NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1837

STATE OF LOUISIANA

VERSUS

MICHAEL ANTHONY TOWNSEND[1]

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 571,378, Division "D"
Honorable David W. Arceneaux, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered May 3, 2012

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[1] Although defendant was charged by bill of information under the name of "Michael Anthony Townsend," the defendant testified that his full name is "Michael Anthony Townsend, Jr."

PARRO, J.

The defendant, Michael Anthony Townsend, was charged by bill of information with possession of cocaine, a violation LSA-R.S. 40:967(C).[2] He pled not guilty and waived his right to a jury trial. Following a bench trial, the defendant was found guilty as charged. The defendant filed a motion for new trial, which was denied. The trial court sentenced the defendant to five years of imprisonment at hard labor. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

At about 9:00 p.m. on January 29, 2010, Agent John Hebert, with the Terrebonne Parish Sheriff's Office, was patrolling when he observed the defendant in a 2002 Mitsubishi Galant leaving a nightclub on Main Street in Houma. As Agent Hebert drove behind the Galant, the defendant turned onto Prospect Boulevard without signaling. The agent turned on his lights and siren to conduct a traffic stop. The defendant did not stop but, instead, engaged Agent Hebert in an extended pursuit. As the defendant drove through Houma, he exceeded the speed limit, ran a stop sign, and ran a red light. Finally, the defendant pulled into a driveway on Memory Lane. The defendant was subdued and placed into custody.

The passenger-side door of the Galant was still open and the interior light was on. Agent Hebert approached the car and observed several rock-like substances that appeared to be cocaine on the driver's seat and driver-side floorboard. The defendant was **Mirandized** and questioned about what was found in the car. The defendant said it was not his and that he did not know what the agent was talking about. Agent Hebert seized the white substance, which was later determined to be .13 grams of cocaine.

Katara Burns testified at trial that she had just purchased the Galant that day (January 29). Burns told a friend she wanted someone to look at the car. Her friend's grandfather, Jerry Gabriel, took the Galant for a test drive. Burns had also spoken to the

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[2] A bill of information charging the defendant with four traffic offenses under a separate docket (number 571,761) was consolidated with the bill of information in this case. These traffic violations occurred while the defendant was in possession of cocaine. Counts 1 through 4 were, respectively, failing to use a turn signal, disregarding a stop sign, careless operation, and resisting an officer. The defendant was found guilty on all counts, and for each of the four counts, he was sentenced to six months in the parish jail. The trial court ordered each of these sentences to run consecutively to each other, and to run consecutively to the five-year sentence for the possession of cocaine conviction.

defendant about test-driving her car. Thus, after Gabriel returned her car, the defendant took the car for a drive and, as discussed, was stopped by the police.

Burns testified at trial that there were no drugs in her car when Gabriel took it for a drive. The defendant testified at trial that he took Burns's car for a test drive and that he did not know there was cocaine in her car. He also testified that he did not have cocaine on his person and that he did not put cocaine in her car. According to Gabriel's trial testimony, he picked up a prostitute in Burns's car. He gave the prostitute twenty dollars with which she bought a small baggie of cocaine. Gabriel and the prostitute began to argue in the car. He grabbed the baggie from her, and the cocaine spilled out. Gabriel cleaned up the cocaine and returned the car to Burns.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends the state failed to prove he knowingly or intentionally possessed the cocaine found in the car he was driving.[3]

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. 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. **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. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, LSA-R.S. 15:438 requires that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence See **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, and 00-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La.

[3] The defendant does not challenge any of his other convictions.

10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

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 fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

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. Guilty knowledge therefore is an essential element of the crime of possession. A determination of whether 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 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 (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. A determination of whether there is sufficient "possession" of a drug to convict depends on the peculiar facts of each case. **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983).

The evidence at trial established that the defendant, by virtue of his dominion and control over Burns's car as the driver, exercised dominion and control over the cocaine found on the driver's seat on which the defendant was sitting and on the driver-side floorboard. See **State v. Walker**, 03-188 (La. App. 5th Cir. 7/29/03), 853 So.2d 61, 65-66, writ denied, 03-2343 (La. 2/6/04), 865 So.2d 738 (holding that the driver and sole passenger had custody of the car and the cocaine found in the car was within his

immediate control even though ownership of the vehicle was not proven). The location of the drugs was within the reach of, and immediately accessible to, the defendant as the driver and as the sole occupant of the car. These facts alone are sufficient to convince a rational trier of fact beyond a reasonable doubt that the defendant exercised ample control and dominion over the cocaine to constitute the required element of constructive possession. See **State v. Major**, 03-3522 (La. 12/1/04), 888 So.2d 798, 803.

The defendant argues in his brief that, despite his physical proximity to the cocaine in the car, the state did not prove he knowingly possessed the cocaine because he testified he knew nothing about the cocaine, and Gabriel testified that the cocaine was his (Gabriel's). While guilty knowledge is an essential element of the crime of possession of cocaine, knowledge is a state of mind and, therefore, need not be proven as fact, but rather may be inferred from the circumstances. See **Major**, 888 So.2d at 803. Flight following an offense reasonably raises the inference of a "guilty mind." **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984).

According to testimony at the trial, Agent Hebert became involved in a prolonged pursuit of the defendant. Instead of stopping after Agent Hebert engaged his siren and lights, the defendant ignored the authority of the police and drove through the city violating several traffic laws. The defendant exceeded the speed limit several times, turned without signaling, ran a red light, and ran a stop sign. Agent Hebert testified that during the chase, he was directly behind the defendant and had a clear view of everything that was going on inside of the car. As he chased the defendant down Prospect Boulevard, Agent Hebert saw the defendant move one or two times to his right and continually move forward toward the floorboard.

The defendant testified at trial that he was taking Burns's car out for a test drive. However, this alleged "test drive" occurred after Burns had already bought the car. Further, the defendant drove to a nightclub in Burns's car and went inside and had three drinks. The record reflects that the defendant was convicted of possession of cocaine in 2002 and 2005, and he was also convicted of a DWI. Although he was charged with distribution of marijuana in 1999, according to the defendant, that charge was thrown out in exchange for his joining the military. However, the defendant never joined the military.

When the defendant was in drug court, he twice tested positive for drugs. The defendant testified that he was an addict. The defendant stated he fled from the police because he had an arrest warrant for failing to make payments on a leased television.

Jerry Gabriel testified at trial that he, too, had taken Burns's car for a test drive. According to Gabriel, he drove the car to East Street and was propositioned by a prostitute. She got in the car and agreed to perform a sexual act on Gabriel in exchange for drugs. Gabriel drove the car to an area and gave the prostitute twenty dollars, which she used to buy a $20-bag of powdered cocaine. He and the prostitute subsequently got into an argument. As they struggled in the car, Gabriel snatched the bag of cocaine from her, and the bag burst open. The cocaine "went everywhere" and the prostitute jumped out of the car and left. Gabriel pulled over, cleaned out the cocaine, and brought the car back to Burns. Gabriel testified that he did not see the defendant that night and that he had no idea the defendant drove Burns's car. Gabriel testified he had several prior convictions, including forgery, and had been to jail more than once.

More than three months after the defendant's arrest, Gabriel went to the office of defense counsel (for this trial) and signed a "Dismissing Affidavit," wherein he stated that: he borrowed Burns's car; "he inadvertently dropped what he believed was [c]ocaine while operating the vehicle"; he returned the car to Burns; and "he did not know that he dropped the cocaine in the vehicle until after Michael Townsend, Jr. [defendant] departed in the vehicle."[4] The affidavit was submitted into evidence at trial.

