STATE OF LOUISIANA	*	**NO. 2001-KA-1727**
VERSUS	*	**COURT OF APPEAL**
ANN M. BERNARD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 407-589, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay III, Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

STATEMENT OF CASE

The defendant Ann Bernard was charged by bill of information on June 18, 1999, with one count of possession with the intent to distribute crack cocaine and one count of distribution of crack cocaine in violation of La. R.S. 40:967 (A)(1). The defendant pleaded not guilty at her June 23,1999, arraignment. On September 15, 1999, the defendant waived her right to jury trial. On that same date, the court found the defendant guilty of possession of crack cocaine and attempted distribution of crack cocaine. On September 22, 1999, the defendant was sentenced to seven months for her possession of cocaine conviction, and thirty months for the attempted distribution conviction. On March 13, 2000, the trial court denied the defendant's pro se motion to reconsider sentence. On June 28, 2000, the defendant was granted an out of time appeal.

STATEMENT OF FACT

Detective Donald Polk testified that on June 3, 1999, at approximately 8:00 p.m., he and other officers were located on Chef Menteur Hwy. for an

undercover operation. Undercover Detective Polk met Leroy Williams and asked Williams if Williams could help him purchase crack cocaine. Williams got into the vehicle with Detective Polk and explained that he could make a phone call to have some delivered. Detective Polk drove Williams to a nearby restaurant where Williams made a phone call. After the phone call, Williams explained to the detective that a woman would be delivering to them, and the two returned to the place where they met. While in the vehicle together the detective gave Williams a twenty-dollar bill, which had been photocopied for use in the drug purchase. A woman later identified as the defendant arrived on the scene, driving a green Pontiac. Williams met with the defendant and exchanged the twenty dollars for a piece of crack cocaine. Williams then returned to Detective Polk's vehicle and gave him the crack cocaine.

Officer Michael Hamilton testified that he was part of the take down team that arrested the defendant. The officer further testified that the defendant was arrested about a half mile from the place of the drug transaction. Once the defendant was under arrest Officer Hamilton conducted a pat down search and retrieved the currency given to Williams by Detective Polk.

Detective Perry Burke testified that he observed and identified the

defendant as the person who made the delivery to Williams.

Officer Raynell Celestine testified that she followed Detective Polk, and identified the defendant as the person who made the delivery in the drug transaction. Officer Celestine further testified that she recovered a piece of crack cocaine from the defendant's person when she escorted the defendant to the restroom.

The state and the defense stipulated that Pham Wong was an expert in forensic chemistry, and if he were to testify he would state that he tested substances that tested positive for cocaine.

ERRORS PATENT

There are no errors patent.

ASSIGNMENT OF ERROR NUMBER 1

The defendant complains the evidence was insufficient to support her conviction of attempted distribution of cocaine.

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 all of the essential elements of the offense proven 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 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. 4th Cir. 1989).

When circumstantial evidence forms the basis for the conviction, such evidence must 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, this court when evaluating the evidence in the light most favorable to the prosecution, must determine 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. State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012. This is not separate test from Jackson, but is instead an evidentiary guideline for the jury when considering circumstantial evidence, and this test 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).

To support a conviction for an attempt, the state must prove that the defendant had the specific intent to commit the crime and did or omitted some act toward accomplishing his goal. A person may be convicted of an attempt to commit a crime even where it appears that the defendant actually perpetrated the offense. La. R.S.14:27.

La. R.S. 40:967 provides that it shall be unlawful for any person to knowingly or intentionally: produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance analogue classified in Schedule II.

A defendant is guilty of distribution of cocaine when he transfers possession or control of cocaine to his intended recipient. State v. McGee, 98-2116 p.10 (La. App. 4 Cir. 2/23/00), 757 So.2d 50,58, writ denied, 2000-0877 (La. 10/27/00), 772 So.2d 121. The state must show (1) delivery or physical transfer; (2) guilty knowledge of the controlled dangerous substance at the time of transfer; and (3) the exact identity of the controlled dangerous substance. McGee, id.

In State v. McGee, id, this court found that the evidence was sufficient to support a conviction for attempted distribution of cocaine where a police officer testified that the defendant approached the officer and told the officer

he knew where she could get twenty dollars' worth of drugs thereby indicating intent and willingness to participate in distribution of narcotics. The defendant then went to a second person, who gave the cocaine to a third person, who gave the cocaine to the officer.

In the instant case, like McGee, the defendant participated in the delivery of a substance found to be a controlled and dangerous substance. Therefore, it does not appear that the trial court abused its discretion in finding the defendant guilty of attempted distribution of cocaine. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant also complains that the record does not show she made a knowing and intelligent waiver of her right to a jury trial.

La. C.Cr.P. art. 780 provides, in part:

> A. A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury.
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> B. The defendant shall exercise his right to waive trial by jury in accordance with the time limits set forth in Article 521. However, with permission of the court, he may exercise his right to waive trial by jury at any time prior to commencement of trial.

In State v. Abbott, 634 So.2d 911 (La. App. 4 Cir. 1994), this court stated that the waiver of trial by jury was valid only if the defendant acted voluntarily and knowingly. The court further stated that the preferred method of ensuring that right was for the trial judge to advise the defendant personally on the record of his right to a jury trial and to require the defendant to waive the right personally, either in writing or by oral statement in open court on the record. However, as noted by this court in State v. Richardson, 575 So.2d 421 (La. App. 4th Cir. 1991), the Supreme Court has upheld cases in which a waiver of jury trial was made by the defendant's attorney, rather than the defendant personally, when the defendant was considered to have understood his right to a jury trial and still consented to the waiver.

The waiver of the right to a jury trial cannot be presumed. State v. Wolfe, 98-0345 p.6 (La. App. 4 Cir. 4/21/99), 738 So.2d 1093, 1097.

In State v. Moses, 2001-0909 p.4 (La. App. 4 Cir. 12/27/01), 806 So.2d 83, 86, citing State v. Nanlal, 97-0786 (La. 9/26/97), 701 So.2d 963, this court indicated that where the record does not reflect a valid waiver of a defendant's right to trial by jury, the proper procedure is to remand the case to the district court for an evidentiary hearing to determine whether the defendant validly waived that right. If the evidence showed the defendant

did not make a valid waiver of his right to trial by jury, the district court must set aside the defendant's conviction and sentence, and grant him a new trial.

In Moses, id, the record contained no evidence that the defendant waived his right to a jury trial. However, in the instant case the minute entry of June 23, 1999, which was the defendant's arraignment date, states that the trial court advised the defendant of her right to trial by judge or jury. The minute entry of September 15, 1999, notes that the defendant appeared for trial and with counsel present the defendant waived her right to trial by jury. The minute entry also notes that both the state and the defense were ready to proceed to trial. It can be presumed that the defendant had no objections to proceeding to trial by judge.

For the foregoing reasons we affirm the defendant's conviction and sentence.

AFFIRMED