STATE OF LOUISIANA	*	**NO. 2000-KA-2128**
VERSUS	*	**COURT OF APPEAL**
LAMAR FORD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 413-356, SECTION "J"
Honorable Leon Cannizzaro, Judge

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JUDGE

JOAN BERNARD ARMSTRONG

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin and Judge David S. Gorbaty)

MARY CONSTANCE HANES
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COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AFFIRMED;
SENTENCE AMENDED
AND AS AMENDED
AFFIRMED.

The defendant, Lamar Ford, was charged by bill of information on March 16, 2000, with possession of cocaine with intent to distribute, a violation of La. R.S. 40:967(A). At his arraignment on March 22, 2000, he pleaded not guilty. After trial on April 19, 2000, a twelve-member jury found him guilty of attempted possession of cocaine with intent to distribute. He was sentenced on June 19, 2000 to serve five years at hard labor without benefit of parole, probation, or suspension of sentence. The sentence was imposed under La. R.S. 15:574.5, allowing the defendant to participate in the About Face Program. The defendant now appeals.

At trial Officer Randy Greenup testified that on February 2, 2000, about 10 a.m., he and his partner, Officer Calvin Brazley, executed a search warrant at 1123 Touro Street and arrested six people. In the first room of the residence that he entered, Officer Greenup saw a woman with young children sitting on a bed and a young man, later identified as Lamar Ford, sitting on a sofa. Officer Greenup stated that his attention was on the woman with the children rather than on the man, and under cross-examination, the officer admitted that the defendant might have been stretched out on the sofa asleep. Officer Greenup also stated that the residence could be described as a crack house.

Officer Calvin Brazley testified that he was the first person in the house at 1123 Touro Street, and there he saw a man lying on a couch, facing the back of the couch with his hands under his body. The officer identified the defendant as the person he saw on the sofa. The officer grabbed the defendant's right arm and found in his fist a large plastic bag containing what appeared to be many rocks of crack cocaine. The bag was about "half the size of a baseball." Under the sofa pillow Officer Brazley found another small plastic bag containing one white rock.

The parties stipulated that the 124 rocks wrapped in plastic and found in the clear plastic bag and the two pieces in the small bag were tested and proved to be crack cocaine.

Sergeant Pat Brown testified, over the defense's objection, as an expert in the field of narcotics packaging for retail distribution. The sergeant admitted he did not know the defendant or have anything to do with this investigation. However, when he looked at the larger bag of cocaine retrieved from the defendant, he stated that each piece of cocaine therein was individually wrapped in plastic.

Lamar Anthony Ford, the seventeen-year-old defendant, testified that when he was arrested he was in the home of Samantha Williams who sells drugs. He stated that he lived with his mother, but on February 2, 2000, he

had arrived at Williams' house at 5 a.m. to use drugs. He admitted being asleep on the sofa when the police officers came into the room; however, he denied having a bag of cocaine in his hands. He said he was lying on his back. He also stated he had thirty-nine dollars in his pocket. Under cross-examination, he speculated that the cocaine attributed to him was probably stashed in the sofa. He acknowledged that he had sold a rock of cocaine prior to the day of this incident.

Officer Brazley testified in rebuttal that when he first saw the defendant he was sleeping face down on the sofa.

Before addressing the assignment of error, we note an error patent. The defendant was sentenced under La. R.S. 40:967(B)(4)(b), which provides for a sentence of five to thirty years with the first five years without benefits, and La. R.S. 40:979(A), which provides for a sentence in the same manner as the offense attempted but not to exceed one-half the punishment prescribed. The defendant's entire five-year sentence was imposed without benefit of parole, probation, or suspension of sentence, and under La. R.S. 40:979(A) only two and one-half years should be so imposed. Accordingly, we shall amend the defendant's sentence so that only the first two and one-half years are imposed without benefits.

In a single assignment of error, the defendant maintains that there was

insufficient evidence to prove that he attempted to possess cocaine with intent to distribute.

In State v. Ash, 97-2061 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, writ denied, 99-0721 (La. 7/2/99), 747 So.2d 15, this Court presented the standard of review applicable when a defendant claims that the evidence produced against him is constitutionally insufficient:

> 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). 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). Additionally, 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 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 proved 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 is 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. Ash, 97-2061, pp. 4-5, 729 So.2d at 667-68.

The state must prove beyond a reasonable doubt that the defendant knowingly or intentionally attempted to possess cocaine and that he attempted to possess it with the intent to distribute it. La. R.S. 40:966(A), La. R.S. 40:979; State v. Mamon, 98-1943, p.5 (La. App. 4 Cir. 9/8/99), 743 So.2d 766, 770, writ denied, 99-2715 (La. 3/17/00), 756 So.2d 326. Intent can be inferred from the circumstances surrounding the defendant's arrest. Id. In State v. Hearold, 603 So.2d 731, 735 (La. 1992), the Louisiana Supreme Court listed five factors, originally summarized in State v. House, 325 So.2d 222 (La. 1975), that are helpful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance:

> (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 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 baggies or scales, evidencing an intent to distribute.

The defendant’s possession of large sums of money may also be considered circumstantial evidence of intent. State v. Jordan, 489 So.2d 994,

997 (La. App. 1 Cir. 1986). Weapons may also be considered as evidence. State v. Hearold, 603 So.2d at 736; State v. Mamon at p.6, 743 So.2d at 770. "In the absence of circumstances from which an intent to distribute may be inferred, mere possession of a drug does not amount to evidence of intent to distribute, unless the quantity is so large that no other inference is possible." State v. Hearold, 603 So.2d at 735-36. In State v. Thomas, 543 So.2d 540, 88-1514 (La. App. 4 Cir. 1989), writ denied, 548 So. 2d 1229 (La. 1989), evidence of thirty-three bags of powder cocaine in a large plastic bag was sufficient to sustain the defendant's conviction for possession of cocaine with intent to distribute. In State v. Fernandez, 489 So.2d 345 (La. App. 4 Cir. 1986), writ denied, 493 So.2d 1215 (La. 1986), evidence of twenty-one small packets of cocaine and three larger bags of cocaine combined with an expert's testimony that that amount of cocaine was inconsistent with personal consumption was sufficient to support a conviction for distribution of cocaine.

In State v. Mamon, at pp. 8-9, 743 So.2d at 766, this Court recently examined a situation where the defendant threw down a plastic bag containing fifteen smaller plastic bags containing marijuana. He was standing in front of a neighborhood store and tossed the bag to the ground when he saw a marked police car approaching. He was carrying only

thirteen dollars and did not have a weapon. There was no expert testimony as to the significance of the amount or the packaging of the marijuana. The defendant's conviction for possession with intent to distribute was reversed by this court and amended to possession of marijuana on the grounds that the circumstantial evidence did not support the charge against the defendant.

In the case at bar, the defendant was found in the crack house for which the arresting officers had a search warrant. He maintains that there was no evidence for possession of cocaine because he testified that he did not have the large plastic bag in his hand when the officer found him. However, Officer Brazley testified that in one hand the defendant was holding a bag containing many individually wrapped rocks and the second bag containing only one rock was found beneath his pillow. In finding the defendant guilty the jury obviously found the officer's testimony more credible than the defendant's version.

Under the factors listed in State v. House, 325 So.2d 222 (La. 1975), and cited in State v. Hearold, 603 So.2d 731, we note that although the defendant was sleeping when arrested and had not been seen attempting to distribute the drug, he did acknowledge that he had sold cocaine on another occasion. Secondly, the drug was in the form associated with distribution to others, in that each of the pieces was individually wrapped. Thirdly, the

amount of cocaine found, 143 pieces, creates an inference of intent to distribute. As to the fourth factor, the expert testimony established only that the cocaine was individually wrapped and not that the amount appeared to be inconsistent with individual use; however, inherent in the amount itself is the fact that it is incompatible with individual use. Finally, there was no paraphernalia found, as required by the fifth factor.

This case can be distinguished from State v. Mamon, 98-1943 (La. App. 4 Cir. 9/8/99), 743 So.2d 766, writ denied, 99-2715 (La. 3/17/00), 756 So.2d 326. In Mamon, the defendant was standing on the street and dropped a parcel, later found to contain drugs, on seeing the police; in the case at bar, the defendant was asleep in a crack house when arrested, and he admitted he had been smoking cocaine there. The defendant was apprehended in a house where drugs are sold and consumed; thus, initially there is a presumption that the defendant is involved in the consumption of illegal narcotics. In Mamon, the defendant discarded one bag containing fifteen smaller bags of marijuana; in this case, the defendant held a bag containing 143 rocks of crack cocaine. This Court found in Mamon that there was insufficient evidence to support the charge that the defendant intended to distribute the marijuana because the amount of marijuana was insufficient circumstantial evidence. In contrast, in the case at bar, there is more evidence than in State

v. Thomas, 543 So.2d 540, (La. App. 4 Cir. 4/27/89), where thirty-three pieces of individually wrapped crack cocaine were held to be sufficient to support a distribution conviction, or in State v. Fernandez, 489 So.2d 345 (La. App. 4 Cir. 1986), where twenty-one small packets and three large bags of cocaine were deemed sufficient.

Because the circumstantial evidence supports the conviction of attempted possession of cocaine with intent to distribute, we affirm the defendant's conviction. His sentence is amended to provide for a restriction of the benefits of parole, probation, and suspension of sentence for two and one-half years, and as amended, his sentence is affirmed.

CONVICTION AFFIRMED;
SENTENCE AMENDED
AND AS AMENDED
AFFIRMED.