

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2004-KA-1221
VERSUS	*	COURT OF APPEAL
MICHAEL A. ZUVICH, JR	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

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APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 02-3702, DIVISION "B"
Honorable William A. Roe, Judge

* * * * *

Judge Roland L. Belsome

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(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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NOVEMBER 3,

2004

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AFFIRMED

On December 13, 2002, the State filed a bill of information charging Michael A. Zuvich, Jr. with distribution of cocaine in violation of La. R.S. 40:967(A). After trial on October 14, 2003, a twelve-member jury found the defendant to be guilty as charged. He was sentenced on January 28, 2004, to serve seven years at hard labor.

In his sole assignment of error, the defendant argues that the evidence is insufficient to support the conviction because the State failed to prove the identity of the defendant beyond a reasonable doubt and failed to negate the possibility of misidentification.

FACTS

At trial Agent Chuck Adams of the Plaquemines Parish Sheriff's Office testified that he is an undercover supervisor in the narcotics division. The agent explained that he uses "cooperating individuals" in his drug trafficking cases. Such people are paid or are "working off charges" that are pending. Because it is hard to bring new people into Plaquemines Parish without arousing suspicion, the agent uses individuals who know the drug dealers and are willing to make buys for the Sheriff's Office. In this case the Sheriff's office used Edward Demolle.

On May 21, 2002, Agent Adams and his assistant, Agent Michael Burt, planned a drug purchase at Locke's Lounge in Empire, Louisiana. At approximately 8 p.m. the agents dropped Demolle off close to the lounge; he was wired with an audio recorder. The agents set up surveillance and watched as Demolle moved between cars parked in front of the lounge. The agents noticed a white man running across the street, behind another bar, and then returning. The man was not wearing a shirt. About two minutes later the agents met again with Demolle who gave them white rocks that he had purchased; he said he got them from Michael Zuvich. Demolle said he had known Zuvich for some time. The agents prepared a photo lineup, which was shown to Demolle. He selected the defendant's picture and named him as the person who sold him crack cocaine.

At trial, Demolle admitted pleading guilty to distribution of cocaine in 1994. He began working for the narcotics section of the Sheriff's Office after that, and in the course of a year, he made twenty to thirty buys for them. In the case at issue, the agents searched Demolle's person prior to the buy. The agents provided him with money and had him wear a recording device. When the agents dropped him off near the lounge, he spoke to a man named Slim, who was sitting in a car in front of the lounge. Demolle asked Slim if anyone was working in the lounge; Demolle explained that he

wanted to know if anyone was selling drugs. Slim answered that no one was selling at that time.

Next a truck driven by Buddy Griffice stopped in the parking lot. Demolle recognized the passenger Michael Zuvich, whom he had known for years. When Zuvich got out of the truck Demolle asked him for “a bill” which is slang for one hundred dollars worth of cocaine. Zuvich, wearing sweat pants and no shirt, went across the street behind the Watutsi Lounge. Zuvich returned quickly and gave Demolle seven rocks; Demolle paid for the drugs and left. Demolle was asked if he had listened to the tape made of the transaction, and he said that he had heard the tape and it was an accurate depiction of the drug buy. The tape was played for the jury. Demolle said he called Zurich “Mike” on the tape. Later Demolle selected Zurich’s picture from a photo lineup. On cross-examination Demolle admitted that he did not notice that Zurich’s tattoos of a huge Confederate Flag and the Grim Reaper on his chest.

Agent Burt testified that he was working with Agent Adams on May 21, 2002. His testimony tracked that of Agent Adams. He also said that he knew that Zurich lived in a trailer behind the Watutsi Lounge.

Buddy Arlen Griffice, a boat captain from Empire, Louisiana, testified that he was at Locke’s Lounge on May 21, 2002 “messaging around.” Griffice

claimed he saw a man called “Slim” there, and he saw Demolle come into the parking lot. Demolle “had asked . . . [Griffice] about scoring some drugs” but Griffice answered he knew nothing about that. Griffice stated that Zurich was not in his truck that night and he did not see any deals between Demolle and Zuvich. However, on cross-examination, Griffice admitted he saw Zuvich in the parking lot at Locke’s Lounge that night.

ANALYSIS

In *State v. Ash*, 97-2061, pp. 4-5 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, 667-668, this court summarized the standard of review that applies when a defendant claims that the evidence produced to convict him was constitutionally insufficient:

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). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. *State v. Mussall*, 523 So.2d 1305 (La. 1988). Additionally, the 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. *Id.* The trier of fact’s determination of credibility is not to be disturbed on appeal absent an abuse of discretion. *State v. Cashen*, 544 So.2d 1268

(La. App. 4th Cir. 1989). 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 proved 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 is 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).

The defendant was convicted of distribution of cocaine, in violation of La. R.S. 40:967(A), which makes it unlawful for any person to knowingly or intentionally, among other things, distribute a controlled dangerous substance classified in Schedule II, which includes cocaine. *See* La. R.S. 40:964. A defendant distributes a controlled dangerous substance when he transfers possession or control of it to his intended recipient. *State v. Cummings*, 95-1377, p. 4 (La. 2/28/96), 668 So.2d 1132, 1135; *see also* La. R.S. 40:961(14). The state must show (1) "delivery" or "physical transfer;" (2) guilty knowledge of the controlled dangerous substance at the time of transfer; and (3) the exact identity of the controlled dangerous substance. *State v. Kanost*, 99-1822, p. 4 (La. App. 4 Cir. 3/29/00), 759 So. 2d 184, 187, *writ denied*, 2000-1079 (La. 11/13/00), 773 So. 2d 726. Guilty

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.

The defendant maintains that the State failed to prove his identity because no one identified him by the fact that he had a huge tattoo on his chest. However, all three witnesses already knew the defendant and recognized him from past experience. They all mentioned the fact that he had no shirt on and that he was wearing sweat pants. They also noted that he was first in the parking lot, then ran across the street and behind the Watutsi Bar, and then returned to the parking lot. On the audiotape from Demolle, the defendant can be heard counting out the seven rocks.

When, as here, there is a question of determining the credibility of witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Allen*, 94-1895 (La. App. 4 Cir. 9/15/95) 661 So.2d 1078. The trier of fact determines the weight to be given the evidence presented. It is not the function of an appellate court to assess credibility or reweigh the evidence. *State v. Rosiere*, 488 So.2d 965 (La.1986). The testimony of the two agents established that they both observed the defendant while he was in the parking lot and then crossing the street. Demolle testified that he had known the defendant for years that he asked for “a bill” of cocaine, that the

defendant crossed the street to get it, and that he returned and counted out seven pieces of rock that he gave to Demolle. Accordingly, there was little to suggest the possibility of a mistake by the agents or Demolle. The question for the jury fell squarely within the realm of witness credibility. Absent clear evidence to the contrary, a trier of fact's determination as to the credibility of a witness will not be disturbed. *State v. Vessell*, 450 So.2d 938, 943 (La.1984). Viewing the totality of the evidence in the light most favorable to the State, the evidence was sufficient to convince a reasonable juror beyond a reasonable doubt that the defendant distributed cocaine.

Accordingly, for the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED