

Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **13th day of May, 2021** are as follows:

PER CURIAM:

2019-K-01899

STATE OF LOUISIANA VS. WALTER PERELL FISHER, JR. (Parish of St. Tammany)

REVERSED. SEE PER CURIAM.

Retired Judge Robert Klees appointed Justice ad hoc, sitting for Crain, J.,
recused in case number 2019-K-01899 only

Crichton, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2019-K-01899

STATE OF LOUISIANA

versus

WALTER PERELL FISHER, JR.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF ST. TAMMANY**

PER CURIAM:^{*}

Defendant, Walter Perell Fisher, Jr., was taking a bath at his girlfriend's residence in Slidell when officers of the St. Tammany Parish Narcotics Task Force accompanied by a parole officer arrived to conduct a "residence check." The residence check pertained to two probationers who also resided there, Richard Dantin and his fiancée Kristie Smith. Dantin and Smith were on probation for operating a clandestine methamphetamine lab and numerous convictions for possession and distribution of controlled dangerous substances.

In response to questioning by the parole officer, Dantin revealed that he had a small quantity of methamphetamine and a pipe on his person. Officers then obtained a search warrant for the residence. They found controlled dangerous substances and paraphernalia in the common areas and bedrooms. In the bedroom belonging to Samantha Irvin, defendant's girlfriend, officers found a single, loose prescription promethazine pill on a cluttered nightstand. In the pocket of a size medium Saints jacket hanging in Irvin's closet, officers found an opaque container with less than a gram of methamphetamine inside and a bottle of Adderall prescribed to Irvin. She told

^{*} Retired Judge Robert Klees appointed Justice ad hoc, sitting for Crain, J., recused.

officers that defendant had no knowledge of the methamphetamine or the promethazine pill in her room. No contraband was found in the bathroom where defendant was taking a bath.

A St. Tammany Parish jury found defendant guilty as charged of possession of methamphetamine, La. R.S. 40:967(C), and possession of a legend drug without a prescription, La. R.S. 40:1060.13, based on the methamphetamine found in the jacket pocket and the single promethazine pill found on the nightstand. The trial court adjudicated defendant as a third-felony offender, La. R.S. 15:529.1, and sentenced him to consecutive terms of 10 years imprisonment at hard labor for possession of a legend drug without a prescription (then the statutory maximum for the offense and his offender class),¹ and four years imprisonment at hard labor for possession of methamphetamine.

The court of appeal affirmed in an unpublished opinion. *State v. Fisher*, 19-0669 (La. App. 1 Cir. 11/15/19), available at 2019 WL 6045310. While the court of appeal considered several assignments of error, two are pertinent here. First, the court of appeal found the evidence sufficient to prove defendant had constructive possession of the single promethazine pill found on the nightstand and the small quantity of methamphetamine found in the pocket of the jacket that was hanging in the closet. That is, it found the evidence, when viewed according to the due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), sufficient to permit the jury to reasonably infer defendant knew the contraband items were present, and that he had dominion and control over them. The court of appeal based its determination on the following evidence: officers found defendant's Louisiana

¹ By 2018 La. Acts 203, the crime of possession of a legend drug was reduced from a felony to a misdemeanor. Under the law as amended, a sentence for possession of a legend drug is no longer subject to enhancement under the Habitual Offender Law.

Purchase Card in the residence; officers found some items of male clothing and shoes in Irvin's closet; defendant's dog was present in the residence at the time of the arrest; Dantin testified in a prior trial that defendant was "staying" in the home with Irvin; Smith testified in the present trial that defendant lived intermittently with Irvin; and defendant told police during their investigation of another offense that he "stayed" at two residences, one of which was where the crimes at issue here occurred.

Second, the court of appeal found that any error by the trial court in admitting the video of defendant's statement to police from the investigation of another crime, which showed defendant handcuffed and in an orange jumpsuit, was harmless. During that statement, defendant initially gave a different address as his residence, but later acknowledged that he also "stayed" with Irvin at her home. The court of appeal determined that defendant's assignment of error—that the video compromised his presumption of innocence by showing him shackled and in an orange jumpsuit—was not preserved by contemporaneous objection. At trial, according to the court of appeal, counsel had only objected that the interview was not relevant because defendant did not specify when he lived with Irvin, only that he had done so "at some point in time."

The court of appeal concluded that regardless, the video was not unduly prejudicial because the jury had already learned of the other crime when the defense stipulated to Irvin's testimony from the prior trial.

"In reviewing the sufficiency of the evidence to support a conviction, an appellate court in Louisiana is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*. . . . [T]he appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Captville*, 448 So.2d 676, 678 (La. 1984).

Pursuant to La. R.S. 40:967(C) and La. R.S. 40:1060.13, the State had to prove that defendant knowingly or intentionally possessed methamphetamine, and that defendant possessed promethazine without an order or prescription. Because defendant was not in the room where the contraband was found, the State had to prove that defendant was in constructive possession of the contraband. Constructive possession exists when an offender has guilty knowledge of the contraband's presence and exercises dominion and control over it. *State v. Smith*, 257 La. 1109, 1114–15, 245 So.2d 327, 329 (1971). Several factors are relevant to a determination of whether a defendant exercised dominion and control sufficient to constitute constructive possession. *State v. Toups*, 2001-1875, p. 4 (La. 10/15/02), 833 So.2d 910, 913. These factors include knowledge that drugs were present; the defendant's relationship with the person found to be in actual possession; defendant's access to the area where the drugs were found; evidence of the defendant's recent drug use; and defendant's physical proximity to the drugs. *Id.* "The mere presence of someone in the area where the controlled dangerous substance is found, or mere association with the person found to be in possession of the contraband, is insufficient to constitute constructive possession." *State v. Bell*, 566 So.2d 959 (La. 1990) (internal quotation marks and citations omitted).

While defendant had access to the room where officers found the methamphetamine and promethazine pill, the State failed to introduce any evidence establishing defendant's knowledge of their presence. Officers found less than one gram of methamphetamine in an opaque container inside the pocket of a size medium jacket that was hanging in Irvin's closet. A jury could only make a series of speculative leaps to infer that defendant knew the methamphetamine was there, in part because defendant might have been able to fit into the jacket (as one officer speculated

at trial).² While officers found the single pill of promethazine in plain sight on Irvin's nightstand, the nightstand was cluttered with many personal effects, and other medications that were prescribed to Irvin were also found in the room. Even if the jury inferred that defendant noticed it, there was no evidence from which the jury could further infer defendant knew the small white pill required a prescription, or that it had not been prescribed to Irvin.

Although the State argues that the jury could infer defendant's knowledge from the drugs and paraphernalia found in the common areas, Dantin claimed ownership of those items and defendant was not charged with possessing them. The jury could only speculate that defendant's knowledge of contraband in the common areas somehow alerted him to the presence of the contraband in Irvin's bedroom. The State introduced no evidence from which a jury could reasonably conclude that defendant knew the items he was charged with possessing were present, and that he had dominion and control over them.

Based on the evidence presented, the jury could only speculate to find defendant guilty of constructive possession of the methamphetamine and the legend drug. When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first assess the sufficiency of the evidence, *see State v. Hearold*, 603 So.2d 731, 734 (La. 1992), because the accused may therefore be entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981). *See also Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2148, 57 L.Ed.2d 1 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Defendant here is so

² No evidence was presented that defendant owned the jacket, had ever worn the jacket, or could

entitled. *See State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988) (“the court is not to substitute its judgment of what the verdict should be for that of the jury, but that at the same time the jury cannot be permitted to speculate if the evidence is such that reasonable jurors must have a reasonable doubt”) (quoting 2 C. Wright, *Federal Practice & Procedure, Criminal 2d*, § 467, at 660-661 & n. 23); *see also State v. Lubrano*, 563 So.2d 847, 850 (La. 1990) (per curiam). Accordingly, we vacate defendant’s convictions and sentences, and we enter a judgment of acquittal on both charges in his favor.

Considering the above, we need not address defendant’s remaining claims. However, we find the State’s introduction of a 12-minute excerpt of the 36-minute interview with defendant, recorded during the investigation of another crime, to be concerning, and addressing this issue would be instructive. Defendant contended that showing the video to the jury undermined his presumption of innocence because it showed him handcuffed and wearing an orange jumpsuit. The court of appeal found this complaint was not preserved for review by contemporaneous objection, and further found that the video’s introduction was harmless because the jury was independently aware of the other charge by another source.

Our review of the record suggests the court of appeal too narrowly construed defendant’s objection. Therefore, the claim was properly before that court. Furthermore, it is difficult to conclude that the guilty verdicts rendered here were surely unattributable to the error, as required by *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Although defendant’s periodic residence in the home with Irvin is one factor relevant to the issue of dominion and control, the video was cumulative of other evidence on that issue, and therefore its probative value

wear the jacket, other than an officer’s opinion that it might fit him.

may have been outweighed by the danger of unfair prejudice, particularly in such a weak case.

Furthermore, it is worth noting that the State introduced the video in rebuttal rather than in its case-in-chief. The video, however, did not rebut evidence introduced by defendant or otherwise become relevant only as an effect of some evidence introduced by defendant. *See* La.C.E. art. 611(E) (“the state in a criminal prosecution shall have the right to rebut evidence adduced by their opponents”); *see also State v. Turner*, 337 So.2d 455, 458 (La. 1976) (describing rebuttal evidence as “evidence which has become relevant or important only as an effect of some evidence introduced by the other side”); *State v. Tyler*, 97-0338, p. 17 (La. 9/9/98), 723 So.2d 939, 948–49 (finding rebuttal evidence is that “which is offered to explain, repel, counteract, or disprove facts given in evidence by the adverse party”).

Regardless, we need not examine this issue further considering that Double Jeopardy protections require acquittal on both charges because the State failed to introduce evidence sufficient to establish defendant’s constructive possession of the methamphetamine and the legend drug. Here, the jury could only speculate that defendant knew the contraband was present, and that he exercised dominion and control over it. While a reviewing court cannot substitute its judgment of what the verdict should be for that of the jury, the jury cannot be permitted to speculate if the evidence is such that reasonable jurors must have a reasonable doubt.

Accordingly, we reverse the decision of the court of appeal. We vacate defendant’s convictions and sentences for possession of methamphetamine, La. R.S. 40:967(C), and possession of a legend drug without a prescription, La. R.S. 40:1060.13. We enter a judgment of acquittal on both charges.

REVERSED

05/13/21

SUPREME COURT OF LOUISIANA

No. 2019-K-01899

STATE OF LOUISIANA

VS.

WALTER PERELL FISHER, JR.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST
CIRCUIT, PARISH OF ST. TAMMANY**

Crichton, J., additionally concurs and assigns reasons:

For the reasons assigned by the per curiam, I agree with the finding that there is insufficient evidence to find defendant guilty for the crimes for which he was convicted. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). I write separately because I disagree with the per curiam's discussion, in unquestionable *dicta*, of the alleged error and harmful effect of the district court's admission of certain video evidence at defendant's trial. Although I am likewise troubled by this evidence, the Court's insufficiency holding and related acquittal on both charges renders the question of the video evidence's admissibility immaterial.