

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1841

STATE OF LOUISIANA

VERSUS

BRYAN P. JOHNSON

Judgment Rendered: 'MAY 14 2012

Appealed from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany, State of Louisiana  
Trial Court Number 464207

Honorable William J. Knight, Judge Presiding

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BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

**WHIPPLE, J.**

The defendant, Bryan P. Johnson, was charged by bill of information with one count of possession of a firearm by a convicted felon (count I), a violation of LSA-R.S. 14:95.1;<sup>1</sup> one count of distribution of marijuana (count II), a violation of LSA-R.S. 40:966(A)(1); and one count of distribution of MDMA (count III), a violation of LSA-R.S. 40:966(A)(1). He pled not guilty on all counts. He moved for severance of the offenses, but the motion was denied. Following a jury trial, on count I, he was found guilty of attempted possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:27 & LSA-R.S. 14:95.1; and on counts II and III, he was found guilty as charged. He moved for a post-verdict judgment of acquittal, arrest of judgment, and a new trial. The motions were denied as to counts I and II, but a post-verdict judgment of acquittal was granted as to count III. On count I, he was sentenced to seven years at hard labor without benefit of parole, probation, or suspension of sentence. On count II, he was sentenced to fifteen years at hard labor, with the first two years of the sentence without benefit of probation, parole, or suspension of sentence. The court ordered the sentences on counts I and II were to be served concurrently. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging, in regard to count II, that defendant was a fourth-felony habitual offender.<sup>2</sup> Following a hearing, the defendant was adjudged a fourth-felony habitual offender as to count II. Thereafter, the trial court vacated the sentence previously imposed on count II, and, on that count, sentenced

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<sup>1</sup>In count I, the bill of information charged that on July 31, 2006, under Twenty-second Judicial District Court Docket #367832, the defendant was convicted of possession with intent to distribute cocaine.

<sup>2</sup>Predicate #1 was set forth as the defendant's July 31, 2006, conviction, under Twenty-second Judicial District Court Docket #358603, of possession with intent to distribute clorazepate. Predicate #2 was set forth as the defendant's July 31, 2006 conviction, under Twenty-second Judicial District Court Docket #367832, of possession with intent to distribute cocaine. Predicate #3 was set forth as the defendant's conviction, under Twenty-second Judicial District Court Docket #367833, of possession of alprazolam.

the defendant to serve the remainder of his natural life at hard labor, without benefit of parole, probation, or suspension of sentence. The defendant now appeals, challenging the denial of the motion to sever; challenging the denial of the motion for post-verdict judgment of acquittal; challenging the denial of the motion for new trial; challenging the sufficiency of the evidence to support the convictions; and arguing the trial court erred in allowing the State to refer to suppressed evidence. For the following reasons, we affirm the convictions, habitual offender adjudication, and sentences.

### **FACTS**

On February 12, 2009, St. Tammany Parish Sheriff's Office Narcotics Division Detectives Scott Saigeon and Bill Johnson were observing 1429 Cherry Street in Slidell, following a complaint of narcotics activity at that address. Detective Saigeon saw a light blue vehicle arrive at the residence. A black male, later identified as Isaac Casnave, exited the car and entered the residence. A few minutes later, Casnave returned to his vehicle and left the location. Based on his experience and the "original information" he had received, Detective Saigeon suspected Casnave had engaged in narcotics activity and pursued him to the parking lot of a business some distance away from Cherry Street. Thereafter, Detective Saigeon arrested Casnave, who was in the front passenger seat of the vehicle, and took a statement from him. Casnave's girlfriend, Nicole Ballagh, was driving the vehicle, and Joseph Fey was a passenger in a rear seat of the vehicle. According to Detective Saigeon, Casnave stated that he, Ballagh, and Fey went to Cherry Street to purchase marijuana and MDMA, purchased those items, and left.

After Detectives Saigeon and Johnson left to pursue Casnave, St. Tammany Parish Sheriff's Office Detective Ricky Edwards maintained surveillance on 1429 Cherry Street. He indicated the front of the house was "lit up." He saw several

vehicles come and go from the residence, with the occupants of the vehicles staying at the residence for a very short period of time. He also saw several pedestrians walk to the residence, stay for a short period of time, and walk away. In his experience, repetitive short visits to a home were an indicator of narcotics activity.

Detective Edwards testified that one of the subjects he saw at the residence was a black male with a "chee-wee style," short dreadlock haircut. That subject left in a white Honda Accord, which had a Florida license plate, drove past Detective Edwards, and then returned approximately ten or fifteen minutes later. Detective Edwards indicated that as the subject drove past him, the subject looked directly at him from a distance of between ten and fifteen feet. After the subject returned, he stayed for between fifteen to thirty minutes and then left again. He passed Detective Edwards again, but drove more slowly. Detective Edwards indicated that while the subject was away from the residence, no visitors came to the residence. Detective Edwards identified the defendant in court as the subject.

Detective Saigeon executed a search warrant on 1429 Cherry Street. In the laundry room of the rear bedroom, later identified as the bedroom of Ranata Toney, he located an SKS assault rifle with twenty-nine live rounds in its magazine. Detective Johnson also found a Ziploc bag containing several other "baggies" in the dresser drawer of Ranata Toney's bedroom. Based on his experience in conducting "several hundred, if not thousands," of narcotics investigations, he concluded that the baggies contained marijuana residue and were consistent with bags used in the packaging of certain types of narcotics.

Detective Saigeon advised Ranata Toney of her Miranda<sup>3</sup> rights, and took a written statement from her concerning the weapon. Subsequent investigation revealed the middle name of the defendant was Peter, and he was also known as "P" and "Pete." He was the boyfriend of Chantelle Toney, who also lived at 1429 Cherry Street, and the father of her child.

Detective Saigeon testified he also spoke to Sheila Boyd at 1429 Cherry Street. According to Detective Saigeon, Boyd stated she was "not going to jail for anybody" and told him that she knew the defendant was distributing narcotics from her residence, but she was in poor health, and "felt like that she couldn't do anything about it." At trial, Boyd denied making the statement.

The defendant was arrested less than twenty minutes after the execution of the search warrant on 1429 Cherry Street. He had been driving a white Honda Accord with a Florida license plate. At the time of his arrest, he had \$8,260.00 in cash in his pocket.

The trial court accepted St. Tammany Parish Sheriff's Office Crime Lab Division Deputy Lloyd Thomas Morse as an expert in the identification and comparison of fingerprints. He testified he had fingerprinted the defendant that morning, and his fingerprints matched those appearing on the back of the bill of information in Twenty-second Judicial District Court Docket #367832.

#### **SUFFICIENCY OF THE EVIDENCE**

In assignment of error number 2, the defendant contends the evidence is insufficient to support the convictions. In assignment of error number 3, he contends the trial court erred in denying the motion for post-verdict judgment of acquittal. Combining these assignments of error for argument, he contends that the evidence

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<sup>3</sup>Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

was insufficient on count I because Ranata Toney's written statement implicating him was inconsistent with her testimony at trial. He also argues it was inconsistent for the trial court to grant the motion for post-verdict judgment of acquittal as to count III, but deny the motion as to count II, because both the marijuana and the MDMA had been ordered suppressed by this court.

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, in order to convict, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157, 2000-0895 (La. 11/17/00), 773 So. 2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. Wright, 730 So. 2d at 487.

Louisiana Revised Statute article 14:95.1, in pertinent part, provides:

A. It is unlawful for any person who has been convicted of ... any violation of the Uniform Controlled Dangerous Substances Law<sup>4</sup> which is a felony ... to possess a firearm or carry a concealed weapon.

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<sup>4</sup>Louisiana Revised Statute 40:961, *et seq.*

Louisiana Revised Statute article 14:95.1 does not make "actual" possession a necessary element of the offense or specifically require that the defendant have the firearm on his person to be in violation. "Constructive" possession satisfies the possessory element of the offense. Constructive possession occurs when the firearm is subject to the offender's dominion and control. Dominion and control over a weapon are sufficient to constitute constructive possession even if the control is only temporary in nature and even if the control is shared with another person. Mere presence in an area where a firearm is found, or mere association with an individual found to be in possession of a firearm, does not necessarily establish possession. See 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.

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. LSA-R.S. 14:27(A). Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S. 14:10(1); State v. Henderson, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So. 2d 1235. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. Id.

At trial, the State introduced into evidence the December 12, 2008 written statement of Ranata Toney, to-wit:

The gun that was found in the laundry room right outside of the room that my kids and myself sleep in does not belong to me. I was unaware that there was a gun in that room. The gun was bought [sic] here by Brian Johnson.

Ranata Toney also testified at trial. She indicated that on February 12, 2009, she was living on Cherry Street. She stated the police came to the house on that date. She testified the defendant had been in the house that day. She claimed the police questioned her about a gun, but showed her only a bag. She indicated the police told her the gun was found outside the room where she was sleeping. She denied any knowledge that the gun had been located there. She conceded she had given the police a written statement implicating the defendant. She claimed she did so after the police insisted she tell them to whom the gun belonged. She claimed the police threatened to take “everybody” to jail and place her children with the office of child services. She stated, “If a gun was found in the house, I know that none of my sisters or my mom would have brought a gun there,” but claimed she did not “know” who brought the gun into the house.

At the hearing on the post-trial motions, trial defense counsel indicated Casnave’s attorney had advised trial defense counsel that the alleged MDMA was in fact “a synthetic substance and was not chargeable under the statute.” The court found there was “clear evidence” that the defendant distributed a substance which was marijuana. The court stated the jurors could have determined there was clear evidence the residue in the bags was marijuana. In regard to count III, the court, even in viewing the evidence in the light most favorable to the State, could not find sufficient evidence to support the verdict.

A thorough review of the record indicates that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted possession of a firearm by a convicted felon and distribution of marijuana. The verdict returned on count I indicates the jury credited the written statement of Ranata Toney and rejected defense attempts to discredit that statement. As to count II, the jury examined the baggies containing alleged marijuana residue, and Detective Saigeon testified they contained marijuana residue and were consistent with bags used in the packaging of narcotics. Detective Saigeon also testified that when Casnave was stopped after leaving 1429 Cherry Street, he confessed to purchasing marijuana and MDMA on Cherry Street. Additionally, Detective Saigeon testified that Boyd told him the defendant was distributing narcotics from 1429 Cherry Street.

On review, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may 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. State v. Lofton, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So. 2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So. 2d 1331. Further, in reviewing the evidence, we cannot say that the trial court's determination was irrational under the facts and circumstances presented to it. See State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis

of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trial court. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

We also reject the defendant's claim that the trial court had to grant the motion for post-verdict judgment of acquittal as to count II because it granted the motion as to count III. The trial court granted the motion in regard to count III on the basis of trial defense counsel's claims that the substance alleged to be MDMA was a synthetic version of the drug not listed as a controlled dangerous substance. Trial defense counsel made no similar allegation concerning count II. The ruling had nothing to do with whether or not the alleged MDMA had been ordered suppressed by this court.

These assignments of error are without merit.

#### **SEVERANCE OF OFFENSES**

In assignment of error number 1, the defendant argues the trial court erred in denying the motion to sever count I from the remaining charges. Specifically, the defendant argues that it was too prejudicial to allow the jury to learn of his previous conviction, which was also for a drug offense, in the instant trial.

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial. LSA-C.Cr.P. art. 493. If it appears that a defendant or the State is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate

trials, grant a severance of offenses, or provide whatever other relief justice requires. LSA-C.Cr.P. art. 495.1.

A defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever; factual, rather than conclusory, allegations are required. In ruling on a motion for severance, the trial court must weigh the possibility of prejudice to the defendant against the important considerations of economical and expedient use of judicial resources. An appellate court will not reverse the trial court's ruling denying a motion for severance absent a clear showing of prejudice. State v. Morris, 99-3075 (La. App. 1st Cir. 11/3/00), 770 So. 2d 908, 913-14, writ denied, 2000-3293 (La. 10/12/01), 799 So. 2d 496, cert. denied, 535 U.S. 934, 122 S. Ct. 1311, 152 L. Ed. 2d 220 (2002).

In the instant case, prior to trial, the defendant moved for severance of count I from counts II and III, alleging “[t]he jury will necessarily infer a criminal disposition on the part of the accused and be hostile to his defense if counts 1, 2, and 3 are tried together.” At the hearing on the motion, the defense argued, “[g]iven the fact that [the defendant] is facing a substantial amount of time if convicted on either one of these charges, the prejudicial effect that allowing those counts to be tried together far outweighs any probative value.” The State argued that the same facts and circumstances supporting count I explained how the officers arrived at the home and how they were able to obtain a search warrant. Thus, the State noted, the jury would hear evidence of all three counts whether they were tried together or separately. The State also argued that judicial economy would be served by trying all three counts together. The trial court denied the motion to sever, relying on the Morris case.

Morris involved charges of possession of a firearm by a convicted felon, four counts of armed robbery, aggravated kidnapping, and second degree murder. Morris, 770 So. 2d at 912. On appeal, the defendant argued the trial court had erred in

refusing to sever the charge of felon in possession of a firearm from the other charges because such joinder allowed the jury to hear the otherwise inadmissible evidence that he was a convicted felon. Morris, 770 So. 2d at 913. This court found the defendant had offered only conclusory allegations and failed to meet the burden of establishing prejudicial joinder. We noted that the trial court's instructions, both after the presentation of the evidence and during general instructions, setting forth that the evidence of the defendant's prior conviction having been admitted only to establish an element of the felon-in-possession-of-a-firearm charge and not as evidence of the defendant's character, limited any prejudice. Morris, 770 So. 2d at 915.

In the instant case, we also conclude that there was no improper joinder. Counts I, II, and III were triable by the same number of jurors and required the same concurrence. See La. Const. art. I, § 17(A); LSA-C.Cr.P. art. 782(A); LSA-R.S. 14:95.1(B), LSA-R.S. 40:966(B)(3), LSA-R.S. 40:966(B)(2). Further, the defendant offered only conclusory allegations for severance and failed to meet the burden of establishing prejudicial joinder. Additionally, the trial court specifically instructed the jury that the evidence, showing the defendant was convicted of an offense other than the offense for which he was on trial, was to be considered only for a limited purpose and did not necessarily mean the defendant was failing to tell the truth. The court also instructed the jury that the defendant was on trial only for the offense charged and that the jury was not permitted to find him guilty of the instant charges because he may have committed another offense.

This assignment of error is without merit.

#### **REFERENCE TO SUPPRESSED EVIDENCE; MOTION FOR NEW TRIAL**

In assignment of error number 4, the defendant contends the trial court erred in allowing the State to refer to evidence which had previously been ordered suppressed by this court. In assignment of error number 5, he contends the trial court erred in

denying the motion for new trial. He combines these assignments of error for argument. He argues that this court ordered the physical evidence seized in the unlawful stop of Ballagh's vehicle suppressed, and thus, it was improper for the State to question Casnave about drugs found on his person during the traffic stop.

In an unpublished decision addressing the defendant's pretrial writ application, State v. Johnson, 2009-1901 (La. App. 1st Cir. 10/23/09), writ denied, 2010-0246 (La. 4/30/10), 34 So. 3d 281, this court ruled:

**WRIT GRANTED IN PART AND DENIED IN PART.** The ruling of the trial court denying relator's motion to suppress the evidence seized from the searches conducted pursuant to the investigatory automobile stop of Issac Casnave, Joseph Fey, and Nicole Ballagh is reversed. Herein, the anonymous tip, together with the observations of the police officers during the surveillance, did not provide reasonable suspicion for an investigatory stop. See State v. Robertson, 97-2960 (La. 10/20/98), 721 So. 2d 1268, 1270. See also State v. Johnson, 98-0264 (La. App. 1st Cir. 12/28/98), 728 So.2d 885. The writ is denied insofar as it seeks review of the ruling denying the motion to suppress the confession. La. Const. art. 1, § 5 grants standing to any person "adversely affected" by a search and seizure conducted in violation of the Louisiana constitutional guarantee against unreasonable searches and seizures. However, a person adversely affected by a confession unlawfully obtained from another has no standing to raise its illegality in court. See State v. Burdgress, 434 So.2d 1062, 1064 (La. 1983). See also State v. Tran, 98-2812 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1279, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101. This writ is denied in all other respects and this matter is remanded for further proceedings.

**JTP**  
**JMG**

**CARTER, C.J.**, agrees in part and dissents in part and would deny the writ in its entirety.

At trial, Casnave testified that on February 12, 2009, he was arrested for possession of marijuana and MDMA, and he had these drugs in his possession when he was stopped by the police. Thereafter, the defense objected, contending the State had solicited impermissible evidence after the State asked Casnave, "What did you tell [the police] about the drugs that you had on you?" The trial court overruled the

objection and Casnave responded, "They really didn't ask me nothing. They found them on me and put me in cuffs and gave me a possession charge." Casnave denied telling the police he had travelled to Cherry Street to purchase marijuana and MDMA from "Pete." He claimed the police never asked him where he had obtained the drugs he had in his possession. He stated the defendant gave him "tattoo ink" on the day in question.

In his brief to this court, the defendant quotes LSA-C.Cr.P. 851 (grounds for new trial), but makes no specific argument concerning that article. In his motion for new trial, he argued, "[t]he prosecutor blatantly disregarded the Louisiana First Circuit's ruling and made references to the suppressed evidence within the hearing of the jury[.]" At the hearing on the motion, he argued the trial court's ruling on objections showed prejudice, and cited the questioning of Casnave, concerning his arrest for controlled dangerous substances, as demonstrating such prejudice. The trial court rejected his argument in pertinent part, stating:

Mr. Johnson was successful on a Motion to Suppress certain evidence which clearly would have inculpated him in distribution of MDMA and marijuana. That particular evidence was suppressed. That particular evidence was, apparently, prohibited substances, but it was suppressed. The testimony relative to the transactions was not suppressed and was not suppressible in this Court's view. Reference to the fact of what transpired was not suppressible.

The trial court correctly distinguished the physical evidence, *i.e.* marijuana and purported MDMA, which this court ordered suppressed, from Casnave's testimony concerning that evidence. This court specifically rejected the defendant's attempt to have the latter suppressed, ruling "a person adversely affected by a confession unlawfully obtained from another has no standing to raise its illegality in court." The jurisprudence has recognized this distinction. In State v. Anderson, 358 So. 2d 276 (La. 1978), the defendant appealed from his convictions for armed robbery and attempted kidnapping. He argued the trial court erred in overruling his objection to

State-elicited testimony referring to suppressed evidence. 358 So. 2d at 277. The court rejected that argument, holding:

[The holdings in **Mapp v. Ohio**, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961) and **Ker v. California**, 374 U.S. 23, 83 S.Ct. 1623, 10 L. Ed. 2d 726 (1963)] established that any tangible evidence obtained through an unconstitutional search could not be admitted into evidence. It is reasonable to conclude that no testimony relating to the location of the evidence at the place searched, as well as the physical evidence itself, may be admitted into evidence. However, this exclusionary rule does not preclude every reference to the existence of the items ordered suppressed. It merely precludes the admission of the physical items into evidence.

358 So. 2d at 277.

The defendant cites State v. Patton, 374 So. 2d 1211 (La. 1979) for the proposition “[a]ny distinction ‘between testimonial and tangible evidence’ is irrational and untenable.” However, the court in Patton was addressing the limited issue of whether or not an investigator’s in-court identification of the defendant was permissible following his illegal arrest, or whether the identification had to be suppressed as the fruit of the illegal arrest. 374 So. 2d at 1212-14. That issue is not presented in this case.

These assignments of error are without merit.

**CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.**