

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY GONZALEZ A/K/A HENRY
FROMETA GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55803

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Anderson*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of possession of a controlled substance with intent to sell, one count of possession of a controlled substance, and two counts of trafficking in a controlled substance. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Henry Gonzalez argues that there was insufficient evidence to support his conviction for possession of marijuana. He also argues that his convictions for possession of a controlled substance with intent to sell should be reversed because his convictions for trafficking in a controlled substance provide a greater penalty for the same offenses. See Vidal v. State, 105 Nev. 98, 100-01, 769 P.2d 1292, 1294 (1989). The State does not object to reversing the counts for possession of a controlled substance with intent to sell because those counts were charged in the alternative to the counts for trafficking in a controlled substance. We therefore reverse the convictions for possession of a controlled substance with intent to sell but affirm the counts of trafficking in a controlled

substance.¹ As explained below, we also reverse the conviction for possession of marijuana.

In July 2009, a SWAT team executed a search warrant of Gonzalez's two-bedroom apartment. After the team secured the apartment, investigators were called in and, during their search, found 12.76 grams of cocaine in Gonzalez's pocket; 900 baggies in the kitchen; 5.12 grams of methamphetamine, a woman's purse, and two scales in Gonzalez's bedroom; and 4.35 grams of marijuana in a paper bag on a bed in the guest bedroom. Gonzalez and four acquaintances were inside the apartment at the time of the raid. The prosecution charged Gonzalez with possession of cocaine and methamphetamine with intent to sell, possession of marijuana, and trafficking in cocaine and methamphetamine. After a jury trial, Gonzalez was convicted on all five counts. Gonzalez argues on appeal that the prosecution produced insufficient evidence to support his conviction for possession of the marijuana because the State failed to prove that the marijuana belonged to him.

"The standard of review [for assessing sufficiency of the evidence arguments] is '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.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "The rule is well established that it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker

¹Gonzalez does not seek reversal of his convictions for trafficking in the controlled substances of methamphetamine and cocaine.

v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). This principle obtains so that “a verdict supported by substantial evidence will not be disturbed by a reviewing court.” McNair, 108 Nev. at 56, 825 P.2d at 573. But when as a matter of law “the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury,” State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994), that conviction must be reversed. That is the case here.

To obtain a conviction, the State was required to show that Gonzalez knowingly possessed the marijuana. NRS 453.336; Fairman v. Warden, 83 Nev. 332, 336-37, 431 P.2d 660, 663 (1967); 1 Wayne R. LaFave, Substantive Criminal Law § 6.1(e), at 430-31 (2d ed. 2003). The State elicited testimony that the marijuana was found in a paper bag on the bed in the guest bedroom. Because the marijuana was not in Gonzalez’s actual possession, the prosecution proceeded on a theory that Gonzalez had constructive possession of the marijuana.

“The accused has constructive possession only if [he] maintains control or a right to control the contraband.” Glispey v. Sheriff, 89 Nev. 221, 223, 510 P.2d 623, 624 (1973). Evidence of constructive possession may be circumstantial and the jury may draw reasonable inferences from the evidence presented. Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). “[P]ossession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [his] dominion and control.” Palmer v. State, 112 Nev. 763, 769, 920 P.2d 112, 115 (1996) (quoting Sheriff v. Shade, 109 Nev. 826, 830, 858 P.2d 840, 842 (1993)). Constructive possession is “both the power and the intention at a given

time to exercise dominion or control over a thing, either directly or through another person or persons.” Palmer, 112 Nev. at 768, 920 P.2d at 115 (quoting Black’s Law Dictionary 1163 (6th ed. 1990)).

Although the State proved that Gonzalez had dominion and control over the apartment, the State failed to prove that the location at which the marijuana was found was “immediately and exclusively accessible” to Gonzalez. Palmer, 112 Nev. at 769, 920 P.2d at 115 (quoting Sheriff v. Shade, 109 Nev. 826, 830, 858 P.2d 840, 842 (1993)). The State’s SWAT team witness described the raid, noting that four or five people were in the apartment when it began, but could not say who was where within the apartment. The detective, who arrived after the raid when all individuals had been secured, testified that four visitors were sitting handcuffed in the living room and Gonzalez was on the front balcony. He also testified that Gonzalez told him he was the only person living there and that the other four people found at the time of the raid were people who “c[o]me and go” from the apartment.

