FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4554

DION JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Alachua County.
James M. Colaw, Judge.

December 19, 2019

LEWIS, J.

Appellant, Dion Johnson, appeals his convictions for trafficking in substituted cathinones, possession of a structure where drugs are trafficked, sold, or manufactured, and use or possession of drug paraphernalia. Appellant argues that the trial court erred in denying his motion for judgment of acquittal. Although we find no error in the denial of Appellant's motion as to the possession crimes and affirm those convictions, we agree with Appellant as to the trafficking offense and, therefore, reverse that conviction.

Appellant was visiting the house at issue when SWAT team members executed a search warrant. There were other individuals present at the residence. Appellant was neither the owner nor the

lessee of the house and was not the named subject of the search warrant. The evidence at trial established that many people in the neighborhood would freely come and go from the house. One of the State's witnesses testified that drugs were routinely sold there and that although she could not remember the exact date, she had seen Appellant sell drugs from there on one occasion. Appellant was in the living room when law enforcement arrived. Various drugs were found in the bedrooms, including what was determined to be substituted cathinones. The only item found in the house that had any connection to Appellant was a cell phone. The one photograph found on the phone showed approximately six baggies on top of what was identified as the kitchen countertop in the house. The baggies contained unidentified items, but the way in which they were tied was similar to the way in which the baggies containing the drugs found in the bedrooms were fastened. The photograph was taken two days before the search warrant was executed. The trial court denied Appellant's motion for judgment of acquittal, relying in part upon the photograph of what "appeared to be similar suspected controlled substances being photographed from within that house." The jury found Appellant guilty of the three offenses at issue along with a fourth offense, the conviction for which was not appealed. It found him not guilty of two other drug-related offenses. The trial court sentenced Appellant to fifteen years' imprisonment on the trafficking offense and to time served and probation on the other offenses for which he was found guilty. This appeal followed.

An appellate court reviews a trial court's denial of a motion for judgment of acquittal de novo to determine whether the evidence is legally sufficient to sustain a conviction; in doing so, the court must consider the evidence and all reasonable inferences therefrom in a light most favorable to the State. *Kemp v. State*, 166 So. 3d 213, 216 (Fla. 1st DCA 2015). In a case where the State submitted some direct evidence, the denial of a motion for judgment of acquittal will be affirmed if it is supported by competent and substantial record evidence. *McWatters v. State,* 36 So. 3d 613, 631 (Fla. 2010). In a wholly circumstantial evidence case, however, a special standard applies, whereby a conviction cannot be sustained unless there is competent, substantial evidence inconsistent with any reasonable hypothesis of innocence. *Id.*; *see also Kocaker v. State*, 119 So. 3d 1214, 1225 (Fla. 2013)

(explaining that the State is only required to introduce competent evidence inconsistent with the defendant's theory of events and need not conclusively rebut every possible variation of events that may be inferred).

Appellant contends in part that his convictions cannot be sustained because the State's evidence was not inconsistent with his reasonable hypothesis of innocence. However, this specific argument was not raised below when defense counsel moved for a judgment of acquittal. As we have explained, there are two legally distinct issues that can be raised by a defendant in a motion for judgment of acquittal: (1) whether the State presented legally sufficient evidence to establish each element of the charged offense; and (2) whether in a case where the only proof of guilt is circumstantial, the State's evidence is inconsistent with any reasonable hypothesis of innocence, including the defendant's own version of the evidence. *Newsome v. State*, 199 So. 3d 510, 512 (Fla. 1st DCA 2016). "To preserve either or both of the above issues, the precise legal argument as to why the evidence is insufficient to sustain a conviction must be presented to the trial court." *Id.* at 513. Because Appellant did not raise a circumstantial evidence/reasonable hypothesis argument below, that argument was not preserved for appeal. *Id.; see also Charles v. State*, 253 So. 3d 1230, 1233 (Fla. 1st DCA 2018) ("Here, as in *Newsome*, appellant's counsel failed to preserve a claim that the evidence was wholly circumstantial, and thus the special standard of review for circumstantial evidence claims was not triggered."). As such, in analyzing this issue, the question is whether the trafficking conviction is supported by competent, substantial evidence. *See McWatters*, 36 So. 3d at 631.

Appellant was tried and found guilty of violating section 893.135(1)(k), Florida Statutes (2017), which prohibits a person from selling, purchasing, manufacturing, delivering, or bringing into Florida or knowingly being in actual or constructive possession of ten grams or more of a substituted cathinone. To prove the crime of trafficking, the State must prove that: (1) the defendant knowingly possessed, sold, purchased, manufactured, delivered, or brought into Florida the substance at issue; (2) the substance was a controlled substance; and (3) the substance was a certain weight. Fla. Std. Jury Instr. (Crim.) 25.7(a).

