STATE OF LOUISIANA	*	**NO. 2002-KA-2482**
VERSUS	*	**COURT OF APPEAL**
MELVIN ANDERSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 423-723, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay III, Judge Max N. Tobias Jr., Judge Edwin A. Lombard)

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CONVICTION AND SENTENCE AFFIRMED;
REMANDED FOR IMPOSITION OF FINE

STATEMENT OF CASE

On August 6, 2001, the State charged Melvin Anderson with being a felon in possession of a firearm, a violation of La. R.S. 14:95.1. The defendant pled not guilty at his August 10, 2001, arraignment. On November 2, 2001, the court found probable cause and denied the defendant's motions to suppress statements and evidence. On November 20, 2001, defense counsel filed motions to suppress, which the court denied noting that it had already denied motions to suppress filed by the defendant. On November 26, 2001, a twelve-member jury found the defendant guilty as charged. On December 20, 2001, the defense filed motions for post verdict judgment of acquittal and for a new trial; the court denied both motions. Also, on that date, the court sentenced the defendant to serve thirteen years with credit for time served. On July 12, 2002, this Court granted the defendant an out-of-time appeal.

STATEMENT OF FACT

Parole Officer Stephanie Moore testified that she supervised the

defendant's parole for a 1993 armed robbery conviction. Her duties included monthly visits with the defendant, usually at his residence, to verify his adherence to the conditions of his parole, i.e., no alcohol, weapons or association with convicted felons, etc. After his release from custody, the defendant advised the parole office that he was living with his girlfriend, Chandra Dillon, on Wilton Street. On July 24, 2001, New Orleans Police Department (NOPD) officers notified Officer Moore that they were at the defendant's residence, and had arrested the defendant for parole violation after finding weapons in the bedroom defendant shared with his girlfriend. Officer Moore relocated to Wilton Street where she explained to Ms. Dillon the reason for the defendant's arrest.

Parole Officer Mary Downie of the Violent Offenders Integrated Community Enforcement Program (VOICE) testified that on July 24, 2001, she and NOPD Detective Jules Martin arrived at the defendant's Wilton Street residence to perform a walk through inspection of the premises. When Officer Downie and Detective Martin arrived at the residence, they encountered the defendant outside of the residence. They identified themselves and informed the defendant that they were there to perform a visual residence inspection. The defendant began fidgeting with his keys and became visibly nervous. The defendant hesitantly agreed to admit the

officers into the residence. However, he told them he could not admit them through the front because it was obstructed by construction in the front room. The defendant then led the officers to the side door, which he said was locked. After circling the exterior of the residence with the defendant, Officer Downie asked if there was a problem. The defendant asked the officers to wait at the side door, while he entered through the front and came around to unlock the side door. Fearing for their safety, the officers refused and told the defendant they would enter the residence by the same door he did. Officer Downie became suspicious as result of the defendant's behavior. As the officers followed the defendant through the front door, Officer Downie saw two workmen in the house, but nothing obstructing the entrance. The defendant led the officers to the bedroom he shared with his girlfriend. Officer Downie inspected the defendant's bed and found a Larson .380 pistol under one pillow, a Highpoint .9 mm gun under the other pillow, and an AK-47 assault rifle under the mattress. All of the weapons were fully loaded. Officer Downie also located a pair of the defendant's pants on the bed. The pants contained the defendant's wallet and driver's license bearing the Wilton Street address. Officer Downie also found the defendant's clothing in the bedroom closet and his shirts and underwear in furniture in the bedroom. Officer Downie advised the defendant that he was

in violation of his parole.

Detective Jules Martin testified corroborating Officer Downie's testimony. Detective Martin added that the defendant's nervous demeanor caused him to suspect something was amiss. Detective Martin identified in court the defendant's pants and driver's license, and the weapons seized during the inspection. He testified that the defendant said that he shared the bedroom with his girlfriend.

Ms. Chandra Dillon testified for the defense. Ms. Dillon stated that she owned the Wilton Street house in which she and the defendant resided. She initially denied any romantic involvement with the defendant. She further denied that the defendant shared the bedroom with her or kept his belongings in her bedroom. Instead, Ms. Dillon told the court that the defendant paid her a monthly sum of money to sleep on the sofa in the living room. On the day of the defendant's arrest, Ms. Dillon was not home but had two workmen in the house repairing the air conditioning system. To accommodate the workmen, she moved furniture in the front room, which blocked the front entrance to the house. When she returned, she found police officers in her house and her house ransacked. She tried to explain to the officers that she owned the house and the guns, but the officers would not listen. Ms. Dillon testified that the guns found in her bedroom belonged

to her. She said she normally kept the weapons in the attic but because the workmen needed access to the area, she hid the guns in her bed. Ms. Dillon claimed that she purchased one of the guns, and that the other gun and the AK-47 rifle belonged to her deceased boyfriend. She testified that she kept the weapons for sentimental reasons after her boyfriend was murdered. Ms. Dillon insisted that the defendant neither owned nor knew of the location of the weapons.

Under cross-examination, Ms. Dillon stated that she moved the obstructions from the front door before she left for exercise class and locked the side door, but forgot to tell the defendant. Moreover, Ms. Dillon admitted that she and the defendant had a romantic relationship.

ERRORS PATENT

A review of the record shows two errors patent with regard to the defendant's sentence.

The defendant was convicted of being a felon in possession of a firearm, a violation of La. R.S. 14:95.1. The statute provides for a sentence upon conviction of imprisonment at hard labor for not less than ten years, nor more than fifteen years, without benefit of parole probation or suspension of sentence, and a mandatory fine of not less than one thousand dollars, nor more than five thousand dollars. The trial court's failure to

restrict the defendant's sentence to deny parole, probation and suspension of sentence, and failure to impose a mandatory fine constitute an illegally lenient sentence. An illegally lenient sentence can be noticed by the appellate court *sua sponte*. *State v. Williams,* 2000-1725, p.16 (La.11/28/01), 800 So.2d 790, 802.

Although the trial court did not restrict probation, parole, or suspension of sentence eligibility on the defendant's sentence as mandated by La. R.S. 14:95.1, La. R.S. 15:301.1(A) self-activates the correction, and eliminates the need to remand for a ministerial correction of the sentence. *Williams, supra*.

As for the trial court's failure to impose a statutorily mandated fine, recently, in *State v. Williams*, 2003-0302, p. 34 (La. App. 4 Cir. 10/6/03), 859 So.2d 751, 753, this Court considered the issue:

> The Louisiana Supreme Court has held that an appellate court may correct an illegally lenient sentence by remanding to impose a mandatory fine. *State v. Decrevel*, 2003-0259 (La. 5/16/03), 847 So. 2d 1197. However, it did not say that an appellate court is required to do so. In *State v. Comena*, 2002-1562, p. 4 (La. App. 4 Cir. 3/19/03), 843 So.2d 464, 467, and in *State v. Major*, 2002-0133, p. 7 (La. App. 4 Cir. 10/2/02), 829 So.2d 625, 631), we declined to do so. However, a contrary holding was rendered right before *Major, supra,* was decided in *State v. Legett*, 2002-0153 (La. App. 4 Cir. 5/22/02), 819 So. 2d 1104. In *Legett,* we held that the failure to impose the mandatory fine under La. R.S. 40:967 required we remand the matter for the imposition of that fine. Similarly, in *State v. Hall*, 2002-1098, pp. 5-6 (La. App. 4 Cir. 3/19/03), 843 So. 2d 488, 494, we held that "the matter must be remanded for the imposition of the fine." *Id.*
>
> To resolve this conflict in this circuit, we submitted this issue

> for an *en banc* vote, and this circuit voted *en banc* to follow *Legett* and *Hall.* Following those cases, we remand this case to the trial court for the imposition of the mandatory fine.

Therefore, following the dictates of *Williams, supra,* we remand this case to the trial court for imposition of a fine.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment, the defendant complains that the evidence is insufficient to support his conviction because the State failed to prove that the defendant had previously been convicted of a felony and, further, did not produce sufficient evidence that the defendant possessed a firearm.

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, 1324 (La.1992).

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, 378 (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).

For a defendant to be found guilty of possession of a firearm by a convicted felon the State must prove: (1) the possession of a firearm; (2) a

previous conviction of an enumerated felony; (3) absence of the ten-year statutory period of limitation; and, (4) general intent to commit the offense. La. R.S. 14:95.1; *State v. Husband*, 437 So.2d 269,270 (La.1983).

In this case, the bill of information lists the defendant's previous conviction for armed robbery, in case number 93-3426 of the Twenty-Fourth Judicial District Court for the Parish of Jefferson. Without objection, the State offered the testimony of the defendant's parole officer, Stephanie Moore, who verified that the defendant was convicted of armed robbery in 1993, and was on parole on July 24, 2001, when he committed the present offense. Further, Officer Moore identified the defendant at trial as having been previously convicted of armed robbery. Considering the foregoing evidence and testimony, the State met its burden of proof as to the first three requirements of La. R.S. 14:95.1.

As for proof of possession of weapons pursuant to La. R.S. 14:95.1, possession of a firearm by a convicted felon does not require actual physical possession of a firearm upon the person of the accused; constructive possession of a firearm satisfies the possessory element. *State v. Day*, 410 So.2d 741,742 (La.1982). Constructive possession exists when the illegal object is subject to the defendant's dominion and control. *State v. Johnson*, 463 So.2d 778 (La.App. 4 Cir.1985).

An individual found in close proximity to an area where contraband is located may be considered in constructive possession if the contraband is subject to his dominion and control. A defendant's dominion and control over a weapon constitutes constructive possession even if it is only temporary in nature and even if the control is shared. *State v. Washington*, 605 So.2d 720, 721 (La. App. 2 Cir. 1992). The determination of whether there is "possession" sufficient to convict depends on the particular facts of the case. *State v. Walker*, 514 So.2d 604 (La.App. 4 Cir.1987).

The record in this case reflects that during the August 28, 2001 motion hearing, the State offered, filed, and introduced into evidence, without objection, a certification packet for Melvin Anderson in which he pled guilty in Jefferson Parish in 1993 to armed robbery, one of the felonies enumerated in La. R.S. 14:95.1.

Officer Mary Downie and Detective Jules Martin both testified that the defendant told them he shared the bedroom in the Wilton Street residence with his girlfriend, Ms. Dillon. Officer Downie testified that she found the two handguns under the pillows on the bed, and the assault rifle between the mattresses. On the element of possession, the jury chose to credit the officers' testimony that the defendant slept in the bedroom where the weapons were found, rather than Ms. Dillon's denial otherwise.

Considering the evidence offered by the State, it is not unreasonable for the jury to have concluded that the defendant had constructive possession of the weaponry. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In a second assignment of error, the defendant complains that the lack of a complete transcript of this matter denies him his constitutional right to appellate review. More particularly, he claims transcripts of pre-trial hearings, voir dire proceedings and bench conferences are missing, and that there are numerous instances in the trial transcript where the court reporter failed to report portions of the trial, writing only “inaudible.”

La. Const. Art. I, § 19 provides that "[n]o person shall be subjected to imprisonment ... without the right of judicial review based upon a complete record of all evidence upon which the judgment is based." La.C.Cr.P. art. 843 requires, in all felony cases, the recording of "all the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements and arguments of counsel." This Court has recognized that a complete appellate review of a defendant's conviction and sentence can be accomplished even when there are missing portions of the trial record. *State v. Thomas*, 92-1428 p.2-3, (La.App. 4 Cir. 5/26/94) 637

So.2d 1272, 1274. Where the record includes a complete transcript of the evidentiary portion of the trial, the appellant's "constitutional right to a judicial review of all evidence" has not been compromised. *Id*. A defendant is not entitled to relief absent a showing of prejudice based on the missing portions of the transcripts. *State v. Castleberry*, 98-1388, p. 29 (La.4/13/99), 758 So.2d 749, 773.

The record in the instant case contains a complete transcript of the voir dire proceedings as well as the evidentiary portion of the trial. Review of those transcripts reflects that while there are instances of “inaudible” responses, only short phrases or statements or a series of words were "inaudible." The transcripts as a whole are coherent and understandable. The overwhelming majority of the testimony of all witnesses and responses from prospective jurors was recorded, with no large omissions. The witnesses obviously understood the questions posed, as they responded with no objection or hesitation. Additionally, examination of questions and answers preceding and following the “inaudible” references allows the reader to glean the sum and substance of the testimony and responses. Cross-examination further clarifies and reinforces the content of the testimony. Moreover, there are no objections noted with reference to any “inaudible” testimony offered by the witnesses.

Subsequent to the filing of the defendant's brief, the record was supplemented with the transcript from the suppression hearing.

Finally, the defendant complains that the missing transcript of bench conferences during which defense counsel urged a motion for mistrial based upon the State's reference to stolen property has denied him appellate review because there is no way of knowing "what points or additional evidence may have been raised at these unrecorded proceedings."

By its nature, a bench conference is conducted purposely out of the jury's hearing. Defendant's contention that he is denied benefits of "points or additional evidence" that may have been elicited during the conferences rings hollow. Any "points" would simply have been argument between counsel, not evidence for the jury's consideration. In addition, evidence is presented to the jury only through witnesses, not argument of counsel. The defendant has not shown any prejudice because of the absence of a transcription of the bench conferences. A defendant is not entitled to relief absent a showing of prejudice based on the missing portions of the transcripts. *State v. Hawkins*, 96-0766 (La.1/14/97), 688 So.2d 473, 480.

Because the missing portions of the trial record are not evidentiary, their absence does not compromise the defendant's constitutional right to a judicial review of all evidence. *Thomas*, 637 So.2dat 1274. This assignment

is meritless.

ASSIGNMENT OF ERROR NUMBER 3

In this assignment, the defendant argues he was prejudiced by the State's reference to other crimes, specifically, possession of stolen property.

Generally, evidence of other acts of misconduct is not admissible because it creates the risk that the defendant will be convicted of the present offense simply because the unrelated evidence establishes him or her as a "bad person." La. C.E. art. 404(B)(1); *State v. Jackson*, 625 So.2d 146, 148 (La.1993). This rule of exclusion stems from the "substantial risk of grave prejudice to the defendant" from the introduction of evidence regarding his unrelated criminal acts. *State v. Prieur*, 277 So.2d 126, 128 (La.1973). This general rule ensures that a defendant who has committed other crimes, wrongs or acts will not be convicted of a present offense simply because he is perceived as a "bad person," irrespective of the evidence of his guilt or innocence. A conviction should be based on guilt and not on character. *State v. Johnson*, 94-1379 (La. 11/27/95), 664 So.2d 94, 99.

Under cross-examination the prosecutor asked Ms. Chandra Dillon if she was aware that stolen checks and credit cards were found in her bedroom when the parole officer conducted the walk through inspection of the residence. Defense counsel objected and moved for a mistrial, which the

trial court denied.

The defendant claims that the State's introduction of other crimes evidence so prejudiced his right to a fair trial that his conviction must be reversed.

The credibility of a witness may be attacked by any party; and, in doing so, such party may examine the witness concerning any matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony. La. Code Evid. art. 607.

From a review of the State's cross-examination of Ms. Dillon, it appears the reference to stolen property was to rebut the accuracy of her testimony.

During direct examination, defense counsel asked Ms. Dillon whether she would know if the defendant had a gun or other contraband in the house. Ms. Dillon responded that she knew everything that went on in her house, and was aware of every item in her house, particularly her bedroom. Defense counsel "opened the door" as to the accuracy of Ms. Dillon's declarations that she would be aware of the presence of any contraband. Responding to cross-examination, Ms. Dillon explained that she was aware of the checks and credit cards, but had no idea they were stolen. She testified that they belonged to the defendant's girlfriend. Further review of

her cross-examination indicates that the State's only purpose in the line of questioning was to cast doubt on Ms. Dillon's credibility. For instance, additional questioning by the State shows that Ms. Dillon retreated from her original assertion that she did not allow the defendant to store anything in her bedroom, to the admission that he regularly kept "important papers" in a shoebox on a shelf in the bedroom. Considering the evidence adduced at trial in a light most favorable to the State, even if admission of the offending testimony was error, it was harmless as the State never accused the defendant of having stolen the checks or credit cards. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 4

In a fourth assignment, the defendant argues that the State's improper reference in closing argument to the defendant's "possession of stolen property" constitutes reversible error.

The defense did not make a contemporaneous objection to this alleged error. It was therefore not preserved for appellate review. La.C.Cr.P. art. 841. Nevertheless, even if the issue had been preserved by contemporaneous objection, and there was error, it was harmless. The trial judge instructed the jury that the defendant was charged only with being a felon in possession of a firearm, and that they should disregard any

testimony or reference to stolen checks or credit cards. This assignment is meritless.

ASSIGNMENT OF ERROR NUMBER 5

By this assignment of error, the defendant makes a non-specific argument that the trial court erred by failing to grant his motion to suppress the physical evidence.

Probationers and parolees have a reduced expectation of privacy, which allows reasonable warrantless searches of their persons and residences by their probation or parole officer, even though less than probable cause may be shown. *State v. Malone,* 403 So.2d 1234, 1239 (La.1981). This reduced expectation of privacy evolves from a probationer's conviction and agreement to allow a probation officer to investigate his activities in order to confirm that the probationer is in compliance with the provisions of his probation. However, a probationer is not subject to the unrestrained power of the authorities. A search of the probationer may not be a subterfuge for a police investigation. A warrantless search of a probationer's property may be permissible when:

> [I]t is conducted when the officer believes such a search is necessary in the performance of his duties, and must be reasonable in light of the total atmosphere in which it takes place. In determining the reasonableness of a warrantless search, [an appellate court] must consider (1) the scope of the particular intrusion, (2) the manner in which it was conducted, (3) the justification for initiating it, and (4) the place in which it was conducted.

State v. Malone, 403 So.2d at 1239; s*ee* also *State v. Thomas*, 96-2006 (La.App. 4 Cir. 11/06/96), 683 So.2d 885.

Although the State still bears the burden of proof because the search was conducted without a warrant, when the search is conducted for probation violations, the State's burden will be met when it establishes that there was reasonable suspicion that criminal activity was occurring. *Malone* at 1239.

The record in this case contains the transcript of the hearing on the motion to suppress the physical evidence. Detective Jules Martin and Officer Mary Downie testified at the motion hearing and at trial. Their testimonies aligned with one another, and their individual testimonies were consistent at the motion hearing and at trial. The officers testified that the defendant had a prior felony conviction, that this was the first time a parole officer visited him at the Wilton Street address, thus necessitating an interior inspection, that he was on parole the day he was charged with the present offense, and that he slept in the bedroom where the guns were found. Moreover, the defendant’s nervousness, evasiveness and peculiar behavior on the day of the walk through inspection aroused the officers’ suspicions, and prompted them to perform a thorough investigation of the premises. Considering the evidence elicited at trial, the trial court did not err by

denying the defendant's motion to suppress. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 6

In this assignment, the defendant claims the trial court erred by admitting into evidence his statement to the parole officer that he slept in the bedroom where the guns were found.

The trial transcript does not reflect any objection to the statement as testified to by Detective Jules Martin or Officer Mary Downie, nor does it reflect the defendant filed a motion to suppress his statement. In the absence of a contemporaneous objection, the issue has not been preserved for appellate review. La.C.Cr.P. art. 841.

ASSIGNMENT OF ERROR NUMBER 7

In a final assignment, the defendant contends the trial court erred in striking two jurors for cause.

When the State requested that the trial judge strike the two jurors, defense counsel objected arguing that he had rehabilitated them such that they could serve as impartial and fair jurors. The trial judge disagreed.

On appeal the defendant maintains that in the absence of a complete voir dire transcript, it is impossible to determine whether defense counsel's objection that he had successfully rehabilitated the jurors has merit.

Article I, Section 17 of the Louisiana Constitution grants an accused the right to a full and complete voir dire examination and to the exercise of peremptory challenges. The purpose of voir dire examination is to determine the qualifications of prospective jurors by testing their competence and impartiality. *State v. Williams*, 457 So.2d 610, 613 (La.1984). Voir dire is an important right given to both the defendant and the state to aid in the selection of an impartial jury. *State v. Monroe*, 329 So.2d 193 (La.1975). It allows the parties to intelligently exercise their challenges to insure a fair trial. The scope of voir dire examination falls within the discretion of the trial judge, who is given wide discretion in the regulation of the examination of prospective jurors. *State v. Thompson*, 495 So.2d 328 (La.App. 4 Cir.1986). La. C.Cr.P. art. 787 provides that the court may disqualify a prospective petit juror from service in a particular case when for any reason doubt exists as to the competency of the prospective juror to serve in the case.

Although the defendant in this case asserts a claim of denial of due process, he fails to state how the trial judge's decision to strike the jurors denied his right to a fair and impartial jury. While several replies from the two jurors were inaudible to the court reporter, the judge heard their replies. The judge heard the two jurors

initially reply to State questioning that they could not agree with a mandatory sentence if the defendant were convicted, and then heard them reverse their stance in replies to defense counsel.

The trial judge is vested with broad discretion in ruling on challenges for cause. His rulings will be reversed only when a review of the entire voir dire reveals his exercise of discretion was arbitrary and unreasonable with resultant prejudice to defendant. *State v. Knighton*, 436 So.2d 1141, 1148 (La.1983).

A review of the entire voir dire transcript does not reflect an abuse of discretion by the trial judge. The defense exercised one peremptory challenge, the State , two challenges for cause. Even if the court had denied the State's challenges for cause, the State could have excused both jurors anyway because it had not exercised any of its twelve peremptory challenges. La. C.Cr.P. art. 799; accord *State v. Murray*, 375 So.2d 80, 88 (La.1979). This assignment has no merit.

CONCLUSION

Accordingly, we affirm the defendants' conviction and sentence but remand the matter for imposition of a fine.

CONVICTION AND SENTENCE

AFFIRMED;
REMANDED FOR IMPOSITION OF FINE