a legitimate prescription for it.

As this Court stated in State v. Brady, 97-1095, pp. 6-8 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1267-68, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99):

This court set out the standard for reviewing convictions for sufficiency of the evidence in State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-28, as follows:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4th Cir. 1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the

evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[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 (La. 1992) at 1324.

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La. 1987).

State v. Allen, 96-0138, pp. 4-5 (La. App. 4 Cir. 12/27/96), 686 So. 2d 1017, 1020.

La. R.S. 40:969(C) provides that it is “unlawful to possess a controlled dangerous substance classified in Schedule IV unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner.” Diazepam is a Schedule IV substance. Furthermore, under La. R.S. 40:990(A), the defendant bears the burden of proving that he possessed otherwise illegal drugs pursuant to a valid prescription. In State v. Lewis, 427 So. 2d 835, 840 (La. 1982), the Louisiana Supreme Court considered a case in which a defendant argued the trial judge erred in declining to instruct a jury that the State has the burden of proving that he possessed drugs without a valid prescription. The Court stated:

La. R.S. 40:990 makes it clear that a defendant has the burden of proof that he possessed the drugs by a valid prescription, an exception to possession of a controlled dangerous substance.

In the case at bar, the defendant did not carry his burden of proof that there was a valid prescription for the five Valium pills he was carrying wrapped in a napkin. The fact that he dropped the pills to the ground when he saw the police coming toward him suggests guilt. His only witness, Ms. Osborne, testified that at one time she had a prescription for Valium, but she did not produce it on the day of trial. The jury, however, viewed copies of

the label from the prescription she claimed was for her. She also testified that she did not have a valid prescription at the time of trial because she had not been back to the doctor to obtain one. Most importantly, she did not tell the officers that the pills were for her and she had them by valid prescription when they returned Patton's bicycle to her after he was arrested.

Accordingly, the evidence was sufficient to prove that Patton had possession of the Valium without a valid prescription. Since the evidence was sufficient to support a conviction for possession, it was clearly sufficient to support a conviction for the lesser included offense of attempted possession.

For reasons cited above, the defendant's conviction and sentence are affirmed.

**AFFIRMED**