NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 2110

STATE OF LOUISIANA

VERSUS

ELMO ANDERSON

Judgment Rendered: March 27, 2009

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of LaFourche
State of Louisiana
Trial Court Number 432136
Honorable Jerome J. Barbera, III, Judge

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J.

Defendant, Elmo Anderson, was charged by bill of information with one count of possession of cocaine, a violation of La. R.S. 40:967. Defendant entered a plea of not guilty and proceeded to trial before a jury. The jury determined defendant was guilty of the responsive offense of attempted possession of cocaine, a violation of La. R.S. 14:27 and 40:967. See also La. R.S. 40:979. The trial court subsequently sentenced defendant to a term of eighteen months at hard labor.

Defendant appeals, citing the following as error:

> Did the district court commit manifest error in accepting the jury's guilty verdict against [defendant] when the record reflects that [defendant] was arrested for drug possession simply because he was standing next to a bag of discarded illegal drugs while traveling through a high-crime area?

We affirm.

FACTS

At approximately 3:00 a.m. on June 11, 2006, Deputy Jeff Chamberlain, who was employed by the Thibodaux Police Department, was patrolling the western part of Thibodaux. Deputy Chamberlain was driving his marked police unit on Washington Avenue when he observed defendant standing in the opposite lane of travel. The headlights of Deputy Chamberlain's police unit were on, but no other lights had been activated. When Deputy Chamberlain was approximately fifteen to twenty feet away from defendant, defendant walked into the shadows next to the roadway.

Deputy Chamberlain stopped his unit, maintained visual contact with defendant, and exited the unit with his flashlight activated. As soon as Deputy Chamberlain, who was wearing a police uniform, activated his flashlight on defendant, he observed defendant bending over, placing something on the ground. At the time, the officer was seven to eight feet away from defendant. Deputy Chamberlain testified that there was some reflection from the object defendant had

placed on the ground that was consistent with the reflection given off by a plastic bag. Suspecting the object contained illegal narcotics, Deputy Chamberlain radioed for back-up and called defendant towards him.

Lieutenant Sherman Berry of the Thibodaux Police Department arrived soon after Deputy Chamberlain radioed for assistance. As Deputy Chamberlain detained defendant near his unit, he directed Lieutenant Berry to the spot in a yard where he had observed defendant place an object on the ground. Lieutenant Berry walked over and observed a small plastic baggie of what appeared to be narcotics.

When Lieutenant Berry informed Deputy Chamberlain of this observation, Deputy Chamberlain began to handcuff defendant. Defendant began to struggle, pulling away from Deputy Chamberlain and screamed, "I'm not going to jail." Deputy Chamberlain deployed a drive stun from his Taser X26 to defendant's brachial plexus. According to Deputy Chamberlain, defendant was not incapacitated, but stunned, so that he could be handcuffed. Deputy Chamberlain then advised defendant of his Miranda rights. He asked defendant what he was doing in the yard, and the defendant replied, "[h]iding from you."

After subduing defendant, Deputy Chamberlain walked over to where Lieutenant Berry was standing next to the plastic bag on the ground. Both officers noted that although the grass was wet with dew, the bag appeared to be dry, leading to the conclusion that the bag had been there a short amount of time. The officers testified that they searched the area the defendant had walked into when he first encountered Deputy Chamberlain, and no other objects were found. Deputy Chamberlain testified that the bag was in the exact spot where earlier he had seen defendant bending over to place something on the ground.

The plastic bag contained what appeared to be powdered cocaine. Deputy Chamberlain weighed the bag and testified that it contained .4 grams of cocaine, which would have a street value of $40.00 to $60.00. Given its value, Deputy

Chamberlain testified that it was unlikely that the bag of cocaine would be lying around in a high-crime area such as the area in which it was found.

Defendant presented testimony from Alice Anderson, his grandmother. Anderson testified she resided at 822 Church Street, which was very near the location of defendant's arrest. According to Anderson, people often used the walk-through pathway between houses in the area. Anderson further testified that defendant sometimes spent the night at her residence.

Defendant testified at trial. According to defendant, he was riding his bicycle on Washington Street coming from his girlfriend's house on his way to his grandmother's house. Defendant claimed a car with no headlights approached him from the opposite direction. Fearing this vehicle presented danger to him, defendant testified he turned toward the alley between the two residences. As he was going through the alley, a police officer called him back, and he complied with the officer's directive.

Defendant denied the recovered baggie containing cocaine belonged to him. Defendant further testified that several police officers arrived before Lieutenant Berry and extensively searched the area, including underneath houses, but found nothing. Only after Lieutenant Berry arrived on the scene was the plastic bag recovered. Defendant further disputed Deputy Chamberlain's testimony that he shined a flashlight on him. Rather, defendant claimed Deputy Chamberlain did not have a flashlight. Defendant also denied resisting the police in any manner and claimed they used the taser on him after locating the baggie on the ground.

Defendant admitted a prior 1998 conviction for possession of cocaine.

SUFFICIENCY OF THE EVIDENCE

In defendant's sole assignment of error, he contends the evidence is insufficient to support his conviction. Specifically, defendant argues the State's evidence fails to establish that he either had actual or constructive possession of the

drugs prior to being detained by the police. Moreover, defendant maintains that because of the high-crime nature of the area, it was not surprising that illegal drugs were found in the area.

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, and the defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. La. C. Cr. P. art. 821(B); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Wright, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157 and 00-0895 (La. 11/17/00), 773 So. 2d 732. The Jackson standard of review 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 in order to convict, the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. State v. Graham, 02-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So. 2d 416, 420.

The appellate court will not assess the credibility of witnesses or the relative weight of the evidence to overturn a determination of guilt by the factfinder. See State v. Polkey, 529 So. 2d 474, 476 (La. App. 1st Cir. 1988), writ denied, 536 So. 2d 1233 (La. 1989). As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of witnesses, the question is one of the weight of the evidence, not its sufficiency. State v. Young, 99-1264, p. 10 (La. App. 1st Cir. 3/31/00), 764 So. 2d 998, 1006. A determination of the weight to be given evidence is a question of fact for the trier of fact, and is not subject to appellate

review. State v. Payne, 540 So. 2d 520, 524 (La. App. 1st Cir.), writ denied, 546 So. 2d 169 (La. 1989).

Defendant was found guilty of attempted possession of cocaine. Conduct constituting "attempt" is described in La. R.S. 14:27(A) as:

> 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.

To support a conviction for possession of a controlled dangerous substance, the State must prove that the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed the drug. Therefore, guilty knowledge 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. State v. Harris, 94-0696, p. 3 (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.

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 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 at pp. 3-4, 657 So. 2d at1075.

In this case, the jury was presented with two theories of how the baggie containing cocaine came to be located in the yard from which it was recovered.

The State's theory was that defendant actually possessed the cocaine, and when he realized that a police unit was approaching him, he walked into the yard and placed it on the grass so he could retrieve it following any interaction with the police. In support of this theory, the State presented testimony from Deputy Chamberlain, who witnessed defendant walk into the dark yard as he approached the defendant in a marked police vehicle. Deputy Chamberlain acknowledged that such behavior always intensifies interest in an individual, so the deputy stopped his unit and shined his flashlight on defendant. For safety reasons, Deputy Chamberlain focused on defendant's hands, and from a distance of no more than eight feet away, he was able to see defendant bending over and placing an object that appeared to be a plastic bag on the ground. Knowing that such objects were commonly associated with narcotics activity, Deputy Chamberlain directed the back-up he requested, Lieutenant Berry, to search the area where defendant had been standing, while he detained defendant near his unit. Lieutenant Berry immediately identified the object as a bag, which he suspected contained cocaine. No other objects were found in the area, and, unlike the grass in the area, the baggie was not wet with dew. Both police officers testified that no one else was in this area during their encounter with defendant. Lieutenant Berry testified that the baggie "stuck out like a sore thumb."

Once advised that he was being arrested, defendant physically resisted arrest to the point he needed to be subdued with a taser. After being tased, defendant was advised of his Miranda rights and admitted to Deputy Chamberlain that he had walked into the dark yard to hide from him. The State also presented testimony from Deputy Chamberlain that the cocaine contained in the baggie was worth between $40.00 and $60.00, and that it was unlikely that amount of cocaine would be lying around in a high-crime area.

The defense's theory, which apparently was rejected by the jury, was that defendant was merely traveling to his grandmother's house when he encountered a car with no activated headlights. Defendant claimed he attempted to avoid this car since it could be a "drive-by," but also claimed he was trying to get to his grandmother's house by going between the houses. Defendant testified that the police stopped him and searched the area, which was frequented by narcotics users, for quite some time, until they eventually discovered the baggie containing the cocaine. Defendant's testimony further contradicted the State's evidence by claiming Deputy Chamberlain never used a flashlight and that he had been tased for no reason. Defendant denied resisting arrest or admitting that he was attempting to hide from the police when he walked into the yard.

We find no error in the jury's conclusion that defendant attempted to possess the cocaine retrieved from the yard where he was observed. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984).

After a thorough review of the record, we find that the evidence supports the jury's verdict of guilty. 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 of cocaine.

This assignment of error lacks merit.

CONCLUSION

Based on the evidence presented, we find no error in the conclusions reached by the jury. Accordingly, we affirm the jury's verdict in this matter.

CONVICTION AND SENTENCE AFFIRMED.