NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0450

STATE OF LOUISIANA

VERSUS

CLIFTON CLAY

Judgment Rendered: October 29, 2010

* * * * * * *

APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LAFOURCHE
STATE OF LOUISIANA
DOCKET NUMBER 442,542, DIVISION "C"

THE HONORABLE WALTER I. LANIER, III, JUDGE

* * * * * * *

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

The defendant, Clifton Clay, was charged by bill of information with possession with intent to distribute cocaine, in violation of La. R.S. 40:967(A) (1) (Count1), and possession with intent to distribute methylenedioxy-methamphetamine (MDMA, also known as ecstasy), a violation of La. R.S. 40:966(A)(1) (Count 2). The defendant pled not guilty to the charges and, following a jury trial, was found guilty of the responsive offenses of attempted possession with intent to distribute cocaine, a violation of La. R.S. 40:979 and La. R.S. 40:967(A)(1) (Count 1), and attempted possession of MDMA, a violation of La. R.S. 40:979 and La. R.S. 40:966(C) (Count 2). See La. R.S. 14:27(A). The defendant filed a motion for post verdict judgment of acquittal, which was denied. For the attempted possession with intent to distribute cocaine conviction, the defendant was sentenced to eight years. For the attempted possession of MDMA conviction, the defendant was sentenced to two years. The sentences were ordered to run concurrently. The defendant now appeals, designating three assignments of error. We affirm the convictions, amend the sentences, and affirm as amended.

FACTS

On June 28, 2006, Lafourche Parish Drug Task Force agents used Audrey Cheramie (Cheramie), a confidential informant (CI), to attempt to purchase cocaine from Tyeine Jones at a two-story house on 160th Street in Galliano, which was being rented by Samantha Merrill (Merrill). Based on the CI's transaction, as well as anonymous calls to the police about illegal drug activities at the Galliano house, Agent Robert Mason, with the Lafourche Parish Sheriff's Office, secured a search warrant to search the house for narcotics.

On July 7, 2006, Drug Task Force agents executed the search warrant at the Galliano house. Therein, agents found the defendant and Merrill in a downstairs bedroom and Kelly Campbell, the defendant's brother, in an upstairs bedroom.

The three occupants were secured in the downstairs living room, where they were **Mirandized** as a group by Agent Mason. A K-9 unit brought into the house alerted on a chest of drawers in the bedroom where the defendant and Merrill had been sleeping. In the top drawer, Agent Mason found a brown paper bag containing four wrapped "cookies" of crack cocaine and an Advil bottle, which contained twelve tablets of MDMA. In a cabinet drawer in the kitchen, Lieutenant Chet Caillouet, with the Lafourche Parish Sheriff's Office, found a razor blade and a digital scale inside a Ziploc box of sandwich bags.

Lieutenant Josh Champagne, with the Lafourche Parish Sheriff's Office and the Drug Enforcement Administration, testified at trial that he **Mirandized** the defendant and questioned him about the drugs found in the room. The defendant told Lieutenant Champagne that the drugs were his and that his brother and girlfriend had nothing to do with the drugs. Agent Mason heard the defendant's admission to Lieutenant Champagne. The defendant also told Lieutenant Champagne that the drugs came from Houma.

Campbell testified at trial. According to his testimony, the defendant lived in Houma with his mother. On the day before the execution of the search warrant, Campbell, along with the defendant, was driving back from Florida, where Campbell worked. While on their way back to Houma, the defendant received a call from his friend, Merrill, who invited the defendant to come to her house in Galliano. Campbell and the defendant agreed to spend the night at Merrill's house instead of driving straight through to Houma. The defendant did not bring any drugs with him, and there were no drugs in Campbell's car. When they arrived at Merrill's house, it was the first time Campbell had met Merrill and, according to Campbell, as far as he knew, it was the first time the defendant had ever been to Merrill's house. However, Cheramie testified at trial that Merrill was the defendant's girlfriend, and she (Cheramie) had seen them hanging out a few times.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to quash the search warrant and/or suppress the evidence seized from the execution of the search warrant. Specifically, the defendant contends that Agent Mason intentionally provided false information in the search warrant affidavit, wherein he stated that the CI had been proven credible and reliable in the past and that the CI possessed the crack cocaine briefly before Jones took the drugs back from her.

On February 11, 2008, the trial court held a pretrial hearing on the defendant's motion to quash and/or suppress the search warrant. Agent Robert Mason, with the Lafourche Parish Drug Task Force, testified that he secured the search warrant for the Galliano residence. Agent Mason stated in the search warrant affidavit that the police had received anonymous phone calls about possible drug activity at the residence. Agent Mason further stated that he used a CI to attempt to purchase cocaine from Tyeine Jones, who was at the residence. Agent Mason testified he had utilized the CI prior to the date of the attempted drug buy and that she had proven reliable in the past. When asked how her reliability had been proven, Agent Mason indicated that there had been convictions based on her information. Regarding the drug transaction between the CI and Jones, Agent Mason testified that Jones gave the CI crack cocaine and the CI gave Jones the money. During the transaction, Jones received a call on his Nextel (cell phone). Immediately thereafter, Jones took the cocaine out of the CI's hand and gave the CI the money back. All of this information was contained in the search warrant affidavit. In finding that the search warrant affidavit established probable cause for the search to be conducted, the trial court denied the defendant's motion to quash and/or suppress the search warrant.

Subsequently, although trial had not yet commenced, the defendant filed a motion for new trial and/or rehearing of the motion to suppress. At the hearing for this motion on February 19, 2008, the defendant fired his attorney and, in proper person, asserted that Agent Mason had lied in his testimony at the hearing on the defendant's motion to quash and/or suppress the search warrant. According to the defendant, Cheramie, the confidential informant, would testify, if called, that no drug transaction between her and Jones took place. The defendant informed the trial court that he was going to secure new counsel. The trial court continued the motion.

At the hearing on July 9, 2008, the motion for new trial and/or rehearing of the motion to suppress was resumed. The defendant, through his new defense counsel, informed the trial court that the basis for the motion was the intentionally false information included in the affidavit that was submitted to obtain the search warrant. The prosecutor responded that a new trial could be granted when there was newly discovered evidence which was unavailable at the time of the previous trial without the exercise of due diligence. Defense counsel called Cheramie, who testified that, prior to June 28, 2006 (the day she attempted to buy drugs from Jones), she had never worked with or had any affiliation with the Lafourche Parish Drug Task Force. She testified she had not worked any cases or supplied any information to the Task Force about any drug transactions or dealings. When asked about the claim that she had worked with the Task Force before and had proven credible and reliable in the past, Cheramie responded, "That's false." She further stated that this was the "[o]ne and only case" that she had any type of involvement with the Drug Task Force. She testified that when she met with Jones, there was no transaction and that she did not see any drugs. She further testified that she did not inform any representative of the Drug Task Force that she had seen any drugs while talking to Jones. On cross-examination, Cheramie

testified that she was friends with the defendant and his wife and had known the defendant for a few years. She also testified that while she saw the defendant about ten times a year, she was not aware in 2006 or 2007 of the defendant's legal problems regarding this case. At the end of that day's proceedings, wherein no ruling was made, the hearing was held over until a later date.

At the hearing on April 21, 2009, the motion for new trial and/or rehearing of the motion to suppress was resumed. The prosecutor argued that the evidence introduced at the hearing on July 9, 2008 was not evidence that was newly discovered by due diligence. Defense counsel argued the motion before the trial court was a motion for new trial based on newly discovered evidence following the February 11, 2008 hearing on the motion to quash and/or suppress the search warrant, which the trial court ruled on. The trial court agreed that the present motion was a new trial motion and, in denying the defendant's motion, made the following pertinent findings:

> I do not believe that any new evidence has been exposed that through due diligence the defendant . . . that in reading the transcript, which the Court did go back and read the transcript, Mr. Stewart [the defendant's first defense counsel] made a reference to knowing who the CI was. I think I want to say he adamantly said we know who the CI is but they need to disclose it or something to that effect.
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> * * * * *
>
> If there's any credibility call between Mr. Mason and Ms. Cheramie, that potentially can be resolved in calling the CI to the stand during the trial. There's not any new evidence that has been brought forth to this Court after this Court has heard numerous motions on the same issue I believe.
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> * * * * *
>
> If there was any evidence of a CI, I do believe that with due diligence after the attorney at that time knew who it was they could have asked certain questions of that CI. And Mr. Clay has the right to present his defense at his trial. So, I will deny the motion for new trial as I read your current motion in this case.

Under La. C.Cr.P. art. 851(3), the court, on motion of the defendant, shall grant a new trial whenever:

> New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or

> during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

In its ruling denying the defendant's motion for new trial and/or rehearing of the motion to suppress, the trial court clearly relied on the law for grounds for new trial under La. C.Cr.P. art. 851(3). See La. C.Cr.P. art. 854. Under the plain language of La. C.Cr.P. art. 851, a motion for a *new* trial shall be filed after the defendant has had a trial. Because the trial had not yet begun in this case when the trial court made its ruling, we find the defendant's motion for new trial to be an improper procedural device for requesting that a hearing on a motion to suppress be reopened. Similarly, we find the trial court's reasons for its denial of the defendant's motion, which were based on new trial law under Article 851(3), to be misplaced. The defendant did not fail to exercise reasonable diligence in informing the trial court of ostensibly newly discovered evidence. To the contrary, about a week after Agent Mason testified at the February 11, 2008 hearing, the defendant, in proper person, informed the trial court at the February 19, 2008 hearing on the motion for new trial and/or rehearing of the motion to suppress that his defense attorney, in failing to call any witnesses at the February 11, 2008 hearing, made no attempt to contradict Agent Mason's testimony regarding the drug transaction and the reliability of the CI. The defendant further represented to the trial court that the CI was at the present hearing and that, if called, she would testify that no drug transaction took place and that the information about the CI and the transaction that Agent Mason provided in the search warrant affidavit was false. The defendant also told the trial court that Merrill would testify that the drugs found in the house were hers. Subsequently, the defendant requested that the CI be allowed to testify that day at the hearing. After some discussion, the trial court stated it was prepared to have the CI testify at a later date. Almost five months later, the CI testified for the first time at the July 9, 2008 hearing.

Nevertheless, in determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979). Upon our review of the entire trial record, we find that, while the reasoning in denying the motion may have been erroneous, the trial court did not err or abuse its discretion in ultimately denying the defendant's motion for new trial and/or rehearing of the motion to suppress. At trial during the defendant's case-in-chief, Cheramie testified on direct examination that this was the first and only case that she ever worked with the Lafourche Parish Drug Task Force. Defense counsel asked Cheramie, "So if Robert Mason, under oath, stated that you had worked with the Task Force prior to that date, that would not be true?" Cheramie responded, "No, sir." Defense counsel further asked, "And if [Mason] said that you had made some cases and that drugs had been seized and sent to the Crime Lab and had come back cocaine, that would not be true?" Cheramie responded, "No, sir. I would like to see that." Cheramie further testified that, while she and Jones had a discussion about the purchase of drugs while she was wired, she did not purchase any drugs.

On cross-examination, Cheramie testified that she had a conviction for possession of cocaine. The arrest for this possession of cocaine conviction was in 2007, yet Cheramie testified she was already on probation in 2006 when the police sought to use her as a CI for the drug transaction with Jones. Accordingly, Cheramie had another conviction that she could not account for. When asked by the prosecutor how she had come to work for the Drug Task Force, Cheramie responded, "Well, first of all, they was always after me for any reason at all. And it had nothing - I mean, they was always watching everywhere I go, everywhere [sic] I do. And not just me, my female friends, too." Cheramie testified that she had just gotten out of a mental hospital about a week or so prior to trial. When

asked why she was in a mental institution, she responded, "For Bipolar, borderline Schizophrenia, panic, anxiety - I'm an anxiety, depression, P.T.S.D." She also stated she was a recovering addict. She testified that during her transaction with Jones, she showed him the money, but she never saw the drugs. When the prosecutor asked her if she had told Robert Mason or any agents of the Drug Task Force that she had the drugs in her hand, she responded that she had told them that, but that it was not true. Cheramie explained that she lied to Agent Mason because she felt if she did not make the deal, she would be arrested. Furthermore, according to Cheramie, if she would have had the drugs in her hand, she would have run with them. Cheramie stated, "And if he woulda gave me the dope, I woulda run off, took my little dope in my pocket and gave them that and gave them - then let them go bust him. But, no, I didn't get no dope."

Defense counsel recalled Agent Mason, who testified that Cheramie, as a CI, had been proven to be credible and reliable in the past. When asked how many times Agent Mason had used Cheramie in the past and the nature of such use, Agent Mason responded:

> Well, when we say we used the individual, that's not necessarily buying narcotics. It's using their information to either forward an investigation or corroborate. Cause we might also have a CI in the same position in this case saying, "I have information on John Smith." And in this case, she provided information that we may have linked and backed up some other CI's information.

Agent Mason further explained that he had not previously used Cheramie in an undercover operation where she was actively involved in the drug transaction. Agent Mason further testified that based on his understanding of the transaction between Cheramie and Jones, drugs were purchased.

On cross-examination, the following relevant colloquy between the prosecutor and Agent Mason took place:

> Q. Did she provide you credible and reliable information which you corroborated?

A. Absolutely.

Q. What did she provide you?

A. She provided us information on - I'm not going into specific names or - the location of what we call "bunkhouses" in Leeville we knew to be distribution points, and through other intel and other sources of information about illegal activity there. Also, a residence on Orange Street. The lady's name was Lacey Nelson, who we've had investigations before, arrests before, and current and ongoing - not this day, obviously, but during this time. And her intel was right along with everybody else's.

* * * * *

Q. So credible and reliable to you meant what?

A. First off, she came and gave us her identity, her information, and also criminal intelligence that seemed, you know, and was backed up both by our investigations, as well as other CIs or sources of information or concerned citizens that called up. So all this stuff, it kinda builds. . . . It doesn't build weight just by one person saying it unless, you know, they have intimate knowledge or something like that. Then we would use them to back it up. It wouldn't be, necessarily, credible and reliable because we wouldn't have anything to back it up.

But in this case, the information that she provided on other investigations, both from our own and other sources of information, we deemed her - and I deemed her - reliable. She wasn't telling us something that we couldn't back up.

Q. Now, if she testified here, earlier today, this morning, that she never gave you any information about Lacey Nelson, would that be a lie?

A. Absolutely.

* * * * *

Q. So, Agent Mason, if Audrey Cheramie testified, this morning, that she never gave you information about Lacey Nelson, would that be a lie?

A. Yes, it would.

Q. If she testified that she never gave you information about bunkhouses in Leeville, would that be a lie?

A. Absolutely.

Q. If she testified that she never gave information to you about drug activity on Orange Street, would that be a lie?

A. Yes. Absolutely.

Q. Let's talk about - you testified that there was a purchase of narcotics at 118 E. 160th Street. Could you explain your answer?

A. Yes. Initially, we had the confidential informant in this case, Audrey Cheramie, approach the house in question, 118 -

Q. Now, what I'm gonna do is - I don't mean to interrupt you. I may interrupt you to flesh your testimony out. Okay?

A. Sure.

Q. Was she acting as a CI at this time?

A. Absolutely.

Q. This was 6/28/06?

A. Absolutely.

Q. Was she wired?

A. Yes, she was. With an audio transmitter, yes.

Q. Did you-all record that transmission?

A. Absolutely.

* * * * *

A. I heard, over the audio system, the male subject, "Here. Here's half hard, here's half soft." She - and while that was taking place, I heard a "Beep. Beep," in the background [Nextel][.] . . .

So we heard the "Beep. Beep." You hear, "Tyene.[sic]" He goes, "Beep. Beep. Yes." And the male's voice says, "Hold up." The male subject, I didn't hear - I mean, I didn't hear or see if he went back inside or if he was still at the doorway. But moments later, he goes, "Come see." You know, the male say, "Come see." And then the next thing I heard was the female saying, "What's up, Bro," or "What's going on?" And you can hear the male either, "Hey. We gotta go," or "Hey" - and there was some conversation about a phone number - giving a phone number from the CI to the male subject, who we believe, you know, was Tyene [sic] based on the audio.

She then left the premises and we picked her up shortly thereafter . . .

* * * * *

So as soon as she got in the car, I asked her "What happened?" And to my surprise, she handed me over - back the hundred dollars in the serialized Task Force funds. So I was, like, "Well, what happened?"

"Well, it was in my . . . f'ing hands." Actually, she said, "fucking hands. And he took it back. He took it back. That mother fucker." That's exactly what she said. So and I'm - at this time, we're departing the area, debriefing her. And I said, you know, "Did he threaten you? Did he, you know, put a gun to your head?" She said, "No. He got a phone call, and you know, he took the dope back after." So -

Q. Have you listened to a tape of the KEL system on that night?

A. Oh, yes.

The audiotape of the drug transaction was played for the jury. The following colloquy between the prosecutor and Agent Mason then took place:

Q. Did you hear Audrey say, "I had it in my fucking hand?"

A. Yes, I did.

Q. Did she tell you, when she got to her car, that she had it in her hand, the drugs?

A. Yes. . . . He told me to hold up. You know, he got an f'ing phone call. And when he came back out, he was a totally different person, took the dope, and told me to leave. . . .

Q. So you - I'm sorry - so your testimony is that she actually did tell you that she saw drugs.

A. She had it in her hand.

* * * * *

Q. If she testified, on July 9, 2008, to the question: "Did you tell representatives of the Task Force that after Mr. Jones answered the knock at the door, . . . that he gave you or handed you a Baggie of cocaine in one hand and a Baggie of crack cocaine in the other," and she said, "No, sir. That's what I had ordered to give me and he was going to supply that. But after he went inside and came back, the phone rang, so I never saw nothing," would that be contradictory to what she told you?

A. Absolutely.

Q. And if she said to the question: "Did you inform any of the representatives of the Task Force that you saw any drugs while talking with Mr. Jones," and her answer was, "No, sir," that would be a lie, also?

A. Well, that's incorrect. She told me, in the back of my car.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-81. However, a

trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

A judge may issue a warrant authorizing the search for and seizure of any thing within the territorial jurisdiction of the court which "[m]ay constitute evidence tending to prove the commission of an offense." La. C.Cr.P. art. 161(A)(3). A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts that establish the cause for the issuance of the warrant. La. C.Cr.P. art. 162. As provided in this state's constitution and the Code of Criminal Procedure a search warrant shall particularly describe the person or place to be searched, the person or things to be seized, and the lawful purpose or reason for the search. La. Const. art. I, § 5; La. C.Cr.P. art. 162. **State v. Green**, 2002-1022, pp. 6-7 (La. 12/4/02), 831 So.2d 962, 968.

Probable cause sufficient to issue a search warrant exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. A magistrate must be given enough information to make an independent judgment that probable cause exists to issue a warrant. Moreover, the process of determining probable cause simply requires that enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system. **Green**, 2002-1022 at p. 7, 831 So.2d at 968.

The testimonial evidence supports the trial court's finding that the search warrant affidavit established probable cause. Agent Mason's testimony was credible and internally consistent with the facts of the case. He explained fully and

convincingly what he meant in the search warrant affidavit by his statement that the CI had been proven credible and reliable in the past. He further made clear that he stated in the affidavit that the CI had the drugs in her hand because that is what the CI had told him. Furthermore, our review of the audiotape of the transaction confirms that as the CI was walking back to Agent Mason's vehicle, she stated that she had it in her hand.

The trial court did not err or abuse its discretion in denying the defendant's motion to suppress. Accordingly, this assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 and 3

In his second and third assignments of error, the defendant argues, respectively, that the trial court erred in denying his motion for post verdict judgment of acquittal, and the evidence was insufficient to support the guilty verdicts. Specifically, the defendant contends there was no evidence that he attempted to possess with intent to distribute cocaine or attempted to possess MDMA because there was no evidence of an act or omission for the purpose of and tending directly toward the accomplishing of the object.

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 La. 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, 1308-09 (La. 1988). The **Jackson** 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, La.

R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute 14:27(A) provides:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.[1]

In his brief, the defendant contends there was no evidence to suggest he knew the drugs were inside the drawer, "much less that he attempted to secure possession of the drugs with the intent to distribute" them. In the absence of any evidence whatsoever of an act or omission on his part to accomplish the purpose of possessing the drugs, the defendant suggests there could be no reasonable inference of an attempt to possess the drugs.

The verdict in this case of attempted possession with intent to distribute cocaine likely represents a compromise verdict, which is a legislatively approved responsive verdict that jurors, for whatever reason, deem to be fair as long as the evidence is sufficient to sustain a conviction for the charged offense. See **State ex rel. Elaire v. Blackburn**, 424 So.2d 246, 251 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983). The trial court charged the jury on attempted possession with intent to distribute cocaine without a timely defense objection. Further, the defendant did not object to the verdict. Absent a contemporaneous objection, a defendant cannot complain if the jury returns a legislatively approved responsive verdict, provided that the evidence is sufficient to support the charged offense. See **State v. Schrader**, 518 So.2d 1024, 1034 (La. 1988).

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[1] See La. R.S. 40:979.

To support a conviction for the charged offense of possession with intent to distribute cocaine, the State must prove beyond a reasonable doubt that the defendant possessed the cocaine with the intent to distribute it. See **State v. Gordon**, 93-1922, pp. 8-9 (La. App. 1st Cir. 11/10/94), 646 So.2d 995, 1002; La. R.S. 40:966(A)(1); La. R.S. 40:967(A)(1). The State must prove that the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed the drug. Guilty knowledge therefore is an essential element of the crime of possession. A determination of whether or not there is "possession" sufficient to convict depends on the peculiar facts of each case. To be guilty of the crime of possession of a controlled dangerous substance, one need not physically possess the substance; constructive possession is sufficient. In order to establish constructive possession of the substance, the State must prove that the defendant had dominion and control over the contraband. A variety of factors are considered in determining whether or not a defendant exercised "dominion and control" over a drug, including: a defendant's knowledge that illegal drugs are in the area; the defendant's relationship with any person found to be in actual possession of the substance; the defendant's access to the area where the drugs were found; evidence of recent drug use by the defendant; the defendant's physical proximity to the drugs; and 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, 1074-75, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477.

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. In the absence of circumstances from which an intent to distribute may be inferred, mere possession of drugs 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. **State v. Smith**, 2003-0917, pp. 7-8 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 800.

In this case, through physical evidence and testimony, the State established that cocaine and MDMA were found in the bedroom of the defendant's female friend's house where the defendant was sleeping. More importantly, the defendant admitted to Lieutenant Champagne that the drugs were his. Also, Agent Mason heard the defendant's admission to Lieutenant Champagne. Based on the foregoing, there was sufficient evidence of the defendant's dominion and control of the cocaine and the MDMA and, thus, his constructive possession of the drugs. See **Gordon**, 93-1922 at pp. 10-11, 646 So.2d at 1003.

The defendant admitted the MDMA was his and that it came from Houma and, further, that his girlfriend and brother had nothing to do with the MDMA. Accordingly, since the defendant had dominion and control over the MDMA, guilty of attempted possession of MDMA was a proper verdict. See **State v. Walker**, 2000-1349, pp. 5-6 (La. App. 4th Cir. 5/16/01), 789 So.2d 632, 636-37, writ denied, 2001-1785 (La. 5/3/02), 815 So.2d 96.

Regarding the evidence of the defendant's intent to distribute the cocaine, Agent Mason found in a drawer a few feet from where the defendant slept a brown paper bag containing drugs, which the defendant admitted belonged to him. Inside the paper bag were four "cookies" of cocaine individually wrapped in baggies and

an Advil bottle containing twelve tablets of MDMA. At trial, Agent Mason explained that a cookie was a large chunk of cocaine that resembled a cookie. Crime lab results indicated that the respective weight of each of the four cookies of cocaine was 13.83 grams, 16.37 grams, 13.24 grams, and 7.72 grams, for a total weight of 51.16 grams of cocaine.

Louisiana State Police Trooper Craig Rhodes testified at trial as an expert in street-level narcotics. Trooper Rhodes testified that he had never arrested a drug user with any more than about $40 worth of crack cocaine, or about two rocks of crack cocaine. He testified an average rock size was about the size of his thumbnail, and that the cookie in evidence he was shown was much larger than a rock of cocaine. Trooper Rhodes was shown all four cookies together and asked by the prosecutor if he would consider a person with that amount of crack cocaine on him to be a user. Trooper Rhodes replied, "That thought would never come into my mind. This is possession with intent." According to Trooper Rhodes, that amount of crack cocaine found on one person would not be for personal use. He further testified that every user he had ever encountered had some way to smoke the crack cocaine, namely with a crack pipe. Trooper Rhodes explained that a distributor would chip off pieces from the cookies and sell those for a profit. He opined that an ounce of crack cocaine was 28 grams and that there were about five crack rocks to a gram. He further explained that because dealers usually have multiple customers, the dealer will have something to weigh the cocaine, such as a digital scale.

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. 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. 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).

Given the testimony of Agent Mason, Lieutenant Champagne, and Trooper Rhodes; the amount of cocaine found near the defendant; the admission of the defendant that the drugs were his; the razor blade and digital scale found in the kitchen; and the lack of paraphernalia to use the cocaine, such as a crack pipe, a factfinder could have reasonably concluded that the defendant intended to sell, rather than use, the cocaine. See **State v. Robertson**, 96-1048 (La. 10/4/96), 680 So.2d 1165, 1166 (per curiam). See also **State v. Hollins**, 99-278, pp. 9-10 (La. App. 5th Cir. 8/31/99), 742 So.2d 671, 679, writ denied, 99-2853 (La. 1/5/01), 778 So.2d 587 (where the court found that the evidence of the amount - nineteen rocks of crack cocaine totaling 4.01 grams, the packaging, and the lack of paraphernalia all support an inference that defendant had the intent to distribute the cocaine).

After a thorough review of the record, we find that the evidence supports the jury's verdicts. 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 attempted possession with intent to distribute cocaine and of attempted possession of MDMA.

These assignments of error are without merit.

SENTENCING ERROR

Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found sentencing errors. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

The sentence for a conviction of attempted possession with intent to distribute cocaine is necessarily at hard labor. See La. R.S. 14:27(D)(3) & 40:967(B)(4)(b). Also, the sentence for a conviction of attempted possession of MDMA is necessarily at hard labor. See La. R.S. 14:27(D)(3) & 40:966(C)(3). In sentencing the defendant, the trial court failed to provide that the sentences were to be served at hard labor.[2] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal.[3] Further, La. C.Cr.P. art. 882(A) authorizes correction by the appellate court. We find that correction of these illegally lenient sentences does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentences. See **Price**, 2005-2514 at pp. 18-22, 952 So.2d at 123-125. Accordingly, since sentences at hard labor were the only sentences that could be imposed, we correct the sentences by providing that they be served at hard labor.

CONVICTIONS AFFIRMED. SENTENCES AMENDED TO PROVIDE THAT THEY BE SERVED AT HARD LABOR; SENTENCES AFFIRMED AS AMENDED.

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[2] The minutes reflect the trial court sentenced the defendant to hard labor for both of the convictions. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[3] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. C.Cr.P. art 882(A).