In light of Gabriel's trial testimony, the statements made in the affidavit raised issues regarding his credibility. Gabriel drove Burns's car before the defendant drove it. Gabriel stated in the affidavit that he was not aware he dropped the cocaine in the car until after the defendant "departed in the vehicle." At trial, however, Gabriel stated that he never saw the defendant and that he cleaned the car out before returning it to Burns. Thus, if Gabriel had not seen the defendant that night, he could not have known the

[4] Gabriel signed this affidavit on May 11, 2010. On July 30, 2010, Gabriel signed a second affidavit. The statement in the second affidavit is precisely the same as the statement in the first affidavit. Defense counsel mistakenly put the defendant's name in the first affidavit as the person who had appeared and made the statement. The corrected second affidavit indicates "Jerry Gabriel" as the person who appeared and made the statement.

defendant "departed in the vehicle." Furthermore, Gabriel's testimony that he pulled over to clean out the cocaine from the car contradicts his statement in the affidavit that he was unaware he dropped cocaine in the car. At the subsequent hearing on the motion for new trial, discussed below, the trial court noted that it had not believed Gabriel's testimony, as follows:

> He testified that he went down, I believe it was East Street . . . and that he picked up some whore and that the whore and he got into some argument and that this crack cocaine that he said he got for the whore ended up all over the vehicle. I just didn't believe that story.
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> * * *
>
> Well, when it was all said and done, I simply did not believe that the cocaine was in the car from Mr. Gabriel ... .

In this case, the trial court was presented with two theories of who possessed the cocaine found by Agent Hebert, *i.e.*, the state's theory that the defendant knowingly and constructively possessed the cocaine that was found in the car he was driving and the defendant's theory that he had no knowledge of the cocaine that belonged to someone else. When a case involves circumstantial evidence, and the trial court 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 which raises a reasonable doubt. See **Captville**, 448 So.2d at 680. The trial court's finding of guilt reflected the reasonable conclusion that the defendant, having dominion and control over the area where the cocaine was found, constructively and knowingly possessed the cocaine.

In its reasons for finding the defendant guilty, the trial court made clear that it did not believe the defendant's theory of innocence, as follows:

> The real question is now what's the verdict to be on the allegation that he knowingly possessed cocaine on that night.
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> In this particular case, I find beyond a reasonable doubt that Mr. Townsend did knowingly possess that cocaine and here's why. I am to believe -- well, first of all, it was in the driver seat area and he didn't stop, and that would have been a reason for him not to stop. And the testimony was . . . that he was fooling around in the vehicle while the police were chasing him with the lights and the siren on. That's all circumstantial evidence that he knew that there was something illegal about what he was doing on that night in that automobile.

> And so for that reason, and among others that I'll explain, I find beyond a reasonable doubt that he knowingly possessed that cocaine in that car.

Thus, with the evidence establishing the defendant's constructive possession of cocaine and that he knowingly or intentionally possessed it, the state proved the elements of the charged crime. The trial court heard all of the testimony and viewed all of the physical evidence presented to it at trial and, notwithstanding any conflicting testimony, the trial court found the defendant guilty beyond a reasonable doubt. 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 fact finder's determination of guilt. **Taylor**, 721 So.2d at 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 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that 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).

The sufficiency inquiry does not require a reviewing court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt but, rather, whether a rational fact finder viewing the evidence as a whole could have found the defendant guilty beyond a reasonable doubt. See **Mussall**, 523 So.2d at 1310-11. In light of the testimony of Agent Hebert, and considering that the cocaine was on the driver's seat and driver-side floorboard of the car the defendant was driving, that the defendant engaged in an extended car chase with the police to avoid being stopped, that the defendant was not test driving the car but used it to go to a nightclub, that the defendant is a self-admitted addict, that the defendant's prior drug convictions diminished his credibility, and that Gabriel's trial testimony was impeached, a fact finder could have reasonably concluded that the defendant knowingly possessed the cocaine found in Burns's car.

After a thorough review of the record, we find that the evidence supports the trial court's judgment of conviction. 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 the defendant's hypothesis of innocence, that the defendant was guilty of possession of cocaine. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENTS OF ERROR NUMBERS TWO AND THREE

The defendant argues these related assignments of error together. In his second assignment of error, the defendant argues that the trial court erred in denying his motion for new trial. In his third assignment of error, the defendant argues ineffective assistance of counsel as a result of defense counsel's failure to provide the trial court, at the hearing on the motion for new trial, with "actual evidence" that Gabriel had been "officially charged" with possession of the same cocaine for which the defendant was convicted.

