STATE OF LOUISIANA	*	**NO. 2000-KA-1938**
VERSUS	*	**COURT OF APPEAL**
MARIO A. BREEDLOVE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-097, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

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

HARRY F. CONNICK
DISTRICT ATTORNEY
JULIET CLARK
ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

KAREN G. ARENA
LOUISIANA APPELLATE PROJECT

PMB 181
9605 JEFFERSON HIGHWAY, SUITE I
RIVER RIDGE, LA 70123

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

STATEMENT OF THE CASE

By bill of information dated April 7, 1999, the defendant, Mario A. Breedlove, was charged with possession of cocaine with the intent to distribute. The defendant was tried by a twelve-member jury on March 13 and 14, 2000; and, he was found guilty of attempted possession of cocaine with the intent to distribute. On May 15, 2000, the trial court sentenced the defendant to seven years at hard labor without benefit of parole, probation, or suspension of sentence. The sentence was also under the provisions of La. R.S. 15:574.5, which is the About Face Program in the Orleans Parish Prison, with the special conditions that the defendant obtain his G.E.D. and complete a substance abuse program. A motion for reconsideration of sentence was filed, but was kept open. On appeal, the defendant raises two assignments of error.

STATEMENT OF THE FACTS

Sergeant Michael Lohman testified that on October 8 and 9, 1998, he was assigned to the Fifth District Narcotics Task Force and that he prepared

a search warrant for a grocery store in the 5500 block of North Galvez. He stated that on October 8, he and a confidential informant went to the store where the informant made a controlled narcotics purchase. Lohman further stated that the informant met with an individual identified as Terrance Johnson and that the informant and Johnson went into the store. The informant was in the store for a few minutes, exited, and met with Lohman in order to give Lohman a piece of white compressed powder believed to be crack cocaine. Lohman testified that he then applied for the search warrant; and, on the following day, he kept the store under surveillance starting at around 1:30 p.m. He further testified that he saw Johnson, who was loitering in front of the store, engage in conversation with various individuals and then enter the store with the individuals. The individuals were in the store for a few minutes; and, when they came out, they were not holding anything. Lohman stated that he also saw Johnson counting money as he stood in front of the store. At approximately 2:00 p.m., Lohman saw a black Mitsubishi Diamante pull up in front of the store; and, the defendant and Russell Harris, the driver of the car, exited the vehicle. Both men went into the store, but Harris came out a few minutes later. Harris conversed with an individual, and they went into the store together. This individual left the store a few minutes, and Lohman said that this person did not have

anything in his hands.

Lohman testified that he decided it was time to execute the search warrant, and he informed other officers to move in to secure the store. Lohman stated that before the officers went to the store, he saw Johnson exit the store and go to a nearby liquor store. Lohman had an officer detain Johnson who was later taken into the grocery store. After the other officers entered the store, Lohman went inside and saw the defendant, Harris, Greg Morris, and Darryl Harrell being detained behind the cash register. He advised them that he had a search warrant which he then proceeded to execute. Lohman testified that the search turned up several cigar boxes containing glass tubes, wire mesh, and small Ziploc bags on the shelves around the cash register. The search also turned up a razor blade containing a white powder residue and several scales. A large piece of a rock-like substance believed to be crack cocaine and $191.00 in cash were found in the cash register, and a plastic bag containing pieces of a white compressed powder were found in a beverage cooler located right below the counter and cash register. Lohman stated that everyone except Darryl Harrell was placed under arrest and that Harrell was released because Harris and Morris told him that Harrell was a hairdresser and did not work at the store. Lohman further stated that currency was found in the possession of everyone except

the defendant and that Johnson was taken to the hospital after having a seizure and admitting that he had swallowed a bag of cocaine.

Michael Cooley, a special agent with the Drug Enforcement Administration, testified that he participated in the search of the store at 5500 North Galvez. He described the layout of the store and stated that there was a small vestibule area and then bulletproof glass and a door. The cash register, which was on a counter, and a cooler were behind the bulletproof glass, and Cooley stated that the defendant and the others were sitting behind the glass. He also stated that there were shelves on the wall behind the defendant and the others and that there was another cooler. He testified that the defendant and the others were sitting within an arm's length of the cash register.

Detective Kenneth Cureau testified that he helped search the store and that he found a plastic bag containing a white rock-like substance in a cooler behind the counter. He further testified that when he entered the store, he saw the defendant sitting in a chair behind the counter.

Detective Barrett Morton testified that he secured the outer perimeter of the grocery store and that he assisted in the apprehension of Terrance Johnson.

Sergeant Bruce Little testified that he entered the grocery store first in

order to get the interior door “unsecured” so that the search warrant could be executed. He testified that when he entered the store, he asked to speak with the owner because he was investigating a burglary at the store. He also told them that he had photographs that he wanted them to look at; and, Little stated that, at first, no one would admit to ownership of the store. Russell Harris, who sat behind the Plexiglas along with the defendant and Greg Morris, then stood up. Little said that the interior door was opened and that the men looked at the photographs. He then gave a prearranged signal, and other officers entered the store in order to secure the premises and execute the search warrant. Little stated that Darryl Harrell, who was standing behind the Plexiglas, was allowed to leave after all of the arrested subjects told him that Harrell was there to do Harris’ hair and was not associated with the business.

Harry O’Neal, a drug analyst at the Crime Lab, was qualified as an expert in the packaging and distribution of controlled dangerous substances. He testified that he tested the substances, some of which were in slab form, seized from the grocery stores and found that they were positive for cocaine. He stated that it was his opinion that the cocaine all came from the same source. He further stated that the glass tubes were used as crack pipes and that the copper wire mesh, which was ordinarily used for scrubbing pots,

would have been used as a filter in a crack pipe. He stated that with all of the things that had been seized, it seemed to him that an individual who had them would be cutting up the cocaine with a razor blade to sell it to individuals.

DISCUSSION

ERRORS PATENT

A review of the record shows that the defendant was not present at arraignment and pleading. La. C.Cr.P. art. 555 provides that a failure to arraign the defendant or the fact that he did not plead is waived if the defendant enters upon trial without objecting thereto, and it shall be considered as if the defendant had pleaded not guilty. Because the record shows that no objection was made by the defendant to his not being arraigned or entering a plea when he went to trial, he is considered to have pleaded not guilty. There are no other errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant complains that the State failed to present sufficient evidence of his guilt. He argues that the State failed to show that he was anything other than a visitor, that he had any connection to the grocery store, or that he exercised dominion and control over the cocaine that was found there as none of the cocaine was found in

plain view and none was found on his person.

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 1305 (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 may be inferred according to reason and common experience. 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 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.

The defendant was convicted of attempted possession of cocaine with the intent to distribute. In State v. Page, 95-2401, p. 28 (La. App. 4 Cir. 8/21/96), 680 So.2d 700, 717, this court stated:

> To prove that a defendant attempted to possess a controlled dangerous drug, the State must prove that the defendant committed an act tending directly toward the accomplishment of his intent, i.e. possession of the drugs. State v. Chambers, 563 So.2d 579 (La. App. 4th Cir. 1990). Moreover, the State need only establish constructive possession, rather than actual or attempted actual possession of cocaine, to support

> an attempted possession conviction. State v. Jackson, 557 So.2d 1034 (La. App. 4th Cir. 1990). 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 (La. 1983). An intent to distribute can be inferred from the quantity found in the defendant's possession. Trahan, supra.

Determining whether the defendant had constructive possession depends upon the circumstances of each case; and, 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).

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 from a black waist pouch located in the hallway of 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 then went into the rear hall of 3510 Desire and returned without the pouch. The brother was also seen removing small objects from the trunk of the car which he gave to one of the defendants. One of the defendants was also seen 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 going to the rear hallway and returning with small objects on other occasions 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 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.

Looking at the evidence in the light most favorable to the prosecution, we find that the State presented sufficient evidence of the defendant's guilt. He was found sitting behind the counter where the cocaine was found, and he arrived at the grocery store with Russell Harris who was seen shortly thereafter escorting an individual into the store. This same individual left

the store after only a short period of time and did not have anything in his hands when he left, which was similar to the other incidents involving Terrance Harris witnessed by Lohman. Additionally, the police released Darryl Harrell after being told he was at the store just to do Harris' hair. If the defendant had been in Harrell's position, that is a mere bystander who was allowed to go free, then that information would have been given to the police. Harrell was found standing to the side whereas the defendant sat near the cash register and the cocaine. From this evidence, it could be inferred that the defendant exercised dominion and control over the cocaine which was being sold from the store. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant complains that the trial court erred in allowing the State's expert witness to testify as to an ultimate issue of fact. He argues that O'Neal should not have been allowed to testify that the evidence seized from the grocery store was indicative of an intent to distribute.

A review of O'Neal's testimony shows there was no specific objection to O'Neal's response to the State's question of how distribution worked considering there was a scale, crack cocaine, baggies, and a razor

blade. O'Neal responded that the appearance of these things in one particular site indicated to him that the person who had these items was cutting the cocaine with a razor blade to sell it to individuals. O'Neal further testified, without objection, that the person could make crack pipes as well. The defendant did object after O'Neal again referred to the making and selling of crack pipes and the use of crack by a purchaser; and, this objection was overruled. O'Neal then stated it indicated to him that the person was selling crack cocaine and the implements to use it. We find that the defendant's objection to O'Neal's opinion testimony was too late to meet the requirements of the contemporaneous objection rule. La. C.Cr.P. art. 841; La. C.E. art. 103. This assignment of error is without merit.

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

AFFIRMED