Where, as here, the conviction is based on a theory of constructive possession, the State is required to prove that a defendant knew of the presence of the contraband and had the ability to maintain dominion and control over it. *Nolley v. State*, 237 So. 3d 469, 474 (Fla. 1st DCA 2018). "Knowledge may be established if the contraband was in plain view in the common areas. Dominion and control may be inferred if the defendant was a resident or owner of the premises in exclusive possession." *Smith v. State*, 125 So. 3d 359, 361 (Fla. 1st DCA 2013). "If the evidence showed joint possession of the premises, or that the defendant was a visitor, the state must establish control over the contraband by independent proof beyond mere proximity, such as by evidence of incriminating statements or circumstances." *Id.; see also Nolley*, 237 So. 3d at 474-75 (explaining that when the premises where the contraband is found are in joint possession, the elements of constructive possession may not be inferred and must be established by independent proof, which "may be evidence establishing that the defendant had actual knowledge of the presence of the contraband in the place where it was found or circumstantial evidence from which a jury might properly infer that the defendant had knowledge of the presence of the contraband").

We agree with Appellant that the State's evidence was insufficient to show his knowledge of and control over the substituted cathinones. The State offered no evidence connecting Appellant to the bedroom in which the cathinones were located. It is undisputed that Appellant was in the living room when law enforcement arrived and that other individuals were in the house at the time. Although one of the State's witnesses testified that Appellant sold drugs from the residence on one occasion, the witness was unable to provide the date of that alleged sale, and it is unknown what type of drugs Appellant sold. As such, other than serving as evidence that Appellant had knowledge that drugs were sold from the residence, that witness's testimony provided no link between Appellant and the substituted cathinones for which he was convicted of trafficking.

It appears from the record and the State's argument on appeal that the primary piece of evidence relied upon by the State was the photograph found on Appellant's phone. Indeed, the trial court

specifically mentioned the photograph of "what appeared to be similar suspected controlled substances being photographed from within that home." However, even when taking the evidence in the light most favorable to the State, which we must, and even assuming that the photograph was taken by Appellant since it was found on his phone, that does not, in our opinion, show that Appellant had knowledge of and control over the substituted cathinones. Not only was the photograph taken two days prior to the search, but, according to the evidence, it was taken in the kitchen, not in the bedroom where the drugs at issue were found. Our conclusion is buttressed by the fact that the State did not offer any testimony or evidence as to what the items in the photograph actually were or appeared to be. Furthermore, even if the State had presented a witness to testify that the items in the photograph were suspected narcotics and even though the baggies shown in the photograph were tied in a similar manner as were the baggies in the bedroom, the color of the items, from our review of the record, does not match.[*] As the State acknowledges on appeal, the photograph of the substituted cathinones found in the bedroom were "brownish colored portions of a substance in cube shapes." While the State contends that the photograph on Appellant's phone "shows what appears to be the same brownish cube-shaped substance," we see nothing in the photograph that matches the substance that was identified as substituted cathinones.

It is for these reasons that we reject the State's argument that the photograph constitutes independent proof that Appellant had knowledge of the substituted cathinones found in the bedroom. Nor does the photograph amount to independent proof that Appellant had control over the drugs for which he was convicted of trafficking. *See Smith*, 125 So. 3d at 360 ("The fact that the man [in a photograph relied upon by the State] is holding a Gatorade bottle that might contain methamphetamine, because it looks like the smaller Gatorade bottle that was seized during the search, may

[*] Pursuant to Florida Rule of Appellate Procedure 9.200(a), we requested and received from the lower tribunal's clerk's office four original exhibits, including the photographs of the substituted cathinones found in the bedroom and the photograph from Appellant's phone.

have been incriminating regarding whether appellant had knowledge about the bottle found during the search, but it did not constitute evidence that he had control over the bottle found during the search, which the evidence showed was a different bottle."); *see also Thomas v. State*, 269 So. 3d 681, 685 (Fla. 2d DCA 2019) (holding that the trial court erred in denying the appellant's motion for judgment of acquittal where the State's evidence proved only that the appellant was one of multiple individuals who had access to a room containing the drugs at issue); *Evans v. State*, 32 So. 3d 188, 189-91 (Fla. 1st DCA 2010) (holding that the State failed to offer independent proof of the appellant's knowledge of the hidden contraband and noting that although presence of the appellant's passport in the bag containing contraband suggested that he could have placed the passport there, that inference provided no time frame as to when the contraband came to reside in the bag or any insight into the appellant's present dominion over the contraband); *Brown v. State*, 8 So. 3d 464, 466 (Fla. 2d DCA 2009) (holding that while the State established that the appellant constructively possessed drugs and paraphernalia that were in plain view, the State failed to present independent proof of the appellant's knowledge of the cocaine in the drawer).

Based upon the foregoing, we reverse Appellant's trafficking conviction, vacate his fifteen-year sentence, and remand with directions that the trial court enter a judgment of acquittal on that offense. *See Wright v. State*, 221 So. 3d 512, 525 (Fla. 2017) (holding that the evidence was insufficient to sustain the appellant's convictions, reversing the convictions, vacating the sentences, and remanding with directions to enter judgments of acquittal); *Grandison v. State*, 160 So. 3d 90, 91 (Fla. 1st DCA 2015) (holding that the trial court erred in denying the appellant's motion for judgment of acquittal, reversing the convictions, and vacating the sentence on one of the offenses). We otherwise affirm.

AFFIRMED in part, REVERSED in part, and REMANDED with directions.

RAY, C.J., and BILBREY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Tabitha Herrera, Assistant Attorney General, Tallahassee, for Appellee.