STATE OF LOUISIANA	*	**NO. 2001-KA-0218**
VERSUS	*	**COURT OF APPEAL**
MARCUS A. AUGILLARD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-745, SECTION "B"
HONORABLE PATRICK G. QUINLAN, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, Judge David S. Gorbaty)

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CONVICTION AFFIRMED; REMANDED FOR RESENTENCING

STATEMENT OF THE CASE

The defendant Marcus A. Augillard was charged by bill information on July 20, 2000, with possession of cocaine, a violation of La. R.S. 40:967 (C). He pleaded not guilty at his August 10, 2000 arraignment. The trial court denied the defendant's motion to suppress the evidence on September 22, 2000. The defendant was found guilty of attempted possession of cocaine during trial by a six-person jury on October 13, 2000. The defendant pleaded not guilty on October 30, 2000, to a habitual offender bill of information, and on November 16 to an amended habitual offender information. The trial court adjudicated the defendant a fourth-felony habitual offender on December 14, 2000, and sentenced him to life imprisonment at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served. The trial court denied the defendant's motion to reconsider sentence, and granted his motion for appeal.

FACTS

New Orleans Police Officer Preston Bosch arrested the defendant on July 12, 2000, at approximately 12:10 p.m. Officer Bosch and his partner, Officer Krekel Eckland, stopped two subjects in the 1900 block of Foucher Street. As the officers exited their vehicle and ordered the two over to the patrol car, Officer Bosch observed the defendant drop an object to the ground with his right hand. Officer Bosch retrieved the object, which he believed to be a crack pipe. The officer explained for the jury how a person would use the pipe to smoke crack cocaine. He responded in the negative when asked whether in his experience as a police officer he was aware of any use for the device other than smoking. Officer Bosch also gave an affirmative response when asked if he had detected a residue in the pipe. He was asked what about the crack pipe caused him to arrest the defendant on a charge of possession of cocaine, rather than only possession of drug paraphernalia, with which the defendant was also charged. The officer replied that the pipe had a white coating on it, and explained that the more a crack pipe is used, the whiter it gets.

Officer Bosch explained on cross-examination that the defendant and the other man were stopped because the other man, accompanied by the defendant, had walked off with a power saw belonging to a third man. The officer admitted that no cocaine of any kind or other contraband was found

on the defendant's person when he was searched incidental to his arrest for the crack pipe.

Nhon Hong, a criminalist with the New Orleans Police Department Crime Lab, was qualified by stipulation as an expert in the analysis and identification of controlled dangerous substances. All three tests Mr. Hong conducted on residue extracted from the crack pipe, gas chromatography, mass spectrometer, and microcrystalline, were positive for cocaine. Mr. Hoang said that he does not weigh such residue, but estimated its weight at less than a decigram, perhaps a centigram; an amount he conceded was "very, very small."

Officer Krekel Eckland testified that at the time he and Officer Bosch stopped the defendant and the other man, his attention was focused on the other man, not the defendant. Consequently, he did not observe the defendant discard anything.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in adjudicating him a fourth-felony habitual offender as the documentation produced by the State failed to establish that he waived his

right against self-incrimination when pleading guilty to his third felony. The defendant raised this issue in a written memorandum filed in opposition to the habitual offender information. Counsel for the defendant also argued the issue at the hearing. Thus, the issue is preserved for appellate review.

In State v. Alexander, 98-1377 (La. App. 4 Cir. 2/16/00), 753 So.2d 933, writ denied, 2000-1101 (La. 4/12/01), 790 So.2d 2, this Court set forth the applicable law as follows:

> LSA-R.S. 15:529.1 D(1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. In State v. Shelton, 621 So.2d 769, 779-780 (La.1993), the Supreme Court stated:
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> > If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a

> minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (footnotes omitted).

98-1377 at pp. 5-6, 753 So.2d at 937.

All three of the defendant's prior felony convictions were guilty pleas entered in the 24th Judicial District for the Parish of Jefferson. Documentation in the record reflecting all three convictions contains identical waiver-of-rights forms. The three Boykin rights are set forth in a single paragraph on the first page of that form. In the forms reflecting the 1981 and 1985 pleas, the defendant confirmed for the court with a handwritten "Yes" that his attorney had advised him of the three rights, and that he understood that by pleading guilty he was waiving those rights. The documentation on the 1989 conviction does not contain a full photocopy of that first page of the waiver-of-rights form, and only one corner of the Boykin paragraph is visible. The visible part of the page does not show that the defendant put a "Yes" there. The defendant attached to his brief a certified copy of the full page. It does not contain a "Yes" for that paragraph. All of the other pertinent paragraphs in the 1989 form contain a handwritten "Yes." Two of these paragraphs refer to the right to a jury trial

and the right to confrontation. Thus, the defendant does not dispute that he waived these two of the three Boykin rights. However, the only place where the defendant himself would have waived the third Boykin right, the right against self-incrimination, is in that first paragraph of the form.

Nevertheless, as the trial court noted in the instant case when rejecting the defense counsel's argument that a Boykin transcript was required, defendant's attorney from that 1989 plea form indicated on the form that he had advised the defendant of his right against self-incrimination, and that he was satisfied that the defendant knowingly, intelligently and voluntarily entered the plea knowing the consequences. The presiding judge who took the 1989 plea indicated on the form that he had entered into the foregoing colloquy with the defendant (encompassing defendant's waiver of his right against self-incrimination), and was satisfied that the defendant understood the consequences of pleading guilty and had made a knowing, intelligent, free and voluntary act of pleading guilty. Finally, the minute entry from the date of that 1989 plea reflects that the trial court advised the defendant of his right against self-incrimination, and that the defendant acknowledged that he understood and waived such right.

Considering this information, the State met its burden of proving that the defendant's 1989 guilty plea was informed and voluntary and was made

with an articulated waiver of the three Boykin rights.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO 2

In this second assignment of error, the defendant also claims that the trial court erred in adjudicating him a fourth-felony habitual offender, as the ten-year "cleansing period" of amended La. C.C.P. art. 15:529.1(C), as applied to his 1989 conviction, constituted a violation of the constitutional prohibition against ex post facto laws. The defendant failed to object to this issue in the trial court, either in his written objection to the habitual offender bill of information or orally at the habitual offender hearing. A defendant is required by La. C.Cr.P. art. 15:529.1(D)(1)(a) to state with particularity his objections to a habitual offender bill of information. State v. Chisolm, 99-1055, p. 12 (La. App. 4 Cir. 9/27/00), 771 So.2d 205, 213. Thus, the defendant has failed to preserve this issue for review.

However, even assuming the defendant preserved this issue for review, there is no merit to his claim. La. R.S. 15:529.1(C), as in effect at the time of the defendant's arrest in the instant case, provided for a ten-year "cleansing period," as it currently does. It states:

> This Section shall not be applicable in cases where more than ten years have elapsed since the expiration of the maximum sentence or sentences of the previous conviction or

> convictions, or adjudication or adjudications of delinquency, and the time of the commission of the last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods. (emphasis added)

At the time of the defendant's third conviction, in 1989, the "cleansing period" was five years. In 1994, the cleansing period was extended to seven years. It was extended to ten years in 1995. The applicable cleansing period is the one in effect at the time of the commission of the instant or present offense, the sentence for which is being enhanced under the statute. State v. Richardson, 2000-0416, p. 12 (La. App. 4 Cir. 2/7/01), 780 So.2d 1103, 1110; Chisolm, pp. 12-13, 771 So.2d at 213. Thus, there is no ex post facto violation. Id. The defendant mistakenly analogizes his situation to that of the defendant in State v. Everett, 99-1963 (La. App. 4 Cir. 9/27/00), 770 So.2d 466. However, in Everett, the third-offender defendant was arrested for his second offense prior to the amendment of La. R.S. 15:529.1(C) extending the cleansing period to ten years. Thus, at that time of his arrest for the second offense the defendant had not been "placed on notice" by the State that he could "no longer rely on" the five-year cleansing period in effect at the time of his first conviction, which had expired prior to his arrest for the second offense.

The defendant's argument in the case at bar is directed to his instant offense and his third offense. The cleansing period was extended to ten years in 1995. The defendant was arrested for the instant offense in 2000. Thus, the defendant had been "placed on notice" by the State some five years before his commission of the instant offense that he could "no longer rely on" the shorter cleansing period in effect at the time of his 1989 conviction. The defendant makes no argument with regard to his first and second offenses. The defendant argues that the State failed to prove that his fourth conviction was within the "five year" cleansing period. There is no merit to this discharge date argument, as the five-year cleansing period was not applicable. The defendant makes no discharge date argument as to the ten-year period.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, the defendant argues that his sentence is excessive. Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the

severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So.2d 672, 677; State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993). However, the entire Habitual Offender Law has been held constitutional, and, thus, the minimum sentences it imposes upon habitual offenders are also presumed to be constitutional. Johnson, 97-1906 at pp. 5-6, 709 So.2d at 675; see also State v. Young, 94-1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 527. There must be substantial evidence to rebut the presumption of constitutionality. State v. Francis, 96-2389, p. 7 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must show by clear and convincing evidence that he is exceptional, which in this context means that because of unusual circumstances he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. State v. Lindsey, 99-3256, p. 5 (La. 10/17/00), 770 So.2d 339, 343; Johnson, 97-1906 at p. 8, 709 So.2d at 677. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." Johnson, 97-1906 at p. 9, 709 So.2d at 677.

Defendant cites State v. Burns, 97-1553 (La. App. 4 Cir. 11/10/98), 723 So.2d 1013, where this court vacated the life sentence of a fourth-felony

habitual offender, finding that under the facts and circumstances it was unable to conclude that the life sentence was not excessive under the constitutional standard. 97-1553 at p. 11, 723 So.2d at 1020.

The defendant in Burns was observed by police selling one rock of crack cocaine to a third person. When arrested, the defendant was in possession of two more rocks and fifty-seven dollars. The defendant testified at trial that he was addicted to cocaine. Noting that two of the defendant's prior convictions were for possession of cocaine, this Court concluded, "thus it is safe to assume he deals to support his habit," 97-1553 at p. 9, 723 So.2d at 1019. The defendant was twenty-five years old, and this court felt that the defendant was "young enough to be rehabilitated." This court noted that a sentence less than life would "afford him the opportunity to partake in self-improvement classes while incarcerated and the possibility of a productive future." Id. The defendant's father testified at trial, stating that the defendant was well liked in the community and would go out of his way to help anyone. Nevertheless, the recognition that none of the defendant's felonies were non-violent was insufficient to override the legislatively designated sentences of the Habitual Offender Law, even though this Court cited Johnson, supra, for the proposition that this fact should not be discounted. This Court also noted that there were no

allegations that the defendant ever possessed a dangerous weapon. Finally, the Court noted that the defendant had difficulties with memory regarding time and place, attributing the problems to a previous gunshot wound to the head. The Court noted that this "surely must affect [the defendant's] ability to function in the same manner as someone who has not been shot in the head." 97-1553 at p. 10, 723 So.2d at 1020. The Court also cited two economic impact considerations–that the defendant would never be a productive taxpayer in prison, and that life imprisonment imposes an undue burden on taxpayers of the state who must feed, house, and clothe the defendant for life, and provide geriatric care in later years.

In the instant case, despite the defendant's possession of a crack pipe, there was no evidence that he was a cocaine addict. Unlike the defendant in Burns, where three of his prior convictions were for possession and/or distribution of cocaine, only one of the defendant's four felony convictions was cocaine-related. Unlike the defendant in Burns, all of whose felonies were non-violent, one of the defendant's convictions was for simple robbery, a crime of violence. This court noted in Burns that there had never been an allegation that the defendant ever possessed a dangerous weapon. The defendant in the instant case was originally charged with armed robbery, committed with a gun, but pleaded guilty to the simple robbery charge.

