

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0502

STATE OF LOUISIANA

VERSUS

JASON C. METZLER

RHP
gms

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 377401, Division "I"
Honorable Reginald T. Badeaux, III, Judge Presiding**

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and

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Defendant-Appellant
Jason C. Metzler**

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered September 20, 2006

McCleendon, J. concurs

PARRO, J.

Defendant, Jason C. Metzler, was charged by bill of information with one count of possession with intent to distribute marijuana, a violation of LSA-R.S. 40:966(A)(1), and one count of possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1. Defendant pled not guilty and was tried before a jury. The jury determined defendant was guilty as charged.

The trial court subsequently sentenced defendant to ten years at hard labor for his conviction for possession with intent to distribute marijuana and ten years at hard labor without benefit of probation, parole, or suspension of sentence for his conviction for possession of a firearm by a convicted felon, plus a fine of \$1,000. The trial court ordered these sentences to be served concurrently.

The trial court granted defendant's motion to reconsider sentence, and amended defendant's sentence on his conviction for possession with intent to distribute marijuana to six years at hard labor. The trial court left defendant's sentence for his conviction of possession of a firearm by a convicted felon unchanged.

Defendant appeals his convictions. Following our review, we affirm defendant's convictions and sentences.

FACTS

On the morning of December 22, 2003, police officers from the St. Tammany Parish sheriff's office responded to a call of a domestic disturbance at 1210 Eagle Lake Drive, Lot 119, in Slidell, Louisiana. Officer Jason Prieto, accompanied by Deputy Richard Holloman, arrived on the scene to find Felicia Michalik, who advised him that she and defendant were having some domestic problems and she wished to take the children and leave. Defendant is the father of Michalik's youngest child.

The police officers suggested they accompany both parties inside the trailer so they could settle the dispute. Once inside the trailer, the officers noted the strong smell of burnt marijuana. The officers did not mention the smell while the dispute

was settled. The officers stayed in the trailer with Michalik as she gathered her belongings and items for the children.

According to Officer Prieto, defendant appeared very nervous and was constantly walking in and out of the trailer. Officer Prieto found defendant to be evasive with the police and noted that defendant refused to make eye contact. Defendant mentioned several times that he had to retrieve some work clothes so he could leave for his job.

Detective Lewis Sanders, who was a patrolman at the time, arrived on the scene as back-up. When he arrived, he found defendant standing outside of the trailer. Detective Sanders entered the trailer and also noted the odor of marijuana. Detective Sanders testified that Michalik told him that defendant had locked her out of the house and she needed to get some clothing, because she and the children were going to stay at another house with a relative.

Detective Sanders noted that defendant moved several times from the driveway to the trailer and indicated he was late for work. Defendant also seemed agitated at the police presence and repeatedly asked when the police were going to leave. When defendant realized the police would stay until Michalik had packed her belongings, he seemed "troubled." Detective Sanders and Officer Prieto accompanied defendant to the master bedroom so defendant could retrieve his needed items. Both police officers noted that underneath an armoire in the master bedroom were two clear plastic bags with what appeared to be two packed bricks of a green leafy substance. The officers suspected this was marijuana, but did not comment on the items at that time. Defendant, while acting in an extremely nervous manner, gathered a work shirt from the bedroom and eventually left the trailer to report for work.

Following defendant's departure, Detective Sanders brought up the fact to Michalik that the trailer smelled of burnt marijuana. Michalik said that she and defendant had smoked a joint prior to the arrival of the police. Detective Sanders

sought and obtained written consent from Michalik to search the residence for narcotics.

The search was initiated in the kitchen, but no contraband was discovered. Accompanied by Michalik, the police then proceeded to the master bedroom. The search of the master bedroom revealed two clear plastic bags containing two "bricks" of marijuana. A separate plastic container was also found underneath the bed and it contained rolling papers and remnants of marijuana. When the police were moving the mattresses from the bed, they also discovered a .25 caliber Beretta pistol. One magazine was inserted into the pistol and a round was in the chamber and there was another magazine next to the pistol.

At that point, the police placed Michalik under arrest. Michalik later pled guilty to misdemeanor possession of marijuana. Michalik provided police with a written statement indicating that the marijuana was there for four days. She also wrote, "I have a [suspicion] where it came from and can help the police." Michalik also wrote "The [marijuana] was not mine. The gun and [marijuana] was not mine it was my boyfriends."

The police then called defendant and requested he return to the trailer. When defendant failed to return, the police immediately sought and obtained an arrest warrant for defendant. The police also seized a furniture delivery invoice indicating defendant had purchased an item that was delivered to that residence and an application for homeowner's insurance indicating Michalik owned the trailer.

At trial, Michalik testified on behalf of defendant. Michalik denied that anyone, in particular defendant, lived there with her. Michalik denied that defendant was her boyfriend at the time of this incident. According to Michalik, defendant lived with his mother in Chalmette. Michalik denied the marijuana belonged to defendant and claimed it was hers and she got it "Off the streets." Michalik provided the same explanation for the pistol. On cross-examination, Michalik stated that she paid one hundred dollars for the two bricks of marijuana and fifty dollars for the pistol.

Michalik denied she was moving out of the residence that day and had asked the police to take her to a relative's home. Finally, Michalik claimed the police threatened her into consenting to the search and providing a written statement.

Pamela Mena, defendant's mother, also testified on his behalf at trial. Mena testified that defendant and Michalik used to date, but had broken up sometime before this incident. Mena also testified that defendant lived with her at that time.

Defendant did not testify.

The state called Detective Sanders on rebuttal and he denied that anyone threatened Michalik in an effort to gain consent to search or provide a written statement. Defendant had a prior conviction for attempted manslaughter.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant contends that the evidence is insufficient to support his conviction because there is no evidence he lived with Michalik at the residence where the marijuana and pistol were found.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821(B). The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." LSA-R.S. 15:438. The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable such that a rational juror could not have found proof of guilt beyond a reasonable doubt. 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 that raises a reasonable doubt.

State v. Smith, 03-0917 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 798-99.

To support a conviction for possession with intent to distribute marijuana, the state had to prove beyond a reasonable doubt that the defendant: 1) possessed the marijuana; and 2) had the intent to distribute the marijuana. LSA-R.S. 40:966(A)(1).

On the issue of whether the evidence sufficiently proved possession, the state is not required to show actual possession of the drugs by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 868 So.2d at 799.

A determination of whether or not 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 possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. **State v. Smith**, 868 So.2d at 799.

To support a conviction for possession of a firearm by a convicted felon under the facts of this case, the state had to prove beyond a reasonable doubt that

defendant: 1) had been previously convicted of a felony;¹ and 2) possessed a firearm. LSA-R.S. 14:95.1.

Actual possession of a firearm is not a necessary element of the offense of possessing a firearm after having been convicted of a felony. Constructive possession satisfies the possessory element of the offense. **State v. Fisher**, 94-2255 (La. App. 1st Cir. 12/15/95), 669 So.2d 460, 462, writ denied, 96-0958 (La. 9/20/96), 679 So.2d 432. Dominion and control over a weapon by a convicted felon are sufficient to constitute constructive possession of a firearm, even if the control is only temporary in nature and even if the control is shared by another person. **State v. Plain**, 99-1112 (La. App. 1st Cir. 2/18/00), 752 So.2d 337, 340.

Applying these factors, we find there is sufficient evidence to establish defendant had control over the marijuana and the gun. Based on the testimony of Detective Sanders and Officer Prieto, defendant's actions and mannerisms after the police were called to the residence reflect that defendant acted in an extremely nervous and agitated manner. Both Detective Sanders and Officer Prieto testified that they had observed the suspected contraband on the floor of the master bedroom, underneath an armoire. These suspicious mannerisms are indicative of defendant's knowledge that contraband was in the residence.

Second, we examine defendant's relationship with Michalik. Michalik testified at trial that the residence belonged to her and that defendant did not live there. However, Officer Prieto testified that when he responded to the domestic disturbance call, Michalik informed him that she and defendant were having domestic problems and she wished to take the children and leave. Detective Sanders testified that Michalik reported she had been locked out of the house and needed to get clothing because she and the children were going to stay at another house with a relative. It is undisputed that defendant is the father of Michalik's youngest child.

¹ Defendant stipulated to a prior felony conviction.

It is also evident that defendant had access to the area where the drugs were found. As the police remained at the scene to ensure that Michalik was able to peacefully pack items for herself and her children, defendant mentioned several times that he needed to get clothing so he could report to work. Detective Sanders and Officer Prieto accompanied defendant to the master bedroom, which contained the suspected marijuana and the weapon. Defendant retrieved a shirt from the master bedroom and continued to move about the room in a nervous and confusing manner. Both police officers noted that defendant went towards the armoire, under which the marijuana was located, and acted as if he wanted to retrieve something.

There is also evidence that defendant had recently engaged in drug use. Both police officers noted the overpowering smell of burnt marijuana as they entered the residence. When this was brought to Michalik's attention, she admitted that she and defendant had smoked a joint just prior to the arrival of the police. Detective Sanders specifically noted that defendant's speech was slurred and he seemed as if he had a hard time keeping up with the conversation. Officer Prieto noted that defendant appeared very nervous and appeared to be very evasive with the police.

Finally, we note that defendant's retrieval of his work clothes put him in close physical proximity to the marijuana and the handgun. Both police officers specifically noted that defendant lingered near the armoire, under which the marijuana was placed.

Based on our examination of these factors, we find that the state presented sufficient evidence to establish that defendant exercised constructive possession over the marijuana and weapon to satisfy that portion of its burden of proof.

As to the evidence of defendant's intent to distribute the marijuana, it is well-settled that intent to distribute may be inferred from the circumstances. Factors useful in determining whether the state's circumstantial evidence is sufficient to prove intent to distribute include: (1) whether the defendant ever distributed or attempted to distribute illegal drugs; (2) whether the drug was in a form usually

associated with distribution; (3) whether the amount was such to create a presumption of intent to distribute; (4) expert or other testimony that the amount found in the defendant's actual or constructive possession was inconsistent with personal use; and (5) the presence of other paraphernalia evidencing intent to distribute. **State v. Smith**, 868 So.2d at 800.

In the absence of circumstances from which an intent to distribute may be inferred, mere possession of marijuana is not evidence of intent to distribute unless the quantity is so large that no other inference is reasonable. For mere possession to establish intent to distribute, the state must prove the amount of the drug in the possession of the accused and/or the manner in which it was carried is inconsistent with personal use only. The presence of large sums of cash also is considered circumstantial evidence of intent to distribute. **State v. Smith**, 868 So.2d at 800.

In the present case, the state established that the marijuana contained in the plastic bags underneath the armoire in the master bedroom was packed in what is commonly referred to as "brick form." Detective Sanders testified that based on his personal experience, this amount of marijuana and the manner in which it was packaged was not consistent with personal use. Moreover, the existence of a weapon hidden in the same room as the marijuana is also consistent with drug trafficking.

Although defendant maintains that Michalik's initial statement to the police indicated that the marijuana and weapon belonged to her "boyfriend," he notes that at trial Michalik denied that she and defendant were dating at the time of this incident. Defendant also points to Michalik's trial testimony indicating that he did not live with her, but lived with his mother, Pamela Mena, in Chalmette. Mena testified on behalf of her son and also stated that defendant did not reside with Michalik and was not dating her at the time of this incident. Although Michalik's statement failed to identify the identity of her boyfriend, she claimed that the only reason she provided a statement and gave consent to search the residence was that she was threatened by the police.

Moreover, defendant argues that Michalik's explanation of a receipt from a furniture store indicating he had purchased a bed for delivery to 1210 Eagle Lake Drive was merely a delivery address for a bed for his son, not an indicator of his residency at that address.

In the present case, it was evident that defendant kept personal items in the master bedroom. The police officers testified that defendant moved about the master bedroom with ease and familiarity when retrieving his work clothes. Although defendant may not have resided with Michalik on a daily basis, there was a reasonable basis for the jury to conclude that defendant exercised some control over items placed in the master bedroom of the residence. Viewing the evidence in the light most favorable to the prosecution, we find a sufficient basis to conclude defendant exercised constructive possession over the Beretta pistol found underneath the bed.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where 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. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984).

Clearly, the jury rejected Michalik's testimony and accepted the testimony of the police officers. There was a reasonable basis to conclude defendant resided at the residence with Michalik based on her call for police to assist with the domestic disturbance surrounding her intent to take the children and go to another relative's house on the date of this incident. Moreover, the jury clearly accepted that the observations of the police officers of the ease with which defendant gathered his own belongings for his job from the bedroom and the nervous manner in which he acted towards the police presence indicated defendant was aware of the risk of being immediately arrested for possession of marijuana. Viewing the evidence in the light

most favorable to the prosecution, we find the evidence sufficiently supports defendant's convictions.

This assignment of error is without merit.

PROSECUTORIAL MISCONDUCT

In his second assignment of error, defendant argues that the state committed prosecutorial misconduct by impermissibly vouching for the credibility of a state witness. Specifically, the prosecutor stated, "Detective Sanders testified at the beginning and then at the end in rebuttal. He was credible. He was believable."

Defendant failed to object to the prosecutor's reference to the credibility of Detective Sanders. Because of defendant's failure to contemporaneously object to this statement, the issue is not preserved for appellate review.² Accordingly, this issue is not preserved for review. See LSA-C.Cr.P art. 841; **State v. Rogers**, 98-2501 (La. App. 1st Cir. 9/24/99), 757 So.2d 655, 661, writ denied, 99-3526 (La. 6/16/00), 764 So.2d 962.

Nevertheless, we note that while a prosecutor may not give his personal opinion regarding the veracity of a witness, it is permissible for a prosecutor to draw inferences about a witness's truthfulness from evidence in the record. See LSA-C.Cr.P. art. 774. Taken in context, we find the alleged improper comments were confined to comparing how Michalik's initial statements and interactions with the police were very different than what she testified to at trial. While the comments at issue could have been phrased differently, we find that they were based on the evidence and not personal opinion based on anything outside of the record. Thus, the prosecutor did not improperly vouch for the credibility of Detective Sanders. See **State v. Palmer**, 00-0216 (La. App. 1st Cir. 12/22/00), 775 So.2d 1231, 1236, writs denied, 01-0211 (La. 1/11/02), 807 So.2d 224, and 01-1043 (La. 1/11/02), 807 So.2d 229.

² Nor does the record reveal that defendant requested the trial court to admonish the jury to disregard the alleged improper comments.

Defendant also takes issue with the following statement by the prosecutor during closing argument:

[PROSECUTOR]:

And I want you to think about [defendant's] occupation. Moving cars around, doing those kinds of things. A good way to move marijuana.

[DEFENSE COUNSEL]:

I totally object to that, Your Honor. That's out of line.

[PROSECUTOR]:

I'm finished with it anyway, Judge.

THE COURT:

Overruled. He's entitled to make his argument.

Defendant argues there was never any evidence that he was involved in drug trafficking using his car business, nor did the police witnesses testify that any further investigation was made into defendant's activities. Defendant asserts that this statement by the prosecutor inflamed the jury.

An appellate court will not reverse a conviction because of improper closing arguments unless it is thoroughly convinced that the remarks influenced the jury or contributed to the verdict. **State v. Johnson**, 00-0680 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 680, writ denied, 02-1368 (La. 5/30/03), 845 So.2d 1066.

Although there was no testimony or evidence that defendant was involved with drug trafficking through his used car business, the prosecutor's comment during his closing argument was based on his conclusions of fact drawn from the evidence admitted. See LSA-C.Cr.P. art. 774. After the defendant's objection was overruled, defendant did not request an admonition or mistrial as a result of the comment. Considering the evidence as a whole, we cannot say this comment inflamed the jury or contributed to the guilty verdicts.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.