NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 1103

STATE OF LOUISIANA

VERSUS

ULYSSES GARRETT

Judgment Rendered: APR 2 4 2015

* * * * * *

On appeal from the
Twenty Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Docket Number 12 CR 8 119070, Division G

Honorable Scott C. Gardner, Judge Presiding

* * * * * *

Walter P. Reed
District Attorney
Covington, LA

Jay Adair
Assistant District Attorney
Franklinton, LA

Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Counsel for Appellee
State of Louisiana

Prentice L. White
Louisiana Appellate Project
Baton Rouge, LA

Counsel for Defendant/Appellant
Ulysses Garrett

* * * * * *

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

GUIDRY, J.

The defendant, Ulysses E. Garrett, was charged by bill of information with possession of a Schedule II controlled dangerous substance (cocaine) (count one), a violation of Louisiana Revised Statutes 40:967C, and possession of drug paraphernalia (count two), a violation of Louisiana Revised Statutes 40:1023C.[1] He pled not guilty. After a simultaneous jury trial (count one) and bench trial (count two), the defendant was found guilty as charged on both counts. The defendant filed motions for new trial and post-verdict judgment of acquittal, both of which were denied. The defendant was sentenced to thirty months at hard labor on count one and to ninety days on count two. The district court ordered that the sentences run concurrently. Subsequently, the State filed a multiple offender bill of information in regard to count one.[2] The defendant agreed to the allegations of the multiple offender bill and was adjudicated a third-felony habitual offender. The district court vacated the sentence imposed on count one only and resentenced the defendant to forty months at hard labor without the benefit of probation or suspension of sentence to run concurrently with the defendant's sentence on count two. The defendant now appeals, challenging the sufficiency of the evidence in support of his convictions. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence on count one. With respect to his conviction and sentence on count two, the misdemeanor charge is not appealable, and the defendant should have applied for a writ of review. See La. Const. art. V, § 10; La. C. Cr. P. art. 782; La. C. Cr. P. art. 912.1C(1). However,

---

[1] The bill of information also charges Philana B. Cassidy with the same offenses.

[2] The predicate offenses as listed on the multiple offender bill of information are the defendant's January 2007 guilty plea to possession of cocaine under 22nd Judicial District Court ("JDC") docket number 06-CR2-94915 and February 2008 guilty plea to possession of cocaine under 22nd JDC docket number 07-CR3-97184.

we choose to exercise our supervisory jurisdiction and also affirm his conviction and sentence on count two. See La. Const. art. V, § 10(A).

JURISDICTIONAL ISSUE

At the outset, we note a jurisdictional issue. The appellate jurisdiction of this court in criminal cases extends only to those cases triable by a jury. See La. Const. art. I, § 17; La. Const. art. V, § 10; La. C. Cr. P. art. 782. A misdemeanor is not triable by a jury unless the punishment that may be imposed exceeds sixth months' imprisonment. See La. Const. art. I, § 17A; La. C. Cr. P. art. 779.

In the instant case, the defendant was charged in a single bill of information with a felony on count one and a misdemeanor on count two.[3] Count one was triable (and actually tried) before a jury. Count two was only triable (and actually tried) before the district court judge. The defendant's instant appeal seeks review of his convictions on both counts. However, the proper procedure for seeking review of a misdemeanor conviction or sentence is an application for writ of review directed to this court to exercise its supervisory jurisdiction.

Rather than dismissing the defendant's appeal with respect to count two, we find that the interests of justice are better served by reviewing count two pursuant to our supervisory jurisdiction. In this case, we find that the facts of the felony and misdemeanor convictions are intertwined to the point that the interests of justice are best served by considering the matters together. Accordingly, pursuant to our supervisory jurisdiction, we will review the misdemeanor conviction on count two. See La. Const. art. V, § 10(A); State v. Trepagnier, 07-0749, pp. 3-4 (La. App. 5th Cir. 3/11/08), 982 So. 2d 185, 188, writ denied, 08-0784 (La. 10/24/08), 992 So. 2d 1033.

---

[3] We note the misjoinder of these offenses under La. C. Cr. P. art. 493, but the defendant apparently did not raise this issue prior to trial, and he does not raise it on appeal. Therefore, we consider any issue with respect to the misjoinder of offenses to be waived. La. C. Cr. P. 841.

FACTS

On August 8, 2012, at approximately 11:15 p.m., Washington Parish Sheriff's Office Detective Jason Garbo assisted two other officers with a report of a man walking down the middle of the northbound lane of Highway 430. The three officers arrived to the scene in separate police units and each activated his unit's lights. The three units were parked partially in the northbound lane of traffic. Detective Garbo noticed a vehicle approaching in the southbound lane at either the speed limit or a higher rate of speed. Because the police units were protruding onto the road and the other two officers were handling the situation with the man walking on the road, Detective Garbo activated the strobe light on his flashing lights and hollered at the vehicle to slow down. The vehicle did not decelerate until it was approximately one hundred or one hundred and fifty yards from the location where Detective Garbo was standing on the road.

Detective Garbo noticed that the driver and passenger of the vehicle were not wearing seatbelts and that there was no license plate on the vehicle. He asked the driver to pull over, and he stepped around to the driver's side of the vehicle while one of the other officers on the scene approached the passenger side of the vehicle. The driver, who was later identified as the defendant, stepped out of the vehicle. The passenger, later identified as Philana Cassidy, also exited the vehicle. As the defendant was stepping out of the vehicle, Detective Garbo saw a twisted yellow baggie on the seat. Detective Garbo asked the defendant for permission to search the vehicle, and the defendant consented to a vehicle search. The yellow baggie was located in the center of the driver's seat, and a glass pipe was located between the driver's seat and the center console.

Detective Garbo testified that approximately three seconds elapsed between the time he asked the defendant to exit the vehicle and the time that he saw the

yellow baggie. During those three seconds, he did not see Cassidy or anyone else reach over to the driver's seat or to the area between the driver's seat and the console. According to Detective Garbo's testimony, Cassidy was exiting the vehicle at the same time he saw the baggie on the seat, and Cassidy was not in the vehicle after the defendant exited. The defendant told Detective Garbo that the cocaine and the pipe did not belong to him and that Cassidy had borrowed his vehicle earlier in the evening. Cassidy denied ownership of the cocaine and pipe. The defendant and Cassidy were both placed under arrest.

The defendant's written voluntary statement was proffered by the defense at trial. In this statement, he indicated that someone had borrowed his vehicle earlier on the day of the instant offense, and he denied any knowledge of the items located in his vehicle. The material located in the yellow plastic baggie inside of the defendant's vehicle tested positive for 0.13 grams of cocaine.

SUFFICIENCY

In his sole assignment of error, the defendant argues that there was insufficient evidence in support of his convictions. Specifically, the defendant contends that the State failed to prove that he knowingly or intentionally possessed the cocaine and glass pipe located in his vehicle. He claims that it was actually Cassidy who was in possession of the items.

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," every

reasonable hypothesis of innocence is excluded. State v. Wright, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157, 00-0895 (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, 98-0601 at p. 3, 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. See La. R.S. 40:967C. Cocaine is a controlled dangerous substance classified in Schedule II. See La. R.S. 40:964, Schedule IIA(4). It is also unlawful for any person to use, or to possess with intent to use, any drug paraphernalia. La. R.S. 40:1023C.

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, 03-0917, pp. 5-6 (La. App. 1st Cir. 12/31/03), 868 So. 2d 794, 799.

A determination of whether 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, 03-0917 at p. 6, 868 So. 2d at 799.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession of cocaine and drug paraphernalia, and the defendant's identity as the perpetrator of those offenses. The jury and the district court judge rejected the defendant's theory that the cocaine and glass pipe located in his vehicle belonged to Cassidy. 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); see also State v. Mack, 13-1311, p. 9 (La. 5/7/14), 144 So. 3d 983, 989 (per curiam). No such hypothesis exists in the instant case. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. State v. Lofton, 96-1429, p. 5 (La. App. 1st Cir.

3/27/97), 691 So. 2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So. 2d 1331. Further, we cannot say that the jury's and the district court's determinations were irrational under the facts and circumstances presented to them. See State v. Ordodi, 06-0207, p. 14 (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 factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the factfinder. See State v. Calloway, 07-2306, p. 1-2 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

This assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.