NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1308

STATE OF LOUISIANA

VERSUS

ALFRED LOUIS MALVEO

Judgment Rendered: MAR 2 3 2012

* * * * * *

On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 10-09-0822

Honorable Donald R. Johnson, Judge Presiding

* * * * * *

Hon. Hillar C. Moore, III
District Attorney
Baton Rouge, Louisiana

Dale R. Lee
Assistant District Attorney
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Frederick Kroenke
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Alfred Louis Malveo

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

Defendant, Alfred Louis Malveo, was charged by bill of information with possession with intent to distribute a Schedule II controlled dangerous substance, cocaine, a violation of LSA-R.S. 40:967A(1). Defendant entered a plea of not guilty. After a trial by jury, defendant was found guilty as charged. The trial court denied defendant's motion for post verdict judgment of acquittal and motion for new trial. After defendant was adjudicated a third-felony[1] habitual offender, the trial court sentenced him to twenty years imprisonment at hard labor without the benefit of probation or suspension of sentence.[2] Defendant now appeals, assigning error as to the sufficiency of the evidence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On September 24, 2009, as a result of an ongoing narcotics investigation, officers of the Baton Rouge Police Department went to an apartment located in a complex on Cezanne Avenue in Baton Rouge to assist in the execution of a search warrant. Upon forced entry, one of the officers deployed a distraction device.[3] As the officers entered the apartment with their weapons drawn, Sergeant Darren Leach observed defendant approach a garbage bag in the kitchen area and rummage into it, while the other individuals immediately got on the floor. Defendant was ordered to put his hands up or get on the floor and he complied. Defendant and the other individuals were advised of their **Miranda**

[1] The State introduced the following July 9, 2008 predicate convictions as a basis for defendant's third-felony habitual offender adjudication: access device fraud at a value over five hundred dollars in violation of LSA-R.S. 14:70.4 (under docket number 3-08-0475 in the 19th Judicial District Court); and possession of marijuana, second offense in violation of LSA-R.S. 40:966E(2) (under docket number 5-08-0521 in the 19th Judicial District Court). Defendant has not raised any issues regarding the habitual offender adjudication or sentencing on appeal.

[2] The minutes indicate that the sentence was imposed with a parole restriction. However, the transcript reflects that while the trial judge initially stated that the sentence would be imposed without parole, upon prompting by the prosecution, the trial court amended the sentence on the record to delete the parole restriction. The transcript prevails over the minute entry where there is a discrepancy. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). Nonetheless, the first two years of the sentence automatically will be served without benefit of parole. LSA-R.S. 15:301.1A; LSA-R.S. 40:967B(4)(b); **State v. Williams**, 00-1725, p. 10 (La. 11/28/01), 800 So.2d 790, 798-99.

[3] The distraction device was an explosive device that disorients with loud noise and a bright flash of light.

rights. Sergeant Leach was suspicious of defendant's behavior and advised the other detectives to search the garbage bags. Defendant informed Detective Michael Burkett that he lived in the apartment with his aunt. A bag of marijuana was recovered from defendant's pants pocket. Additionally, a bag of a rock-like substance (suspected crack cocaine) was recovered from the garbage bag.[4] Defendant was placed under arrest in connection with the evidence, including incriminating statements made by defendant at the scene.

ASSIGNMENT OF ERROR

In the sole assignment of error, defendant argues that the evidence presented by the State is insufficient to support the verdict. Defendant notes that the evidence includes a small amount of cocaine and his statement to the police that he was selling cocaine to assist his aunt. Defendant contends that the State did not present any evidence to prove his intent to sell or distribute the drugs. Defendant argues that the amount of cocaine was consistent with personal use. Defendant further argues that there was no evidence that he sold or attempted to distribute drugs, that the cocaine was in a form usually associated with distribution to others or was inconsistent with personal use only, that the amount of the cocaine created an inference of an intent to distribute, or that there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. Defendant concludes that his statement to the police without corroboration is insufficient to prove the corpus delicti that a sale or distribution occurred. Defendant contends that the conviction must be overturned.

In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after 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. 821B; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988); **State v.**

[4] According to the Louisiana State Police Crime Laboratory results, the bag contained cocaine and the weight of the contents was 2.66 grams (one gram being the amount of substance in a single use sugar packet as noted by lab chemist Rebecca Nugent during the trial).

Wright, 98-0601, p. 2 (La.App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 00-0895 (La. 11/17/00), 773 So.2d 732. The elements must be proven such that every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. Louisiana Revised Statute 15:438 is not a separate test from **Jackson v. Virginia**, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. All evidence, direct and circumstantial, must meet the **Jackson v. Virginia** reasonable doubt standard. **State v. Wright**, 445 So.2d 1198, 1201 (La. 1984). 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. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

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. 1 Cir. 9/25/98), 721 So.2d 929, 932.

Louisiana Revised Statutes 40:967A provides, in pertinent part, that it shall be unlawful for any person knowingly or intentionally: (1) to produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance or controlled substance analogue classified in Schedule II. Cocaine and its derivatives are listed in Schedule II. LSA-R.S. 40:964, Schedule IIA(4). A defendant is guilty of distribution of cocaine when he transfers possession or control of cocaine to his intended recipients. See LSA-R.S. 40:961(14); **State v.**

Cummings, 95-1377, p. 4 (La. 2/28/96), 668 So.2d 1132, 1135. To support a conviction for possession with intent to distribute a controlled dangerous substance, the State was required to prove both possession and specific intent to distribute. See LSA-R.S. 40:967A(1). In order to prove the element of intent to distribute, the State must prove the defendant's specific intent to possess in order to distribute. Specific intent is a state of mind. It need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. **State v. Gordon**, 93-1922, pp. 9-10 (La.App. 1 Cir. 11/10/94), 646 So.2d 995, 1003.

A person not in physical possession of a drug is considered to be in constructive possession when the drug is under that person's dominion and control. See **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983). In this case, defendant does not contest being in possession of the controlled dangerous substance in question, he merely argues that there was insufficient evidence to find intent to distribute. In cases where the intent to distribute a controlled dangerous substance is an issue, a court may look to various facts: (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of the drug created a presumption of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. **State v. House**, 325 So.2d 222, 225 (La. 1975). The presence of large sums of cash also is considered circumstantial evidence of intent. However, in the absence of circumstances from which an intent to distribute may be inferred, mere possession of a drug does not amount to evidence of intent to distribute, unless the quantity is so large that no other inference is reasonable. Mere possession of the drug may establish intent to distribute if the amount of the drug in possession of the accused is inconsistent

with personal use only. **State v. Smith**, 03-0917, p. 8 (La.App. 1 Cir. 12/31/03), 868 So.2d 794, 800.

At Sergeant Leach's guidance, Detective Burkett asked defendant if there were any illegal narcotics, weapons, or currency in the residence, and defendant stated that he had a small bag of marijuana in his front pants pocket. Detective Burkett recovered the marijuana from defendant's pants pocket and asked him if there was anything else. Defendant replied negatively. As directed by Sergeant Leach, Detective Burkett opened the garbage bag in the kitchen area and observed the bag of crack cocaine directly on top. The crack cocaine was packaged in a portion of a plastic bag or wrapping. Detective Burkett showed the cocaine to defendant and requested an explanation. Defendant admitted that the cocaine was his, indicating that he did not want his aunt to get in any trouble as she had no knowledge of its presence. Defendant further stated that he was selling small amounts of cocaine to survive and help his aunt with monetary expenses including the rent and bills. Defendant's aunt and a neighbor also were present in the home at the time.

Detective Burkett had been working in the narcotics division for approximately eight years at the time of the offense and was the lead detective investigating narcotics activities in the area. Detective Burkett characterized the cocaine as a small amount and noted that he did not find any other evidence consistent with distribution such as scales or packaging materials. However, Detective Burkett noted that those items were not necessary for distribution and further noted that defendant had four hundred and fifty-two ($452.00) dollars in his front pants pocket. Additionally, the officers did not find anything in the apartment to indicate personal use of the cocaine such as pipes or any other device for smoking or consuming cocaine. Detective Burkett further explained that in his experience, most of the arrests made for possession for personal use consisted of merely tenths of grams, much less than the crack cocaine involved in the instant case. Detective Burkett associated the amount of cocaine in

question with distribution as opposed to personal use. Defendant did not appear to be under the influence of any drugs.

Defendant did not testify during the trial. In his appeal brief, he cites **State v. Taylor**, 04-346, p. 5 (La.App. 5 Cir. 10/26/04), 887 So.2d 589, 592, wherein the court noted the State's burden to prove corpus delicti, or the fact that a crime had been committed. As noted therein, the law of corpus delicti was discussed by the Louisiana Supreme Court in **State v. Brown**, 236 La. 562, 108 So.2d 233, 236 (1959) as follows:

> In the trial of every criminal case the State, to warrant a legal conviction of an accused, must prove the corpus delicti, or the fact that a crime has been committed. Without such proof no conviction will be permitted to stand....
>
> . . .
>
> Suspicion, rumor, gossip, or mere hearsay evidence is not sufficient to establish the proof of corpus delicti. (Internal citation omitted.)

A conviction cannot be based on the extrajudicial confession of the defendant, unless corroborated by independent evidence of the corpus delicti. **Brown**, 108 So.2d at 237. When determining the existence of the corpus delicti, the issue is not whether there is sufficient evidence to convict the defendant; but rather, whether there is any evidence at all, independent of the confession, that establishes the fact that a crime was committed. **Brown**, 108 So.2d at 237.

In this case, defendant was attempting to hide the crack cocaine when the officers entered his residence. He candidly admitted to distributing crack cocaine for financial gain. The cocaine was in a form usually associated with possession for distribution to others, and the officers did not locate any tools or devices in the apartment to use for personal consumption of cocaine. Moreover, defendant had a large sum of money on his person at the time of his arrest. We find that defendant's confession was sufficiently corroborated to establish corpus delicti. Based on our review of the evidence, we find that the jury reasonably rejected defendant's hypothesis of innocence that the amount of cocaine was consistent with personal use only. See **State v. Ordodi**, 06-0207, pp. 14-15

(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 trier of fact. See **State v. Calloway**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Based on a thorough review of the evidence, in the light most favorable to the prosecution, we are further convinced that any rational trier of fact could have concluded beyond a reasonable doubt that the evidence was sufficient to exclude defendant's hypothesis of innocence and to support a conviction for possession of cocaine with intent to distribute. Thus, the sole assignment of error lacks merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.