NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0585

STATE OF LOUISIANA

VERSUS

TERRANCE A. PETERS

Judgment Rendered: November 2, 2007

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 392156-1

Honorable William J. Burris, Judge Presiding

* * * * * * * * * *

Walter P. Reed **Covington, LA**	**Attorneys for Appellee,** **State of Louisiana**
Kathryn W. Landry **Baton Rouge, LA**	
Bruce G. Whittaker **Robert C. Jenkins** **New Orleans, LA**	**Attorney for Defendant/Appellant,** **Terrance A. Peters**

* * * * * * * * * *

BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

Hughes, J., dissents with reasons.

WHIPPLE, J.

The defendant, Terrance A. Peters, was charged by bill of information with possession of marijuana with intent to distribute, a violation of LSA-R.S. 40:966(A)(1).[1] He pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The State subsequently filed a "multiple offender" bill of information, and, following a hearing, the defendant was adjudicated a second felony habitual offender. The defendant was sentenced to twenty-five (25) years imprisonment at hard labor. The defendant now appeals, designating three assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

Gloria Harper lived with her children in the Covington Housing Authority, a public housing facility in St. Tammany Parish. Detective Nick Powe with the St. Tammany Parish Sheriff's Office received an anonymous call regarding narcotics activity at Harper's house. Based on this tip, Harper and the defendant became the subjects of an investigation.[2] In the past, the defendant had been involved in a personal relationship with Harper's sister. Also, the defendant's brother had fathered a child with Harper.

Several police officers conducted surveillance of Harper's house. Detective Keith Dowling observed a black Monte Carlo pass Harper's house twice. The defendant drove a black Monte Carlo. When no other information was gathered through surveillance, officers spoke to Harper's neighbor, who informed the officers where Harper worked. On October 28, 2004, when officers approached

---

[1]Gloria Harper was also charged with the same crime. She pled guilty to the charge and was a witness at the trial of this matter.

[2]The defendant was also known in the community as "Pimp."

Harper at work, Harper told them that she knew why they were there and that "it" was at her house. Harper was driven back to her house, where she gave officers written consent to search her house. While officers were searching her house, Harper led one of the officers to a dresser in a bedroom. On top of the dresser was a diaper bag, which contained several plastic bags (or baggies) containing various sizes of marijuana. In the bottom drawer of the dresser, there was a large garbage bag, which also held several plastic bags of various sizes containing marijuana. The total weight of the marijuana was approximately 4.9 pounds. An officer also found a digital scale in a hallway closet behind the water heater. Harper informed the officers that the marijuana was not hers, but that it belonged to the defendant, whom she referred to as "Pimp." Harper also gave a written statement to the police, which implicated the defendant as the person to whom the marijuana belonged. At trial, however, Harper testified that her statements to the police were not true, and that the defendant never possessed the marijuana. Several of the plastic bags of marijuana were sent to the St. Tammany Parish Sheriff's Office Crime Lab for fingerprint analysis. Crime lab testing revealed that one of the plastic bags of marijuana had the defendant's right index fingerprint on it.

The defendant testified at the trial. He denied any knowledge of or involvement with the marijuana seized from Harper's house. He stated that he never had actual or constructive possession of the marijuana, nor did he own or control it. He claimed that he had never been near it, and that he was not aware of its existence. He testified that, prior to being charged for this crime, he drove trucks for St. Tammany Parish for four years. He explained that the $539.00 in cash found on his person when he was arrested for this charge was from a check he had just cashed, not from selling or dealing drugs. The defendant stated that he had purchased marijuana in the past for his "own habit," and that he did not sell it.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was insufficient to support a guilty verdict. Specifically, the defendant contends that the State failed to prove that he possessed the seized drugs.

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 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 also LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207, p. 10 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-1309 (La. 1988). The Jackson v. Virginia 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, LSA-R.S. 15:438 provides that the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932.

To support a conviction for possession with intent to distribute, the State had to prove beyond a reasonable doubt that the defendant: (1) possessed the controlled dangerous substance; and (2) had an intent to distribute the controlled dangerous substance. LSA-R.S. 40:966(A)(1); State v. Young, 99-1264, p. 10 (La. App. 1st Cir. 3/31/00), 764 So. 2d 998, 1006.

On the issue of whether possession is sufficiently proved, the State is not required to show actual possession of the narcotics 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, a defendant's mere presence in the area where narcotics are discovered or mere association with the person who controls the drug or the area where it is located is insufficient to support a finding of constructive possession. See State v. Smith, 2003-0917, pp. 5-6 (La. App. 1st Cir. 12/31/03), 868 So. 2d 794, 799.

A variety of factors are considered in determining whether or not a defendant exercised dominion and control over a drug, including: (1) a defendant's knowledge that illegal drugs are in the area; (2) the defendant's relationship with any person found to be in actual possession of the substance; (3) the defendant's access to the area where the drugs were found; (4) evidence of recent drug use by the defendant; (5) the defendant's physical proximity to the drugs; and (6) any evidence that the particular area was frequented by drug users. State v. Harris, 94-0696, pp. 3-4 (La. App. 1st Cir. 6/23/95), 657 So. 2d 1072, 1075, writ denied, 95-2046 (La. 11/13/95), 662 So. 2d 477.

In the instant matter, Harper testified that she "found" the almost five

pounds of marijuana. When the drugs were seized at her house, Harper gave a written statement to the police. Harper's written statement was read to the jury. In it, Harper denied that the drugs were hers and identified the defendant as the person to whom the drugs belonged. However, Harper later testified that her statement to the police was untrue. She stated that the police told her that if she implicated the defendant, she would not have to go to jail, and she would not lose her house and children.

Four officers with the St. Tammany Parish Sheriff's Office testified to the contrary. Sergeant Danny Fonte, Detective Nick Powe, Detective Keith Dowling, and Lieutenant William Hart were all involved in the investigation and seizure of the drugs. According to their testimony, no threats were made to Harper about losing her house or children, nor were any inducements or promises made that she would not be arrested if she implicated the defendant. Each officer also testified that Harper told them that the marijuana seized belonged to the defendant, known as "Pimp." In particular, Detective Dowling testified, "Ms. Harper stated that she wasn't going to take this charge. That it wasn't her dope. That was Pimp's dope." Lieutenant Hart testified that Harper was "very adamant and basically spoke freely that she was not going to take a charge for anyone. She identified a subject by the name of Pimp. That was Pimp's dope." When Lieutenant Hart was asked on cross-examination if it was possible that Harper was lying to keep herself out of trouble, he responded, "Is it possible, yes. Do I believe she was lying at that point, no."

At trial, the State established that the defendant's fingerprint was found on one of the baggies of marijuana found in Harper's house and seized by the police. According to Sergeant Fonte, on numerous occasions, police have found that a large scale distributor will not keep the narcotics at his own home to avoid

detection from the police. Instead, the distributor will keep the narcotics at the house of a girlfriend or a loved one.

Contrary to defendant's representations in brief, the defendant had more than a passing acquaintance with Harper. Testimony at trial established that the defendant knew Harper through her sister and his brother. According to the defendant's trial testimony, he knew Harper for about seven years. He admitted he "used to mess with" Harper's sister and had been to Harper's house with Harper's sister. Also, the defendant's brother and Harper had had a child together. Thus, the defendant was Harper's son's uncle. The defendant testified that he never saw the marijuana or knew anything about it. He stated that he never possessed it and had no knowledge that it was in Harper's house. When asked if he had an explanation for how his fingerprint got on one of the baggies of marijuana, the defendant responded, "Well, not really. Like I say, I used to mess with her sister, and I done been to her house before, but I don't understand how my fingerprint get [sic] on the bag." The defendant also testified that he had two prior convictions for possession of marijuana.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984). The defendant's hypothesis of innocence was based on the theory that he did not give Harper marijuana to hold for him and that he knew nothing about any marijuana that Harper may have had in her house. Thus, the defendant claimed, he never had actual or constructive possession of the drugs.

The jury's verdict reflects the reasonable conclusion that, based on Harper's written police statement, the testimony of the police officers, and the defendant's

fingerprint found on the seized drugs, the defendant was in constructive possession of the marijuana. In finding the defendant guilty, the jury clearly rejected the defendant's claim of complete lack of knowledge of the drugs, and instead concluded that the defendant's version of the events was a fabrication designed to deflect blame from him. The jury also rejected Harper's recanting testimony, wherein she denied the veracity of her written police statement which implicated the defendant as a possessor of the drugs. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985). We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So. 2d 78, 83.

On the issue of whether the defendant's intent to distribute the marijuana was sufficiently proved, we note 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.

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. Smith, 2003-0917 at pp. 7-8, 868 So. 2d at 800.

Here, the State proved that the large amount of marijuana the defendant possessed, the way in which it was packaged, and the large digital scale, were consistent with possession with intent to distribute. The marijuana, which weighed approximately 4.9 pounds, was packaged in various pound bags, ounce bags, and dime bags. According to the State's witness, marijuana is broken down into smaller amounts to increase the dealer's profit. A pound of marijuana before it is broken down could be bought for $600.00 to $800.00. A gram bag, which sells for about $10.00 would mean that one pound of marijuana broken down into gram bags would sell for $4,540.00, since there are 454 grams in a pound. The State's witness further testified that digital scales are used to weigh narcotics. The witness explained that larger scales, such as the Sunbeam postal scale found in Harper's house, can be used during the packaging of the drugs, and provide for consistent weight, which is good for the dealer's customer base. Given this testimony and the other testimony and evidence introduced by the State, we conclude the jury's finding of specific intent to distribute marijuana was sufficiently supported by the circumstantial evidence presented. See Smith, 2003-0917 at pp. 8-9, 868 So. 2d at 800-801.

After a thorough review of the record, we find that the evidence supports the jury's verdict. 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 marijuana with the intent to distribute it.

The assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues he was denied his right to effective assistance of counsel. Specifically, the defendant contends that defense counsel was ineffective for failing to call certain witnesses at trial.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. State v. Morgan, 472 So. 2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. State v. Robinson, 471 So. 2d 1035, 1038-1039 (La. App. 1st Cir.), writ denied, 476 So. 2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. State v. Carter, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So. 2d 432, 438.

In the instant matter, the allegations of ineffective assistance of counsel

cannot be sufficiently investigated from an inspection of the record alone. In his brief, the defendant states that defense counsel did not call any witnesses to verify he was at work during the surveillance of Harper's house; he did not call any witnesses to establish that he rarely, if ever, visited Harper's house; he did not call any witnesses to state he was not a drug dealer; and he did not call an expert to rebut the State's fingerprint evidence.

The election to call or not to call a particular witness is a matter of trial strategy and is not, per se, evidence of ineffective assistance. State v. Folse, 623 So. 2d 59, 71 (La. App. 1st Cir. 1993). Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[3] Accordingly, these allegations are not subject to appellate review. See State v. Albert, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-1364. See also State v. Johnson, 2006-1235, p. 15 (La. App. 1st Cir. 12/28/06), 951 So. 2d 294, 304.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues he was denied the right to a fair trial. Specifically, the defendant contends that the combined effect of the complained of errors rendered the entire trial unfair.[4]

This claim appears to refer to the alleged errors regarding ineffective assistance of counsel discussed in the second assignment of error. As

[3]The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq., in order to receive such a hearing.

[4]The defendant does not indicate specific errors, and he makes no mention of ineffective assistance of counsel or his second assignment of error in this third assignment of error. However, since the only specific errors alleged in the defendant's brief pertain to his ineffective-assistance-of-counsel claim, we presume these are the errors to which the defendant is referring.

noted above, such alleged errors are not subject to appellate review and therefore, have not been addressed. Thus, we pretermit consideration of the "combined effect," if any, of such alleged errors.

This assignment of error is also without merit.

CONCLUSION

Accordingly, the defendant's conviction, habitual offender adjudication and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0585

STATE OF LOUISIANA

VERSUS

TERRANCE A. PETERS

HUGHES, J., dissenting.

I respectfully dissent. The evidence is insufficient to establish "constructive possession" as to defendant Peters.