

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2017 KA 1617**

**STATE OF LOUISIANA**

**VERSUS**

**RICKEY WINTTER**

*Judgment Rendered:* **APR 13 2018**

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**Appealed from the  
17th Judicial District Court  
In and for the Parish of Lafourche  
State of Louisiana  
Case No. 531361**

**The Honorable F. Hugh Larose, Judge Presiding**

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**BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.**

*MW*  
*JEW*  
*MC*

## **THERIOT, J.**

Rickey Wintter (“the defendant”) was charged by bill of information with possession of methamphetamine, a violation of La. R.S. 40:967(C) (count 1); possession of lisdexamfetamine (also known as Vyvanse), a violation of La. R.S. 40:967(C) (count 2); and possession of methylphenidate hydrochloride (also known as Concerta), a violation of La. R.S. 40:967(C) (count 3). He pled not guilty to all charges and, following a jury trial, was found guilty as charged on all counts. The defendant filed a motion for new trial and motion for postverdict judgment of acquittal, which were denied. For each count, the trial court sentenced the defendant to two years imprisonment at hard labor. The sentences were ordered to run concurrently. The defendant now appeals. For the following reasons, we affirm the convictions and sentences.

### **FACTS**

Sergeant Derek Guidry of the Thibodaux Police Department received information from a credible source that there were illegal narcotics in the defendant’s residence, an old fire station on Canal Boulevard in Thibodaux. The bottom floor of the fire station was a large garage area that contained sofas, furniture, a pool table, storage boxes, tool chests, and other items in storage. The upper floor was a small apartment area where the defendant and his girlfriend, Angela Bourgeois, lived.

On June 4, 2014, a search warrant was obtained and Sergeant Guidry, along with several other police officers, searched the defendant’s residence. All of the drugs and paraphernalia were found in the downstairs garage area. Inside a box of checkers, there was a small plastic box that contained a baggie with suspected crystal methamphetamine residue in it, along with a piece of a green straw. A broken glass pipe with suspected crystal

methamphetamine residue on it was found in a plastic storage drawer. An orange pill bottle with no label was found inside of a metal toolbox. The orange pill bottle contained two blue and white capsules and one off-white oval tablet with the number “27” on it. A third blue and white capsule, similar to the two in the pill bottle, was found under a sofa cushion.

All of these items were sent to the crime lab for testing, where it was determined that the residue on the broken glass pipe contained methamphetamine and the blue and white capsules contained lisdexamfetamine. The oval, or oblong, tablet with “27” imprinted on it was not chemically tested, but was determined to contain methylphenidate hydrochloride, based on a visual examination of the drug.

The defendant and Ms. Bourgeois were arrested and brought to the police station for questioning. In a recorded statement, the defendant admitted that the drugs were his.

The defendant did not testify at trial.

### **DISCUSSION**

In his sole assignment of error, the defendant argues the trial court erred in denying the motions for new trial and postverdict judgment of acquittal because “the evidence was insufficient to support the verdict.” Specifically, the defendant contends the State failed to prove that he possessed the drugs that were found in his residence by the police.<sup>1</sup>

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the

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<sup>1</sup> The defendant’s assignment of error is captioned as “Motion for new trial/Insufficient evidence.” The defendant is specifically challenging the sufficiency of the evidence to support his convictions.

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

To support a conviction for possession of a controlled dangerous substance, the State must prove that the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed the drug. Guilty knowledge, therefore, is an essential element of the crime of possession. A determination of whether or not there is “possession” sufficient to convict depends on the peculiar facts of each case. To be guilty of the crime of possession of a controlled dangerous substance, one need not physically possess the substance; constructive possession is sufficient.

In order to establish constructive possession of the substance, the State must prove that the defendant had dominion and control over the contraband. A variety of factors are considered in determining whether or not a defendant exercised “dominion and control” over a drug, including: a defendant’s knowledge that illegal drugs are in the area; the defendant’s relationship with any person found to be in actual possession of the substance; the defendant’s access to the area where the drugs were found; evidence of recent drug use by the defendant; the defendant’s physical

proximity to the drugs; and any evidence that the particular area was frequented by drug users. *State v. Harris*, 94-0696 (La. App. 1 Cir. 6/23/95), 657 So.2d 1072, 1074-75, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477. See *State v. Trahan*, 425 So.2d 1222, 1226 (La. 1983). A determination of whether there is sufficient “possession” of a drug to convict depends on the peculiar facts of each case. *Trahan*, 425 So.2d at 1226.

The defendant argues in brief that the State failed to establish that he constructively possessed the seized drugs. According to the defendant, there were other people in the house, including the defendant’s girlfriend, Ms. Bourgeois. The defendant avers that in his statement to the police, he was “attempting to take the charge and save his girlfriend,” which further exonerated him. The defendant suggests that if the State did prove possession, it was only for drug paraphernalia. While residue from the seized broken glass pipe was tested and found to be methamphetamine, the defendant notes that the forensic expert testified that she had to scrape some of the residue off to test, but that it had no measurable weight; further, the expert did not do any testing to determine “how long the residue had been on the broken glass pipe.” The defendant further argues that the State failed to prove he possessed methylphenidate hydrochloride because the forensic expert testified that she did not test the marked tablet, but identified it based on a visual inspection.

The evidence at trial established that, pursuant to the factors listed in *Harris*, the defendant exercised dominion and control over the drugs. Police found the drugs in the bottom floor portion of the defendant’s house, meaning the defendant had access to that area and was in physical proximity to the drugs.

Further, under *Harris*, the defendant had knowledge of the illegal drugs in his house, which was established by the defendant's confession. Sergeant Guidry, who participated in the execution of the search warrant at the defendant's house, also interviewed the defendant at the police station after the drugs were found. Sergeant Guidry testified that the defendant told him that the drugs in the residence were his and that the police could let Ms. Bourgeois go. According to Sergeant Guidry, when asked about the lisdexamfetamine, the defendant knew that it was in the garage, but did not know exactly where. Additionally, when asked about the methamphetamine, the defendant said it was inside a medical kit, which was inside a toolbox located in the garage. Sergeant Guidry testified that the lisdexamfetamine, not the methamphetamine, was actually located in the toolbox. Sergeant Guidry further indicated that he gave the defendant numerous opportunities to tell the truth, and that the defendant "maintained that the truth was that the drugs belonged to him." Our review of the taped confession reveals that the defendant admitted that the drugs found in his garage were his. The defendant also admitted in his statement that he had smoked "meth" before.

Based on the foregoing, the defendant's assertion that the State proved only that he possessed drug paraphernalia is groundless. A broken "meth pipe" was found in the defendant's garage, and the defendant admitted that he had smoked "meth." Further, Shawn Kazmir ("Ms. Kazmir"), a forensic scientist with the Louisiana State Police Crime Lab, was accepted by the trial court as an expert in controlled dangerous substance analysis. Ms. Kazmir testified at trial that she chemically tested the three blue and white capsules, and that they contained lisdexamfetamine. While there was only trace amounts of brown residue on the broken glass pipe, Ms. Kazmir

testified she was able to scrape some off and test it. After analyzing the residue via mass spectrometry and microcrystalline tests, Ms. Kazmir determined the residue contained methamphetamine. A conviction for possession of a prohibited substance may rest upon possession of any amount of the drug. *State v. Sylvia*, 2001-1406 (La. 4/9/03), 845 So.2d 358, 361.

Regarding the identification of methylphenidate hydrochloride by visual inspection, when asked on cross-examination if the pill identified as containing methylphenidate hydrochloride could be a “fake pill,” Ms. Kazmir responded that it could be. However, on direct examination, Ms. Kazmir made clear that given the attributes of the tablet, a visual inspection was all that was needed to identify the drug. According to Ms. Kazmir, the drug she visually examined was yellow, oblong, and had the number “27” stamped on it. She used this information to look up the drug in the database, which identified it as methylphenidate. The following relevant exchange then took place:

Q. Did any -- When you typed in the characteristics or searched for these characteristics, did any other pills come up other than methylphenidate?

A. Not with all of the characteristics together. Sometimes you might type in twenty-seven and it might pull up a round tablet but that wouldn't match. It has to have like the right color, the right shape, the right markings for us to make the call. If I had another tablet that was a yellow oblong twenty-seven, I would have went ahead and cut it open to see if it matched.

Q. And so no other oblong twenty-seven tablets came up in your search for physical characteristics?

A. I didn't see any in our databases.

Q. And so in your professional, expert opinion, is that methylphenidate?

A. I feel confident that if I cut this open and tested it, it would be methylphenidate, especially in 2014. The clandestinely

made tablets that are made to mimic pharmaceuticals really is just a recent development in the last year or so.

The foregoing expert testimony of Ms. Kazmir was sufficient to establish that the yellow oblong tablet found in the defendant's house contained methylphenidate hydrochloride. *See State v. Murphy*, 2009-0432 (La. App. 5 Cir. 11/24/09), 28 So.3d 496, 498-500, writ denied, 2010-0016 (La. 6/25/10), 38 So.3d 334; *See also State v. Carter*, 2007-1237 (La. App. 3 Cir. 4/9/08), 981 So.2d 734, 743-45, writ denied, 2008-1083 (La. 1/9/09), 998 So.2d 712.

The trier of fact is free to 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. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. The due process standard of *Jackson v. Virginia* 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*, 2014-2295, p. 4 (La. 1/27/16), \_\_\_ So.3d \_\_\_, \_\_ (2016 WL 314814) (per curiam). The facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a 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*, 2014-1619 (La. App. 1 Cir. 9/18/15), 182 So.3d 126, 129-30, writ denied, 2015-1912 (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*, 2015-1794 (La. App. 1 Cir. 4/26/17), 220 So.3d 35, 40-41.

In this case, the jury was presented with two theories of who possessed the various drugs found in the defendant's house: the State's theory that the defendant knowingly and constructively possessed the drugs, and the defendant's theory that he had no knowledge of the drugs and that they belonged to someone else. When a case involves circumstantial evidence and the trier of fact 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. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). 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*, 2003-1980 (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). The jury's verdicts reflected the reasonable conclusion that, based on the physical and documentary evidence and the testimony of several witnesses, the defendant was guilty as charged on all three counts. In finding the defendant guilty, the jury clearly rejected the defendant's theory of innocence. See *Moten*, 510 So.2d at 61.

After a thorough review of the record, we find that the evidence supports the guilty verdicts. 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, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of possession of methamphetamine, possession of lisdexamfetamine, and possession of

methylphenidate hydrochloride. See *State v. Calloway*, 2007-2306 (La. 1/21/09), 1 So.3d 417, 422 (per curiam).

The assignment of error is without merit.

**CONVICTIONS AND SENTENCES AFFIRMED.**