

NOT DESIGNATED FOR PUBLICATION

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 KA 0647

STATE OF LOUISIANA

VERSUS

KENDALL D. CLOUD

Judgment Rendered: NOV 14 2012

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 507,823

Honorable Raymond S. Childress, Judge

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and
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Defendant – Kendall D. Cloud

BEFORE: PARRO, HUGHES, AND WELCH, JJ.

WELCH, J.

The defendant, Kendall D. Cloud, was charged by bill of information with one count of felon in possession of a firearm¹ (count I), a violation of La. R.S. 14:95.1(A), and one count of possession of cocaine (count II), a violation of La. R.S. 40:967(C), and pled not guilty on each count. Following a jury trial, on count I, he was found not guilty, and on count II, he was found guilty as charged. Thereafter, the State filed a multiple offender bill of information against the defendant, alleging, on count II, that he was a second-felony habitual offender.² The defendant agreed with the allegations of the multiple offender bill, and was adjudged a second-felony habitual offender on count II. On count II, he was sentenced to eight years at hard labor. He now appeals, challenging the sufficiency of the evidence on count II. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence on count II.

FACTS

On May 13, 2011, the defendant was on parole. He was living in his grandmother's trailer on Sylve Road in Slidell. On that date, Department of Public Safety and Corrections Probation and Parole Officer Letitia Moore conducted a residence check, during which she discovered a gun outside the trailer, and cocaine in the defendant's grandmother's car.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues the testimony of Probation and Parole Officer Letitia Moore was insufficient to support the conviction on count II without corroborating evidence.

¹ The bill of information charged that the defendant had previously been convicted of possession of 28-200 grams of cocaine.

² The habitual offender predicate offense was set forth as the defendant's March 26, 2002 guilty plea, under Twenty-second Judicial District Court Docket #341035, to distribution of cocaine.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

As applicable here, it is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II. La. R.S. 40:967(C). Cocaine is a controlled dangerous substance as classified in Schedule II. See La. R.S. 40:964, Schedule II (A)(4).

The State is not required to show actual possession of drugs by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the

area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 2003-0917 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

A determination of whether or not there is “possession” sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. **Smith**, 868 So.2d at 799.

Once the crime itself has been established, a confession alone may be used to identify the accused as the perpetrator. **State v. Carter**, 521 So.2d 553, 555 (La. App. 1st Cir. 1988).

Officer Moore testified her position gave her the authority to search the home, the person, or the property of those persons she was supervising. On May 13, 2011, she was supervising the defendant, a parolee. Officer Moore received information the defendant “was doing things that he should not have been doing while on parole.” Accordingly, Officer Moore decided to conduct a “residence check” of the defendant’s residence. Officer Moore requested assistance from the St. Tammany Parish Sheriff’s Department and went to the defendant’s residence. As Officer Moore and the deputies approached the defendant’s residence, she saw Mario Cloud, the defendant’s uncle, sitting at a table, cleaning a gun. Mario Cloud stated he was cleaning the gun for the defendant, who was “in the house.” Officer Moore went to the defendant’s residence, handcuffed him, searched the residence, and brought the defendant outside. A dog trained to detect the odor of narcotics alerted to the area around the driver’s-side door of defendant’s grandmother’s

vehicle. Officer Moore told the defendant, “[I]f there is any in there, tell me now so the dog doesn’t damage your grandmother’s car.” According to Officer Moore, the defendant replied “[I]t’s in the door.” Thereafter, Officer Moore recovered 2.31 grams of cocaine from a compartment on the inside of the driver’s-side door of the defendant’s grandmother’s vehicle. Officer Moore indicated she then questioned the defendant about the drugs and the gun, and he stated, “[Y]eah, they’re mine.”

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant was guilty of possession of cocaine. The verdict rendered in this case indicates the jury rejected the defendant’s theory that the cocaine found in the defendant’s grandmother’s vehicle belonged to someone other than the defendant. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. Further, the verdict returned by the jury indicates it accepted the testimony of Officer Moore, and rejected the defendant’s attempts to discredit that testimony. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder’s determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, in reviewing the evidence, we cannot say that the jury’s determination was irrational under the facts and circumstances presented to them. See State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its

appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*).

This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction, habitual offender adjudication, and sentence on count II are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT II AFFIRMED.