Following the trial, a hearing was held on a motion for new trial, at which defense counsel made the conflicting arguments that the cocaine in Burns's car was planted by the police and that the cocaine in Burns's car belonged to Gabriel. The trial court denied the motion for new trial. In his brief, the defendant does not argue that the evidence was planted. He asserts instead that the motion for new trial should have been granted because Gabriel testified at trial that he purchased the cocaine, that he had possession of it, and that he signed an affidavit attesting to this.

The defendant is, again, addressing the sufficiency of the evidence, which we have discussed in the first assignment of error. Gabriel's credibility is an issue properly raised by a motion for post-verdict judgment of acquittal, not a motion for new trial. See LSA-C.Cr.P. art. 821. As noted above, given the incongruity between Gabriel's affidavit and his trial testimony, the trial court did not believe Gabriel's story regarding his possession of the cocaine. Gabriel was an unreliable witness, and the trial court found that the evidence proved the defendant knowingly possessed the cocaine.

The defendant also argues ineffective assistance of counsel because defense counsel did not provide the trial court, at the hearing on the motion for new trial, with

evidence that Gabriel had been officially charged with possession of the same cocaine for which the defendant was convicted. According to the defendant, "Logic dictates that two people who occupied a vehicle during separate periods of time should not both be convicted of possessing the same 0.13 grams of crumbs of cocaine that were smashed into the seat and floorboard of said vehicle." The defendant asserts that Gabriel's conviction constitutes new and material evidence, which is grounds for a new trial. See LSA-C.Cr.P. art. 851(3).

We note initially that defense counsel did not argue at the hearing on the motion for new trial that he had new and material evidence. Moreover, the motion and order for new trial filed by defense counsel asserts only one ground for a new trial, namely, that the "verdict of the jury" is contrary to the law and the evidence. See LSA-C.Cr.P. arts. 820 and 851(1). The defendant notes in his brief that shortly after the defendant's trial, Gabriel was charged with possession of the same cocaine, he pled guilty, and he was sentenced to three years at hard labor. Even assuming these details of Gabriel's conviction are true, the defendant's ineffective assistance of counsel claim is baseless. At the hearing on the motion for new trial, defense counsel did, in fact, inform the trial court that Gabriel was likely in jail for admitting that the cocaine was his, as follows:

> Remember, in the trial he had the owner of the car, a new car to her, asked the defendant, she asked two gentlemen to test drive the vehicle. Yet the man who test drove the vehicle say [sic], admitted under oath and I think he's still in jail for it, that the cocaine was his, that Michael [defendant] knew nothing about it. And then you had Michael testify that he knew nothing about it.

Thus, while the trial court was put on notice that Gabriel was also being charged with possession of cocaine, it still denied the motion for new trial. The fact that Gabriel may have also faced charges had no bearing on the defendant's guilt. The trial court's findings notwithstanding, and despite what the defendant asserts logic dictates, more than one person can possess drugs simultaneously, a not uncommon occurrence described in the jurisprudence as joint constructive possession. See **State v. Toups**, 01-1875 (La. 10/15/02), 833 So.2d 910, 913; **State v. Russell**, 46,426 (La. App. 2nd Cir. 8/17/11), 73 So.3d 991, 996-97, writ denied, 11-2020 (La. 2/10/12), 82 So.3d 270; **State v. Thompson**, 09-128 (La. App. 5th Cir. 9/29/09), 22 So.3d 1105, 1110-11; **State v. Williams**, 546 So.2d 963, 965-66 (La. App. 3rd Cir. 1989).

We also find that Gabriel's subsequent conviction for possession of cocaine did not, contrary to the defendant's assertion, constitute new and material evidence. New and material evidence is evidence that, had it been introduced at the trial, "would probably have changed the verdict or judgment of guilty." See LSA-C.Cr.P. art. 851(3). The trial court, even with the information that Gabriel was in jail, denied the motion for new trial because, as already noted, it did not believe Gabriel's story. Thus, any new information about Gabriel's conviction surely would not have changed the judgment of guilty. Having shown no deficient performance by defense counsel, the defendant's claim of ineffective assistance of counsel must fall. See **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

These assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.