The defendant also cites State v. Stevenson, 99-2824 (La. App. 4 Cir. 3/15/00), 757 So.2d 872, writ denied, 2000-1061 (La. 11/17/00) 773 So.2d 734, where this court reversed the mandatory life sentence imposed upon a third-felony habitual offender, comparing it to Burns. In Stevenson, the defendant was a thirty-eight year old mother convicted of distribution of one rock of crack cocaine, with prior convictions for felony theft and simple burglary of an inhabited dwelling. No drugs were found on her person after her arrest for distribution of the cocaine. The Court noted that, like the defendant in Burns, the defendant in Stevenson had no record of violent crimes, nor was there any evidence she had ever used a dangerous weapon. The Court conceded that, unlike in Burns, the defendant in Stevenson did not testify that she was a drug addict, and no one testified on her behalf. However, this Court noted that the trial court had ordered the defendant to report to a substance program, and inferred the possibility that she, like the defendant in Burns, was a drug addict who sold the cocaine to support her own habit.

The trial court noted in the instant case that the life sentence was mandatory, and that the sentence was appropriate, considering the defendant's criminal history. We disagree. The defendant's single violent crime was committed in 1980, some twenty years prior to the date of

sentencing. There is no evidence that he had committed any other violent crimes during the twenty-year period between his 1980 arrest for armed robbery and his arrest in the instant case. Thus, it does not appear that the defendant could fairly be classified as a violent offender. The defendant's second conviction, from 1984, was for unauthorized use of a movable, a motor vehicle, for which he received term of imprisonment at hard labor for three years. This had been reduced in the plea agreement from possession of stolen property valued at more than five hundred dollars. His third conviction, from 1989, was for indecent behavior with a juvenile, for which he received a term of five years at hard labor. The defendant was originally charged with aggravated rape in that case, along with aggravated oral sexual battery, two serious crimes presumably lodged because of the age of the juvenile victim. There is no record of another arrest until the instant one in 2000.

Considering that the defendant's only violent crime was committed twenty years prior to his offense in the instant case, and his current conviction is based on his abandonment of a crack pipe, the defendant has arguabally rebutted the presumption that the sentence provided for him under the Habitual Offender Law is constitutional. Therefore, we find merit to the defendant's argument that he is exceptional, i.e., that because of

unusual circumstances he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Therefore, we remand for Dorethy considerations.

ASSIGNMENT OF ERROR NO. 4

The defendant fails to present any argument in the assignment of error he designated in his list of errors as Assignment of Error No. 4—that the trial court erred in not permitting him to represent himself or to seek other counsel at the habitual offender hearing. "Any specification or assignment of error not briefed is considered abandoned." State v. Anderson, 97-2587, pp. 9-10 (La. App. 4 Cir. 11/18/98), 728 So.2d 14, 20, citing Rule 2-12.4, Uniform Rules Courts of Appeal, State v. Holmes, 95-2249, p. 15 (La. App. 4 Cir. 10/29/97), 701 So.2d 752, 760.

ASSIGNMENT OF ERROR NO. 5

In this last assignment of error, the defendant claims that the evidence is insufficient to support his conviction.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally

> sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
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> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So.2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-228.

The defendant was charged with possession of cocaine, but convicted

on a responsive verdict of attempted possession. If the evidence adduced at trial was sufficient to support a conviction of the charged offense, the jury's responsive verdict is authorized. State v. Harris, 97-2903, p. 8 (La. App. 4 Cir. 9/1/99), 742 So.2d 997, 1001-1002, writ denied, 99-2835 (La. 3/24/00), 758 So.2d 146.

To convict for possession of a controlled dangerous substance, the State must prove that the defendant knowingly possessed it. State v. Handy, 2000-0051, p. 3 (La. App. 4 Cir. 1/24/01), 779 So.2d 103, 104; State v. Lewis, 98-2575, p. 3 (La. App. 4 Cir. 3/1/00), 755 So.2d 1025, 1027. Guilty knowledge is an essential element of the offense of possession of a controlled dangerous substance. State v. Ricard, 98-2278, 98-0424, p.7 (La. App. 4 Cir. 1/19/00), 751 So.2d 393, 397, writ denied, 2000-0855 (La. 12/8/00), 775 So.2d 1078. Knowledge need not be proven as fact, but may be inferred from the circumstances. State v. Porter, 98-2280, p. 3 (La. App. 4 Cir. 5/12/99), 740 So.2d 160, 162. A trace amount of cocaine in a crack pipe, i.e., residue, can be sufficient to support a conviction for possession. See State v. Shields, 98-2283 p. 3 (La. App. 4 Cir. 9/15/99), 743 So.2d 282, 283; Porter, supra. However, the amount of the substance seized will have some bearing on the defendant's guilty knowledge/intent. State v. Monette, 99-1870, p. 5 (La. App. 4 Cir. 3/22/00), 758 So.2d 362, 365. With respect to

crack pipe cases, "the peculiar nature of the pipe, commonly known as a 'straight shooter' and used exclusively for smoking crack cocaine, is also indicative of guilty knowledge." State v. McKnight, 99-0997, p. 4 (La. App. 4 Cir. 5/10/99), 737 So.2d 218, 219; Williams, 98-0806 at p. 7, 732 So.2d at 109. In addition, recent drug use is also a factor evidencing guilty knowledge, as is flight or furtive behavior. See Monette, supra.

One of the circumstances most often cited as evidencing guilty knowledge in crack pipe cases–combined with the fact of possession of the pipe itself–is the presence of visible cocaine residue in the pipe. In State v. Tassin, 99-1692 (La. App. 4 Cir. 3/15/00), 758 So.2d 351, testimony by two police officers that there was visible cocaine residue in a crack pipe found in the defendant's purse was sufficient to show guilty knowledge. In State v. Lewis, 98-2575 (La. App. 4 Cir. 3/1/00), 755 So.2d 1025, an arresting officer noticed what, based on his experience, he believed was cocaine residue in a crack pipe. This Court held that "the presence of visible cocaine residue in the crack pipe found in defendant's front coat pocket is sufficient evidence to support the inference that defendant had the requisite intent to attempt to possess cocaine." 98-2575 at p. 4, 755 So.2d at 1028. In State v. Drummer, 99-0858 (La. App. 4 Cir. 12/22/99), 750 So.2d 360, writ denied, 2000-0514 (La. 1/26/01), 781 So.2d 1257, defendant's possession of two

crack pipes containing visible cocaine residue was sufficient to establish guilty knowledge. In State v. Guillard, 98-0504 (La. App. 4 Cir. 4/7/99), 736 So.2d 273, the arresting officer testified that a crack pipe recovered from the defendant appeared to contain cocaine residue. This court stated: "Defendant's possession of a crack pipe with visible cocaine residue in it allows an inference that the defendant had the intent to attempt possess cocaine." 98-0504 at p. 6, 736 So.2d at 277. In two cases, the fact that arresting officers observed "white residue" in the crack pipes–without any testimony that the officers believed it was cocaine–was sufficient to prove the necessary guilty knowledge. See Shields, supra; Porter, supra.

In the instant case, Officer Bosch testified that he observed the defendant drop an object to the ground. Upon retrieving the item, he discovered it was a crack pipe. Officer Bosch responded in the affirmative when asked if he had detected a residue in the pipe. Officer Bosch said he arrested the defendant for possession of cocaine because the pipe had a white coating on it, residue, explaining that the more a crack pipe is used [to smoke crack], the whiter it gets. Thus, the arresting officer effectively testified that the crack pipe had visible white cocaine residue on it. Thus, the defendant's guilty knowledge can be inferred, because if the residue was visible to the officer, it also would be visible to the defendant. In addition,

while the defendant's abandonment of the crack pipe could have simply been indicative of guilty knowledge that he possessed drug paraphernalia, because the pipe contained visible residue his actions also might be viewed as evidencing guilty knowledge of possession of cocaine.

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that the evidence adduced at trial was sufficient to convict the defendant of possession of cocaine. Thus, the evidence is sufficient to sustain the defendant's conviction of the offense of attempted possession of cocaine.

There is no merit to this assignment of error.

For the foregoing reasons, we affirm the defendant's conviction but remand the matter to the trial court for Dorthey considerations.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING