NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1607

STATE OF LOUISIANA

VERSUS

CALVIN L. ALEXANDER

Judgment Rendered: MAY 04 2012

* * * * * * * * * *

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 485791, Division "F"

The Honorable Martin E. Coady, Judge Presiding

* * * * * * * * * *

Walter P. Reed
District Attorney
Covington, Louisiana

and

Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Gwendolyn Brown
Louisiana Appellate Project
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Calvin L. Alexander

* * * * * * * * * *

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Calvin Lopez Alexander, was charged by bill of information with possession of a Schedule II controlled dangerous substance (cocaine) with intent to distribute, in violation of LSA-R.S. 40:967(A)(1). The defendant pled not guilty and, after a trial by jury, was found guilty as charged. The trial court denied the defendant's motions for new trial and postverdict judgment of acquittal, and it sentenced the defendant to twenty years imprisonment at hard labor. Thereafter, the defendant was adjudicated a fourth-felony habitual offender. The trial court vacated the defendant's original sentence and sentenced the defendant as a fourth-felony habitual offender to twenty years imprisonment at hard labor, without benefit of probation or suspension of sentence. The defendant now appeals, alleging two assignments of error. For the reasons below, we affirm the defendant's conviction, habitual-offender adjudication, and sentence.

FACTS

On February 13, 2010, Corporal Sean Trinity Graves and Deputy Calvin Eskew of the St. Tammany Parish Sheriff's Office were dispatched to investigate possible narcotics activity at the Batiste Apartments in Slidell. The officers parked their respective vehicles on the street adjacent to the apartment complex and then entered the complex on foot. The officers were standing in the complex with the aim of observing suspicious activity when they witnessed the defendant stagger toward a vehicle[1] in the parking lot. The defendant approached this vehicle, opened its rear passenger's side door, and bent over inside the vehicle for approximately "two to three minutes." The officers were unable to directly observe the defendant's actions while he was inside the vehicle. The defendant then shut the rear passenger's side door, staggered to the driver's side of the vehicle, entered the vehicle, and began to drive away. Based on their suspicions

[1] A review of the record indicates only that this vehicle belonged to someone other than the defendant, but on the night of the incident, the vehicle's registered owner was unable to be located.

that the defendant might be impaired, Corporal Graves and Deputy Eskew conducted a traffic stop of the defendant's vehicle.

After the officers informed the defendant of his **Miranda**[2] rights, Corporal Graves administered a field sobriety test to the defendant, and the defendant performed poorly. Deputy Eskew asked for, and received, the defendant's permission to search the vehicle. Corporal Graves testified that he observed that the defendant would become increasingly nervous as Deputy Eskew approached the rear passenger's side door of the vehicle, but he observed this nervousness to subside when Deputy Eskew searched any other area of the vehicle. Deputy Eskew testified that he noticed the same changes in the defendant's demeanor as he searched different areas of the defendant's vehicle.

After Deputy Eskew was unable to find anything incriminating in the vehicle during his initial search, he called a canine unit to the scene. After a free air sniff around the defendant's vehicle, the canine alerted to a scent of narcotics on the rear passenger's side of the vehicle. The canine officer then placed his canine into the defendant's vehicle, where it alerted to a scent of narcotics near the floor of the rear passenger's side door.

Deputy Eskew then returned to the area of the canine's alert to search the defendant's vehicle again. Initially, he was unable to find any contraband, but Deputy Eskew did find three screwdrivers in a pocket on the back side of the front passenger seat. Deputy Eskew testified that these three screwdrivers were "right next" to where the defendant had stood when the officers had observed him initially approach the vehicle. After further investigation, Deputy Eskew observed a black plastic vent in the door jamb of the rear passenger's side door that looked as if it had been handled recently. Deputy Eskew used one of the screwdrivers that

[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

he had found to remove the vent, and he recovered a clear plastic bag with over thirty individual pieces of a substance which was later identified as crack cocaine.

ASSIGNMENTS OF ERROR

In his first assignment of error, the defendant argues that the evidence introduced at trial was insufficient to prove that the drugs found in the car he was driving belonged to him. The defendant's second assignment of error cites the same argument in alleging that the trial court erred by denying his motions for new trial and postverdict judgment of acquittal. Because these assignments of error raise the same legal arguments, we address them together.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821(B). The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test; *i.e.*, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Smith**, 03-0917 (La. App. 1 Cir. 12/31/03), 868 So.2d 794, 798-99.

To support a conviction for the crime charged, the State had to prove beyond a reasonable doubt that the defendant: 1) knowingly possessed the controlled dangerous substance (cocaine); and 2) had the intent to distribute the controlled dangerous substance. See LSA-R.S. 40:967(A)(1); see also **Smith**, 868 So.2d at 799.

On the issue of whether the evidence sufficiently proved possession, 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, the mere presence in the area where narcotics are discovered, or mere association with the person who does control the drug or the area where it is located, is insufficient to support a finding of constructive possession. **Smith**, 868 So.2d at 799.

A determination of whether there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. **Smith**, 868 So.2d at 799.

In the instant matter, there is no dispute that the substance recovered from the defendant's vehicle tested positive for cocaine. With respect to the possession element, the State presented testimony from Corporal Graves that the officers' encounter with the defendant occurred in a "medium to high crime area" where Corporal Graves had previously made arrests for narcotics activity. Both Corporal

Graves and Deputy Eskew observed the defendant spend some amount of time in the area of the vehicle where the cocaine was ultimately discovered. Further, Deputy Eskew testified that the vent behind which the cocaine was found appeared to have been recently handled.

The defendant did not testify or call any witnesses at trial. Clearly, the jury rejected the defense theory, presented in closing arguments, that the defendant was simply unaware of the presence of the cocaine in the car that he was driving. The jury also apparently rejected the defense theory that the defendant may have been vomiting when he spent several minutes near the rear passenger's side door of the vehicle.

Viewing the evidence in the light most favorable to the prosecution, we find that the jury had a reasonable basis to conclude that the defendant possessed the cocaine. The evidence established that the defendant spent a relatively significant amount of time near the location in the vehicle where the cocaine was ultimately found. Moreover, the vent hiding the cocaine appeared to Deputy Eskew to have been recently handled, and tools for manipulating that vent were at the defendant's disposal when he was positioned near the rear passenger's side door of the vehicle. The jury reasonably rejected the theory that the defendant was unaware of the presence of cocaine in the vehicle.

As to the evidence of the defendant's intent to distribute the cocaine, it is well settled that intent to distribute may be inferred from the circumstances. **Smith**, 868 So.2d at 800. 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. **Smith**, 868 So.2d at 800.

In the absence of circumstances from which an intent to distribute may be inferred, mere possession of cocaine 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 that the amount of the drug in the possession of the accused and/or the manner in which it was carried is inconsistent with personal use only. The presence of large sums of cash also is considered circumstantial evidence of intent to distribute. **Smith**, 868 So.2d at 800.

In the present case, the State introduced the testimony of Captain Barney Tyrney, the head of the Narcotics and Street Crimes Unit for the St. Tammany Parish Sheriff's Office, who was accepted by the trial court as an expert in the "use and distribution methods of cocaine." Captain Tyrney explained that a typical crack user would have some device used to smoke the crack on his person, such as a crack pipe. However, no such paraphernalia was found on the defendant. Captain Tyrney also stated that a typical crack user would have only one or two crack rocks on his person, in contrast to the thirty to thirty-five rocks found in the defendant's vehicle. Finally, Captain Tyrney explained that the packaging of the rocks of crack cocaine in a large, clear bag was consistent with what officers observe with street-level sales because many dealers do not want to spend time individually packaging rocks of crack cocaine. Viewing the totality of the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that the defendant intended to sell the crack cocaine in the plastic bag recovered by Deputy Eskew.

In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v.**

Ordodi, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. Further, the jury rationally rejected the hypotheses of innocence presented by defense counsel in closing arguments. 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 evidence of hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). These assignments of error are without merit.

REVIEW FOR ERROR

Upon routine review of the record for error pursuant to LSA-C.Cr.P. art. 920(2), we have discovered that the trial court sentenced the defendant in connection with his possession of cocaine with intent to distribute conviction without waiting at least twenty-four hours after denying his motions for new trial and postverdict judgment of acquittal, as required by LSA-C.Cr.P. art. 873. In cases where the defendant either contests his sentence or complains of the absence of a 24-hour delay, the failure of the trial court to observe the statutory delay or to obtain a waiver thereof normally would require the sentence to be vacated and the case remanded for resentencing. See **State v. Augustine**, 555 So.2d 1331, 1333–35 (La. 1990). However, in the instant case, the defendant neither contests his sentence nor complains about the absence of the 24-hour delay. We further note that this initial sentence was subsequently vacated, and the sentence which is now actually imposed on the defendant is one in connection with his adjudication as a fourth-felony habitual offender. Accordingly, under these circumstances, this sentencing error is harmless and does not require a remand for resentencing.

We also note that, after the defendant was adjudicated a fourth-felony habitual offender, the trial court sentenced him to twenty years imprisonment at hard labor without benefit of probation or suspension of sentence. The defendant's

predicate offenses included five convictions for possession of cocaine and one conviction for possession of cocaine with intent to distribute. Therefore, the defendant was to be sentenced under LSA-R.S. 15:529.1(A)(1)(c)(i) (prior to 2010 amendments), which provided that the sentence is to be "not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life[.]" For his instant possession with intent to distribute cocaine conviction, the defendant faced a maximum sentence of thirty years at hard labor. See LSA-R.S. 40:967(B)(4)(b). Therefore, the defendant's twenty-year sentence is illegally lenient. However, we recognize that the defendant admitted to the allegations in the habitual-offender bill of information in exchange for this lenient twenty-year sentence. Since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See **State v. Price**, 05-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

For the foregoing reasons, the defendant's conviction, habitual-offender adjudication, and habitual-offender sentence are affirmed.

CONVICTION, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.