Possessory interest in the property where narcotics are found, however, is not enough to infer possession of those drugs when others are present. See Watson v. State, 88 Nev. 196, 198, 495 P.2d 365, 366 (1972) (“In a sense it can be said that one has possession of everything that is contained in the home or apartment in which he lives but this is not the sense in which ‘possession’ is used in the penal statute.” (quoting People v. Antista, 276 P.2d 177, 179 (Cal. Ct. App. 1954))); Konold v. Sheriff, 94 Nev. 289, 290, 579 P.2d 768, 769 (1978) (“[M]ere association with . . . the property where it is located, is insufficient to support a finding of possession [of narcotics].” (quoting United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973), abrogation on other grounds recognized by

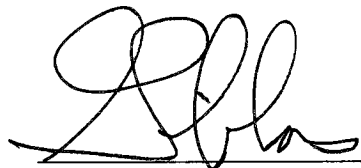
Gibson v. Collins, 947 F.2d 780, 782-83 (5th Cir. 1991))). In Watson, this court held that a parent could not be charged with possession of drugs found in his daughter's room, even though he was the owner of the house. Watson, 88 Nev. at 198, 495 P.2d at 366. More evidence than a proprietary interest is needed to establish a connection between the defendant and a drug. See Charles H. Whitebread & Ronald Stevens, Constructive Possession in Narcotics Cases: to Have and Have Not, 58 Va. L. Rev. 751, 763-64 (1972) (“[T]he fact that one of many individuals present when drugs are found has a proprietary interest in the area does not alone make it more likely than not that he in fact exercises exclusive control over the drugs.”); Emile F. Short, Annotation, Conviction of Possession of Illicit Drugs Found in Premises of which Defendant was in Nonexclusive Possession, 56 A.L.R.3d 948, 953 (1974 & Supp. 2011) (noting that when defendant is not in exclusive possession of premises, it generally cannot be inferred that the defendant knew of or had dominion or control over the drugs without other circumstances to buttress the inference).

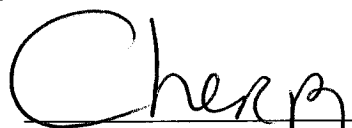
Here, the State did not produce other evidence demonstrating in Gonzalez a “right to control the contraband,” Glispey, 89 Nev. at 223, 510 P.2d at 624. The State argues that Gonzalez's presence in the apartment was enough. But this is not so because he was not there alone, cf. Van Zandt v. State, 538 P.2d 1130, 1130-31 (Okla. Crim. App. 1975) (permitting the inference that defendant had control of drugs in guest bedroom because he was sole owner and only person present at the time of raid), and no evidence suggested that Gonzalez exercised control over the guest bedroom itself. The prosecution did not show that Gonzalez was in the guest bedroom at the time of the raid, nor was the marijuana so


conspicuous that the jury could infer that he controlled and knew of the drug's presence. Compare State v. Luchetti, 87 Nev. 343, 345-46, 486 P.2d 1189, 1191 (1971) (The record did not indicate where in the house the defendants were when arrested and, therefore, did "not establish constructive possession . . . in any defendant having the right to control the contraband"), with Woerner v. State, 85 Nev. 281, 284, 453 P.2d 1004, 1005-06 (1969) (holding that evidence marijuana was in "plain view" of registered guest of hotel room established knowledge and dominion and control of the substance). See also State v. Casey, 203 P.3d 202, 205 (Or. 2009) ("[H]osts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises." (quoting Minnesota v. Olson, 495 U.S. 91, 99 (1990))).

Gonzalez's conviction on this charge is reversed because as a matter of law the prosecution produced insufficient evidence to support the jury's guilty verdict on the possession of marijuana. Purcell, 110 Nev. at 1395, 887 P.2d at 279. Per the State's concession, we also reverse Gonzalez's convictions for possession of a controlled substance with intent to sell but affirm his convictions for trafficking in a controlled substance. Accordingly, we

ORDER the judgment of the district court AFFIRMED in part, REVERSED in part AND REMANDED to the district court for amendment of the judgment consistent with this order.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Pickering

cc: Hon. Jennifer P. Togliatti, District Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk