STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 1535-R

STATE OF LOUISIANA

VERSUS

JOSEPH MICHAEL MOULTRIE

Judgment Rendered: DEC 14 2017

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On Remand from the Louisiana Supreme Court

Appealed from the 32nd Judicial District Court,
Parish of Terrebonne, State of Louisiana
Trial Court No. 586702

The Honorable David W. Arceneaux, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

HH
Holdridge J. dissents with reason

CRAIN, J.

The defendant, Joseph Michael Moultrie, was convicted of possession with intent to distribute cocaine and, after admitting to his status as a habitual offender, was adjudicated a second-felony habitual offender and sentenced to twenty years imprisonment at hard labor without benefit of probation or suspension of sentence. *See* La. R.S. 40:967(A)(1). On original appeal, this court determined the search of the barbeque grill where the drugs were found violated the defendant's constitutional rights, granted the defendant's motion to suppress, and reversed the defendant's conviction that was dependent upon the drug evidence. The Louisiana Supreme Court reversed, finding the defendant failed to make a threshold showing of any reasonable expectation of privacy in the grill, and remanded the matter to this court for consideration of the defendant's argument that the evidence was insufficient to support his conviction of possession with intent to distribute cocaine. *State v. Moultrie*, 14-1535 (La. App. 1 Cir. 10/23/15), 182 So. 3d 1017, *rev'd*, 15-2144 (La. 6/29/17), 224 So. 3d 349 (*per curiam*). We affirm the conviction, habitual offender adjudication, and sentence.

DISCUSSION

A conviction based on insufficient evidence cannot stand, as it violates due process. *See* U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging sufficiency of evidence, an appellate court must determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt based on the entirety of the evidence, both admissible and inadmissible, viewed in the light most favorable to the prosecution. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *State v. Oliphant*, 13-2973 (La. 2/21/14), 133 So. 3d 1255, 1258-59; *see also* La. Code Crim. Pro. art. 821B; *State v. Mussall,* 523 So. 2d 1305, 1308-09 (La. 1988). When circumstantial evidence forms the basis for conviction, the

evidence, "assuming every fact to be proved that the evidence tends to prove ... must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; *Oliphant*, 133 So. 3d at 1258.

The due process standard does not require the reviewing court to determine whether it believes the witnesses or whether it believes the evidence establishes guilt beyond a reasonable doubt. *State v. Mire*, 14-2295 (La. 1/27/16), ___So.3d ___, ___ (2016WL314814). Rather, appellate review is limited to determining whether facts established by direct evidence and inferred from the circumstances established by that evidence are sufficient for *any* rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *State v. Alexander*, 14-1619 (La. App. 1 Cir. 9/18/15), 182 So. 3d 126, 129-30, *writ denied*, 15-1912 (La. 1/25/16), 185 So. 3d 748. The weight given evidence is not subject to appellate review; therefore, evidence will not be reweighed by an appellate court to overturn a fact finder's determination of guilt. *State v. Wilson*, 15-1794 (La. App. 1 Cir. 4/26/17), 220 So. 3d 35, 40-41.

It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II, which includes cocaine. *See* La. R.S. 40:964, Schedule 11A(4); La. R.S. 40:967C. The defendant does not dispute the amount of cocaine seized or that the substance seized was actually cocaine. Instead, he argues the state's evidence is insufficient to prove he put the drugs in the grill. In his brief he contends the jury was asked to make the assumption that because he was the only person outside, he was the only one who could have hidden the drugs. According to the defendant, the "very real possibility of someone else putting the [drugs] there was never eliminated." Although the defendant frames his argument in terms of proof of who put the drugs in the grill, the only relevant inquiry is whether the state proved the defendant possessed the

drugs. Accordingly, we consider the sufficiency of the evidence demonstrating the defendant's actual or constructive possession of cocaine.

The state is not required to show actual possession of the drugs by a defendant to establish the element of possession. Constructive possession is sufficient. It is well settled that the mere presence in an area where drugs are located or the mere association with one possessing drugs does not constitute constructive possession. *State v. Toups*, 01-1875 (La. 10/15/02), 833 So. 2d 910, 913. Nonetheless, a person in the area of the contraband can be considered in constructive possession if the illegal substance is subject to his dominion and control. *See State v. Trahan*, 425 So. 2d 1222, 1226 (La. 1983). Furthermore, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. *State v. Gordon*, 93-1922 (La. App. 1 Cir. 11/10/94), 646 So. 2d 995, 1002.

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 constructive possession include (1) his knowledge that illegal drugs were in the area, (2) his relationship with the person, if any, found to be in actual possession, (3) his access to the area where the drugs were found, (4) evidence of recent drug use by the defendant, (5) his physical proximity to the drugs, and (6) any evidence that the particular area was frequented by drug users. *See Gordon*, 646 So. 2d at 1002. Guilty knowledge, an essential component of constructive possession of contraband, may be inferred from the circumstances of the case. *State v. Pigford*, 05-0477 (La. 2/22/06), 922 So. 2d 517, 521 (*per curiam*).

Agents Dallas Bookenberger and Joseph Renfro of the Terrebonne Parish Sheriff's Office narcotics task force testified at both the motion to suppress hearing and trial that the defendant was the only person on the street when they arrived.

Aside from a woman briefly looking out of her trailer door, the defendant was the only person around and the only one seen by the agents. When the defendant saw the agents approach, he moved quickly out of their sight toward the grill, then returned toward the agents at a slower pace. Agent Renfro testified he had seen this behavior many times before, and that it usually meant that the suspect was getting rid of contraband. Further, as the supreme court pointed out in its consideration of the suppression of the evidence issue, one of the agents noticed the grill's lid was slightly askew with dew that had been disturbed on the handle. *See Moultrie*, 224 So. 3d at 351.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. *State v. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So. 2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. *See State v. Mitchell*, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Quinn*, 479 So. 2d 592, 596 (La. App. 1 Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. *State v. Higgins*, 03-1980 (La. 4/1/05), 898 So. 2d 1219, 1226, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

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 which raises a reasonable doubt. *See State v. Moten*, 510 So. 2d 55, 61 (La. App. 1 Cir.), *writ*

denied, 514 So. 2d 126 (La. 1987). The jury heard all of the testimony and viewed the physical evidence presented to it at trial and found the defendant guilty. The identification of the defendant as the person who placed the drugs inside the grill was established. The defendant did not testify or offer any counter evidence. In finding the defendant guilty, the jury clearly rejected the defense's theory that someone else could have put the drugs in the grill. *See Moten*, 510 So. 2d at 61.

Viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of possession with intent to distribute cocaine. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*).

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

STATE OF LOUISIANA **NO. 2014 KA 1535-R**

VERSUS **COURT OF APPEAL**

JOSEPH MICHAEL MOULTRIE **FIRST CIRCUIT**

STATE OF LOUISIANA

HOLDRIDGE, J., dissents.

I respectfully dissent. I conclude that no rational trier of fact could find that the state proved the element of possession beyond a reasonable doubt.

In reviewing a claim as to the sufficiency of evidence, an appellate court must determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt based on the entirety of the evidence. **Jackson v. Virginia**, 443 U.S, 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed 560 (1979). When circumstantial evidence forms the basis for a conviction, the evidence "assuming every fact to be proved that the evidence tends to prove... must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Oliphant**, 2013-2973 (La. 2/21/14), 133 So.3d 1255, 1258-59. In this case, in order to convict the defendant of possession with intent to distribute, the state first had to prove beyond a reasonable doubt that the defendant possessed the cocaine found in the barbecue grill. The state can meet this element by proving the defendant was in actual physical possession or was in constructive possession of the cocaine. Since the defendant clearly was not in actual physical possession of the cocaine at the time it was uncovered by the agents, the state was required to prove that the defendant had constructive possession of the cocaine. See **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983). In order to meet this burden, the state was required to prove beyond a reasonable doubt that the defendant exercised dominion and control over the cocaine. **Id.**

It is well settled that the mere presence of a defendant in the area of the contraband or evidence seized does not prove that he exercised dominion and control over the evidence and therefore had it in his constructive possession. **State v. Toups**, 2001-1875 (La. 10/15/02), 833 So.2d 910, 913. Thus, the defendant's presence in the area where the cocaine was found was insufficient to establish constructive possession of the cocaine. Moreover, according the Louisiana Supreme Court in **State v. Moultrie**, 2015-2144 (La. 6/29/17), 224 So.2d 349 (*per curiam*), neither the state nor the defendant proved "the ownership of the grill". The court observed that the grill was never seized as evidence and was never identified from any photograph as the grill belonging to the defendant's mother. Based on the **Moultrie** analysis, the defendant, having no connection to the grill, simply could not exercise dominion and control over the grill in which the drugs were found, let alone the contents of the grill.

The only evidence which in any way connected the defendant to the cocaine was the testimony of Agent Renfro that the defendant moved quickly out of the agents' sight toward the grill and then returned toward them at a slower pace.[1] Also, one officer noticed the grill "whose lid was slightly askew with dew that had been disturbed on the handle." These facts do not establish beyond a reasonable doubt that the defendant had constructive possession of the grill's contents. It is just as plausible to conclude that the defendant became nervous when he saw the police and, knowing he had not committed a crime, walked slowly back towards the agents. Further, the lid of the grill could have been slightly askew and the dew disturbed on the handle because an animal in the neighborhood jumped on the grill. I find the majority errs in finding from these facts that "the identification of the defendant as the person who placed the drugs inside the grill was established." A

[1] In finding that the state met its burden of proving constructive possession, the majority notes that Agent Renfro testified that he had seen behavior similar to the defendant's many times before and it usually meant that the suspect was getting rid of contraband. This testimony is not proof; it is merely rank speculation.

fact finder could only make a connection between these "facts" and the defendant's identification as the person who placed the drugs inside of the grill by resorting to sheer speculation. Therefore, I find that the state did not prove that the defendant exercised dominion and control over the grill or its contents.

Because it was relying on circumstantial evidence, in order to convict the defendant of possession of cocaine, the state was required to exclude every reasonable hypothesis of innocence. It did not do so. Any person in this high crime area could have placed the cocaine inside the grill. The evidence showed that the defendant was in the area because his mother lived there and the evidence demonstrated that he often visited his mother. The defendant walked away when he saw the officers, but walked back toward them to speak to them rather than fleeing the area, indicating a lack of guilty knowledge. Also, the dew on the grill could have been disturbed for any number of reasons. Sensing that the state failed to carry its burden of proof, the majority further reasons, "[t]he defendant did not testify or offer any counter evidence." Of course, there is no obligation on the part of the defendant to prove his innocence. For all of the foregoing reasons, I find that the state failed to prove the element of possession and therefore failed to prove the defendant guilty of the crime of possession with the intent to distribute cocaine beyond a reasonable doubt.