

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

Appellee.

Case No. 2D08-3579

Cavokia Evans appeals his judgment and sentence for trafficking in cocaine in violation of section 893.135, Florida Statutes (2005). Among the claims raised, he argues the trial court erred in denying his motion for judgment of acquittal.

For reasons discussed below, we find no merit in Evans' argument that the trial court erred by denying this motion. However, because we find the trial court erred by failing to declare a mistrial after the State made improper comments during closing arguments regarding Evans' right to remain silent, we reverse his judgment and sentence and remand for a new trial.

I. Background

This case arises from a narcotics investigation of a private residence owned by Ricky Kutner. After receiving several complaints from neighboring residents about possible illegal activity at Kutner's house, the Pinellas County Sheriff's Office conducted a surveillance of the property. During the course of their investigation, police repeatedly found drug paraphernalia in trash cans located near the street. Based on the paraphernalia found in the trash, law enforcement was able to obtain a search warrant. Law enforcement proceeded to assemble a substantial narcotics team to execute the search warrant during the evening of October 28, 2005.

While the team was approaching the front of the house, a woman standing on the front porch, later identified as Heather Trummell, noticed the officers and alerted the home's occupants to the impending police raid. The police, realizing that their operation was being compromised, rushed into the front of the residence. In the meantime, several people scattered throughout the house.¹ The police swept the premises and noticed a bathroom door located directly across the hall from a room dubbed the "east bedroom" was slightly ajar. Upon opening the door, they discovered Evans sitting on an open toilet seat with his pants pulled down. Evans was also

¹In all, eight people were found inside the house, including Kutner.

wearing a pair of latex gloves. The police promptly arrested Evans and found \$1785 in cash, mostly in twenty-dollar increments, in Evans' pants pockets. They noted the water in the toilet was undisturbed and did not contain urine, excrement, or any sign that it had been used to flush any contraband. They also found a man, later identified as Glenn Adams, hiding at the bottom of the bathroom closet attempting to conceal himself with towels. No cocaine was found in the bathroom or on Evans' gloves.

No one was found in the east bedroom. However, the police did discover forty dollars, a cell phone, and a latex glove strewn across the bed. On the floor by the east side of the bed, they discovered a fake Pepsi soda can and a police scanner. The fake Pepsi soda can held a plastic baggie with pieces of crack cocaine. On the floor by the west side of the bed, they found an open cereal box and another plastic baggie containing crack cocaine. The cereal box, positioned haphazardly on its side, was covered in small amounts of crack cocaine spilling off the box onto the floor. A razor blade was on the floor next to the cereal box. The box itself contained a pair of latex gloves. The police found a plastic Walmart bag nearby containing various CDs, a digital scale, plastic baggies, and a fake Mountain Dew soda can, which also contained a baggie with pieces of crack cocaine.² The police also found a razor blade and a drink bottle positioned on an end table along the northwest wall of the room, a drug ledger in a shoebox, keys from a rental car parked in front of Kutner's house, and a cigar box and another latex glove on the dresser along the south wall. Evans' fingerprints matched prints taken from the cigar box, shoebox, a drink bottle, CDs, rental car, and cereal box.

²Though the Walmart bag itself was not introduced into evidence, several pictures of the Walmart bag were received at trial. The pictures represented a fair and accurate representation of the bedroom and the Walmart bag as it appeared during the execution of the search warrant.

During Evans' trial, a law enforcement official opined that because the east bedroom appeared to serve as the production and distribution center for the crack cocaine, the gloves could have been used to protect the person cutting and packaging the drugs from having any substances seep into their skin.

II. Evans' Motion for Judgment of Acquittal

At the conclusion of the State's case, Evans moved for a judgment of acquittal, arguing the State failed to offer any independent evidence sufficient to establish Evans' constructive possession of the cocaine. The trial court denied the motion. This appeal follows.

A trial court's denial of a motion for judgment of acquittal is reviewed under a de novo standard and an appellate court will not reverse a conviction which is supported by competent substantial evidence. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). After viewing the evidence in the light most favorable to the State, if a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, then sufficient evidence exists to sustain the conviction. Id. (citing Banks v. State, 732 So. 2d 1065 (Fla. 1999)). "However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence."³ Pagan, 830 So. 2d at 803; see also State v. Law, 559 So. 2d 187, 188 (Fla. 1989). If an inconsistency exists between the defendant's theory of innocence and the State's evidence, then the trial court should deny the motion for

³Circumstantial evidence involves certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. Orme v. State, 677 So. 2d 258, 261 (Fla. 1996) (citing Davis v. State, 90 So. 2d 629, 631 (Fla. 1956)).

judgment of acquittal and allow the jury to resolve the inconsistency. Boyd v. State, 910 So. 2d 167, 181 (Fla. 2005). A motion for judgment of acquittal should not be granted unless " 'there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law.' " Williams v. State, 967 So. 2d 735, 755 (Fla. 2007) (quoting Gudinas v. State, 693 So. 2d 953, 962 (Fla. 1997)).

Because the cocaine was found in a room across the hall from Evans' location, and in a house which had several occupants, the State must demonstrate Evans constructively possessed the cocaine by showing he had "dominion and control" over the contraband and knowledge of the presence of the contraband. State v. Holland, 975 So. 2d 595, 597 (Fla. 2d DCA 2008). Evans did not have exclusive possession of the cocaine at the time he was discovered by police; thus, the two elements cannot be inferred and must be proven by independent proof.⁴ See Brown v. State, 8 So. 3d 464, 465 (Fla. 2d DCA 2009); Holland, 975 So. 2d at 598. This proof "may consist of evidence that the defendant had actual knowledge of the presence of the contraband or evidence of incriminating statements or circumstances, other than simple proximity to the contraband, from which the jury could infer the defendant's knowledge." Wagner v. State, 950 So. 2d 511, 513 (Fla. 2d DCA 2007).

At trial and throughout his appeal, Evans theorized that someone else in the house threw the drugs into the east bedroom during the police raid. In support of his argument, Evans pointed out that there were other fingerprints obtained from the east bedroom that did not match his. However, Evans' assertion merely creates a

⁴Contrary to the dissenting opinion, the State did not need to prove that Evans was in exclusive possession of the east bedroom itself. Rather, the State needed to demonstrate Evans was in constructive possession of the cocaine located inside the east bedroom. See Holland, 975 So. 2d at 598.

dispute of material fact as to the exclusive occupancy of the east bedroom. See Holland, 975 So. 2d at 598. When we infer the evidence in the light most favorable to the State, the evidence suggests that Evans was cutting crack cocaine with a razor on top of the cereal box, but stopped and ran into the bathroom when he heard the police entering the premises. The State's case is supported by the location of the crack cocaine, which police found scattered on top of the cereal box all over the floor by the door of the east bedroom. Evans' fingerprints were found on the cereal box. Evans was also wearing latex gloves, which a law enforcement official testified were customarily used by drug distributors to keep the crack cocaine from being contaminated or coming into contact with human skin. A pair of these gloves was found in the cereal box containing Evans' fingerprints. Similar gloves were found on the dresser and on the bed next to the two twenty-dollar bills. The room also contained a drug ledger, digital scale, and police scanner. Evans' fingerprints were also found on some of the CDs in the Walmart bag, which also held the digital scale and the fake Mountain Dew can containing crack cocaine.

Based on the evidence, one could infer that when Evans fled into the bathroom, he dropped his pants and sat on the toilet in an attempt to separate himself from the drugs in the east bedroom. Law enforcement reported the bathroom door being ajar, not closed, when they were surveying the house, which supports the theory that Evans ran into the bathroom and, in his haste, did not shut the door. In the meantime, Adams was hiding in the bathroom closet and attempting to cover himself with towels. The toilet itself contained no urine or excrement, most likely due to the short time span between the police entry and Evans' mad dash across the hall. Most

importantly, Evans was still wearing the latex gloves when he was discovered. The gloves are an important factor connecting him between the bathroom and the drug activity in the east bedroom.

Thus, we believe the surrounding circumstances of Evans' location, combined with the location and amount of narcotics and drug paraphernalia found in the east bedroom, provided sufficient justification for a rational jury to conclude beyond a reasonable doubt that he constructively possessed the drugs. See Jackson v. State, 995 So. 2d 535, 541 (Fla. 2d DCA 2008) ("The fact that Jackson was known to habitually carry a purse and the presence of his credit card support the conclusion that the Burberry purse [containing drugs] was Jackson's."); cf. Wagner, 950 So. 2d at 513 (noting the absence of fingerprints failed to connect Wagner to the contraband or the containers in which it was found).

Finally, Evans relies on Edison v. State, 954 So. 2d 1235 (Fla. 2d DCA 2007), for the concept that " '[w]here two or more inferences in regard to the existence of a criminal act must be drawn from the evidence and then pyramided to prove the crime charged, the evidence lacks the conclusive nature to support a conviction.' " Id. at 1238 (quoting I.F.T. v. State, 629 So. 2d 179, 180 (Fla. 2d DCA 1993)). However, Evans and I.F.T. are the progeny of Benson v. State, 526 So. 2d 948, 952 (Fla. 2d DCA 1988), which specifically states "the general rule against the pyramiding of inferences is not rigidly applicable in all cases." The exception provides that " 'when no contrary *reasonable* inference may be indulged, such inference is elevated for the purpose of further inference to the dignity of an established fact.' " Benson, 526 So. 2d at 952 (quoting Voelker v. Combined Ins. Co. of Am., 73 So. 2d 403, 407 (Fla. 1954)); see also

Gustine v. State, 97 So. 207, 208 (Fla. 1923) (noting the pyramiding of inferences is prohibited "[i]f the facts in proof are equally consistent with some other rational conclusion than that of guilt").

"[T]he circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences." Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000). Circumstantial evidence, by its very nature, is not free from alternate interpretations, and "[t]he State is not to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." Law, 559 So. 2d at 189 (quoting State v. Allen, 335 So. 2d 823, 826 (Fla. 1976)). Otherwise, "circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime." Allen, 335 So. 2d at 826.

Here, the State met its threshold burden establishing a reasonable theory that, upon being warned of the police raid, Evans ran out of the east bedroom to the bathroom across the hall in an attempt to fool the police into believing that he was merely using the bathroom at the time of the police's search of the premises. However, Evans' attempt to evade police was thwarted by the hurried condition of the drugs left in the east bedroom, the partially open bathroom door, the undisturbed water in the toilet, his gloved attire, and Adams' presence in the bathroom closet. Though it is possible someone else threw the drugs into the east bedroom, Evans' theory is merely an alternate interpretation and "it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Law, 559 So. 2d at 189. Accordingly, we find that, when construing

the evidence in the light most favorable to the State, a rational trier of fact could find Evans constructively possessed the crack cocaine, and thus Evans is not entitled to relief on this argument.

III. The Improper Closing Arguments

Evans also argues the trial court erred in denying his motions for a mistrial after the State improperly commented on his right to remain silent during closing arguments. The State highlighted the fact that Evans was the only person found in the house wearing gloves and said:

[Assistant State Attorney]: [B]ut if [Evans] wasn't guilty, if he wasn't guilty, wouldn't there be some reasonable explanation for him wearing these gloves under the totality of what we find in that house, the circumstances?

[Defense Counsel]: Objection. Judge, I would like to approach.

The court: Approach.

[Defense Counsel]: Judge, I object as to improper argument in closing.

The court: Well, I'm going to have him move on. I certainly don't want him to dwell on it. It's certainly not the burden of the defendant to explain anything.

[Defense Counsel]: And I would ask for a mistrial at this point.

The court: Your motion will be denied.

Shortly thereafter, the State remarked, "And be very clear, evidence that there is no reasonable explanation for him having those gloves on except that he was in control of the east bedroom." Evans objected again and, before the trial court could respond, the State commented in front of the jury, "What other reasonable conclusion can we draw?" The trial court overruled the objection. Though Evans did not make any

further objections, the State continued to comment that "there is no reasonable explanation for [Evans' location in the house]" and "[t]here is no reasonable explanation for those gloves and the circumstances, especially when nobody else had them on."

"In Florida, we have adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). This is because the State, not the defendant, is required to prove an element of a crime beyond a reasonable doubt. Likewise, the defendant has the constitutional right to decline to testify against himself in a criminal proceeding. Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000). Therefore, the State is prohibited from commenting on the defendant's failure to produce evidence to refute an element of the crime "because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); see also Fla. R. Crim. P. 3.250.⁵ We find the State's comments are susceptible of being interpreted by the jury as an impermissible comment on Evans' right to remain silent or his failure to mount a defense.

In response, the State contends any error was harmless because there was overwhelming evidence of Evans' guilt. For the State to prevail on a harmless error argument, it must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable

⁵We note an exception to this rule is when the defendant voluntarily assumes some burden of proof by presenting the defenses of alibi, self-defense, or defense of others. See Jackson, 575 So. 2d at 188. These factors are not present in this case.

possibility that the error contributed to the conviction." DiGuilio, 491 So. 2d at 1138.⁶ If this court "cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." Id. at 1139. Upon reviewing the record, we cannot say beyond a reasonable doubt that the State's comments on Evans' right to remain silent did not contribute to the jury's finding of guilt. Accordingly, we find the trial court erred by failing to declare a mistrial and reverse Evans' judgment and sentence.

Reversed in part, affirmed in part, and remanded for a new trial.

KHOUZAM, J., Concur.

WALLACE, J., Concur in part and dissents in part.

WALLACE, Judge, Concurring in part and dissenting in part.

I concur with the majority that the trial court erred in denying Mr. Evans' motion for a mistrial after the prosecutor improperly commented on the exercise by Mr. Evans of his right to remain silent. However, I respectfully dissent from the majority's holding concerning the sufficiency of the evidence to establish that Mr. Evans was in constructive possession of the cocaine found in the east bedroom of the residence owned by Ricky Kutner. Because Mr. Evans' conviction is not supported by competent,

⁶The Florida Supreme Court emphasizes that the test of harmless error "is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence." DiGuilio, 491 So. 2d at 1139.

substantial evidence, I would reverse his judgment and sentence for trafficking in cocaine and remand for discharge.

Because Mr. Evans did not actually possess the cocaine, the State was required to prove that he was in constructive possession of it. See King v. State, 817 So. 2d 935, 937 (Fla. 5th DCA 2002). To prove constructive possession, the State had to establish that Mr. Evans knew of the presence of the cocaine and that he was able to exercise dominion and control over it. See Edison v. State, 954 So. 2d 1235, 1237 (Fla. 2d DCA 2007). This court recently summarized what the State must prove to establish constructive possession of contraband as follows:

If the State proves that the contraband was in plain view, then the defendant's knowledge of the contraband's presence is established. Brown v. State, 428 So. 2d 250, 252 (Fla. 1983). However, the issue of control is not established by the fact that the contraband is in plain view unless the accused is an occupant or owner. Id. In the event the accused is a mere visitor in jointly possessed premises, then the State must establish control of contraband in plain view by independent evidence. Taylor v. State, 319 So. 2d 114, 116 (Fla. 2d DCA 1975).

Sundin v. State, 34 Fla. L. Weekly D1414, D1415 (Fla. 2d DCA July 15, 2009).

In this case, the State's proof established that the residence where the cocaine was found was owned by Mr. Kutner. There was nothing found in the trash pulls that linked Mr. Evans to the residence, and he was never seen at the residence during the surveillances that preceded the execution of the search warrant. When the sheriff's deputies entered the residence, there were eight people inside, including the owner. The State did not present evidence that Mr. Evans had *any* possessory interest either in the residence or in the east bedroom where the cocaine was found. Based on the evidence presented, Mr. Evans could only be considered to be one of multiple

visitors to the residence. Thus the State's proof completely failed to establish that Mr. Evans had exclusive possession of the east bedroom. I do not argue—as the majority suggests in footnote 4—that the State was required to prove that Mr. Evans was in exclusive possession of the east bedroom. However, because the residence was jointly occupied and the cocaine in the east bedroom was readily accessible to all eight of the residence's occupants, the elements of knowledge and control could not be inferred from Mr. Evans' mere proximity to the cocaine but had to be shown by independent proof. See id.; Diaz v. State, 884 So. 2d 387, 389 (Fla. 2d DCA 2004); S.B. v. State, 657 So. 2d 1252, 1253 (Fla. 2d DCA 1995).

The evidence was insufficient to demonstrate that Mr. Evans had knowledge of or dominion and control over the cocaine. Although there were seven other people inside the residence during the execution of the warrant, none of them testified at trial to place Mr. Evans in possession of the cocaine in the east bedroom. There was no evidence that the deputies had sent a confidential informant into the residence to make a controlled purchase of cocaine. Furthermore, Mr. Evans did not make any incriminating statements indicating his dominion and control over the cocaine. No drugs were discovered on his person, and nobody testified that he had touched, handled, or discarded the cocaine. Although the latex gloves that Mr. Evans was wearing were tested for cocaine residue, none was found. Most of the cocaine was lying on the floor inside a clear plastic bag⁷ near the cereal box, between the bag and

⁷The record reflects that this clear plastic bag was not the Walmart plastic bag mentioned in the majority opinion. The clear plastic bag contained only cocaine and was introduced into evidence as State's exhibit 13. The Walmart bag contained compact disk sleeves, DVDs, and the fake Mountain Dew soda can. The Walmart bag was not introduced into evidence.

the cereal box, and on top of the cereal box. However, no fingerprints were found on the clear plastic bag. Likewise, no fingerprints were found on the fake Pepsi and Mountain Dew soda cans that contained baggies holding cocaine or on the baggies themselves.

Contrary to the majority's reasoning, evidence showing that Mr. Evans' fingerprints were found on various items inside the east bedroom did not tend to establish his knowledge of or dominion and control over the cocaine. Kresbach v. State, 462 So. 2d 62 (Fla. 1st DCA 1984), is instructive in this regard. In Kresbach, a Federal Express employee found an open package inside a drop box. Id. at 63. Inside the package, he found a manila envelope that contained two plastic bags. Id. One of the bags contained cocaine. Id. The police found one fingerprint on the package, five fingerprints on the manila envelope, and twelve fingerprints on the plastic bags. Id. at 63-64. One of the five fingerprints found on the manila envelope matched the defendant's fingerprints. Id. at 64. The First District found that the fingerprint evidence was insufficient to prove the knowledge and control elements because other prints were found and it could not be determined when the defendant had touched the manila envelope. Id. at 65.

The facts in Kresbach are analogous to the facts in this case. To be sure, Mr. Evans' fingerprints were found on various items inside the east bedroom. But fingerprints belonging to another person or persons were also found on the plastic Walmart bag and on a compact disk inside the shoebox. The fingerprints of Kevin Lee, one of the eight persons inside Mr. Kutner's house, matched prints taken from a compact disk found inside the rental car parked outside Mr. Kutner's house, a DVD

sleeve found inside the plastic Walmart bag, and the top of a can found inside the trash can where the sheriff's deputies found the cigar box. Mr. Evans could have touched the cereal box at any time before the cocaine was placed on top of it. The presence of Mr. Evans' fingerprints on various items inside the east bedroom merely shows that he touched those items at an undetermined time and is not inconsistent with his reasonable theory of innocence that one of the other seven people in the house threw the drugs into the east bedroom. Because fingerprints belonging to other persons were found inside the east bedroom and the evidence does not reflect when Mr. Evans touched the cereal box, the fingerprint evidence was insufficient to prove that Mr. Evans knew of or had dominion and control over the cocaine. See Tanksley v. State, 332 So. 2d 76, 77 (Fla. 2d DCA 1976) (reversing a conviction for possession of heroin where the defendant's fingerprints were found on an envelope holding foil packets containing heroin because it was possible that the defendant handled the envelope before the cocaine was placed inside); McClain v. State, 559 So. 2d 425, 426 (Fla. 4th DCA 1990) (reversing a conviction for attempted trafficking where multiple prints were found and the defendant could have touched the item before the drugs were placed inside); Kresbach, 462 So. 2d at 65.

The majority's reliance on Jackson v. State, 995 So. 2d 535 (Fla. 2d DCA 2008), is unwarranted. In Jackson, police found drugs near the defendant at his residence after they entered to execute a search warrant. Id. at 537. The drugs were found about five feet away from the defendant in a change purse that appeared to have spilled from a larger purse. Id. at 540. Next to the change purse was a cigarette case that held a credit card bearing the defendant's name and that also appeared to have

spilled out of the same large purse. Id. at 537. The defendant was known to carry a large purse and there was no evidence that the purse belonged to anyone else. Id. at 541. This court held that this evidence was sufficient to support the defendant's convictions and affirmed. Id.

Here, unlike in Jackson, the evidence did not show that any personal effects belonging to Mr. Evans were found in the east bedroom. The fingerprint evidence showed only that Mr. Evans and various other persons had touched various items in the east bedroom but did not demonstrate ownership. The majority relies heavily on the similarity of the latex gloves that Mr. Evans was wearing when he was arrested to the latex gloves found in the east bedroom. This reliance is misplaced. Latex gloves are mass-produced, fungible items readily available to anyone. Cf. Scruggs v. State, 785 So. 2d 605, 607 (Fla. 4th DCA 2001) (noting that plastic baggies found in defendant's vehicle "similar" to plastic baggies containing cocaine found on the ground "are fungible and readily available to anyone"). In addition, mass-produced disposable products such as latex gloves are substantially different from personal items owned or controlled by a defendant that may give rise to an inference of knowledge and dominion and control. See Jackson, 995 So. 2d at 540 (credit card bearing defendant's name); State v. Holland, 975 So. 2d 595, 598 (Fla. 2d DCA 2008) (health insurance card and other belongings); Wale v. State, 397 So. 2d 738, 740 (Fla. 4th DCA 1981) (box bearing defendant's name); see also Ladd v. State, 710 N.E.2d 188, 191 (Ind. Ct. App. 1999) (defendant's pay stub, bank receipts, and photographs); People v. Coleman, 808 N.Y.S.2d 527, 529 (N.Y. App. Div. 2006) (prescription receipts in defendant's name that listed the apartment being searched as his address). Thus the evidence

concerning the items in the east bedroom did not give rise to an inference of knowledge or dominion and control.

In addition, the State's evidence was insufficient because it required the impermissible pyramiding of inferences in order to arrive at the conclusion of guilt.

"[T]he jury cannot base inference upon inference in order to arrive at a conclusion of fact." Sirmons v. Pittman, 138 So. 2d 765, 770 (Fla. 1st DCA 1962). For this reason, the State cannot rely on the pyramiding of inferences to prove the necessary elements of a crime. See Davis v. State, 761 So. 2d 1154, 1158 (Fla. 2d DCA 2000). " 'Where two or more inferences in regard to the existence of a criminal act must be drawn from the evidence and then pyramided to prove the crime charged, the evidence lacks the conclusive nature to support a conviction.' " Id. (quoting Green v. State, 667 So. 2d 208, 212 (Fla. 2d DCA 1995)).

In this case, the jury was required to pyramid at least four inferences to conclude that Mr. Evans had dominion and control over the cocaine. First, cocaine was being distributed out of the east bedroom. Second, Mr. Evans was responsible for preparing the cocaine for distribution. Third, Mr. Evans fled the east bedroom when he was alerted to the arrival of the sheriff's deputies. And, fourth, immediately before the raid began, Mr. Evans was actively engaged in preparing the cocaine for distribution. Because the testimony established that the cocaine was cut into pieces that would be sold for twenty dollars each and there was a large quantity of cocaine and related paraphernalia found in the east bedroom, I agree that it is reasonable to infer that the cocaine was being distributed out of the east bedroom.

Beyond the entirely reasonable inference about the activities being conducted in the east bedroom, the pyramid of inferences becomes unsupportable. Initially, there is no support for the inference that Mr. Evans was preparing the cocaine for distribution. The State did not establish how long Mr. Evans had been inside Mr. Kutner's house. Although Mr. Evans had \$1785 in cash in his possession when he was arrested, the State did not prove a link between the cash and the cocaine. At trial, the State relied heavily on the latex gloves Mr. Evans was wearing to establish his dominion and control of the cocaine. However, the State's reliance on the gloves is an example of the logical fallacy of the undistributed middle. Presented in the form of a syllogism, the State's argument was as follows:

1. Drug distributors wear latex gloves.
2. Mr. Evans was wearing latex gloves.
3. Therefore, Mr. Evans was a drug distributor.

Even if all drug distributors wear latex gloves to protect themselves and their merchandise, most people who wear latex gloves are not drug distributors. Many people wear latex gloves for legitimate purposes, e.g., food preparation, cleaning, and rendering medical and dental services. Law enforcement officers and other persons engaged in forensic work frequently wear latex gloves to avoid contaminating a crime scene. Clearly, the jury's verdict finding Mr. Evans guilty of trafficking in cocaine could not have been reached without resort to a pyramiding of inferences.

In my view, the Voelker exception to the general rule against pyramiding inferences does not apply in this case. "[W]hen an inference . . . is inescapable, that is to say when no contrary reasonable inference may be indulged, such inference is

elevated for the purpose of further inference to the dignity of an established fact."

Voelker v. Combined Ins. Co. of Am., 73 So. 2d 403, 407 (Fla. 1954). This exception applies in criminal cases, Benson v. State, 526 So. 2d 948, 952-53 (Fla. 2d DCA 1988), and allows the pyramiding of an inference upon another inference "only if the prior or basic inference is established to the exclusion of any other reasonable theory should another be drawn from it," Voelker, 73 So. 2d at 407.

In this case, the inference that Mr. Evans was preparing the cocaine for distribution was not established to the exclusion of any other reasonable inferences. When the sheriff's deputies arrived to execute the search warrant, Mr. Lee and Ms. Trummell were at the front door of Mr. Kutner's house. When Mr. Lee and Ms. Trummell saw the deputies approaching, they ran back inside the residence. The deputies found Mr. Lee in the hallway between the bathroom and the east bedroom. He had marijuana on his person. Based on these facts, it is just as likely that Mr. Lee—and not Mr. Evans—was the person who was preparing or selling the cocaine. Similarly, the inference that Mr. Evans fled the east bedroom as the deputies burst into the residence was not established to the exclusion of any other reasonable inferences. No one testified to how long Mr. Evans had been in the bathroom. The deputies found the bathroom door ajar and Mr. Adams hiding inside the bathroom closet beneath some towels. Mr. Adams, who was trying to conceal himself, may well have been the person who left the bathroom door ajar in his rush to hide from the deputies. In addition, Mr. Kutner, the owner of the residence, was on the premises during the execution of the search warrant. Because the State did not establish the inferences on which its theory of the case depended to the exclusion of other reasonable theories, the Voelker

exception does not apply. See Green House, Inc. v. Thiermann, 288 So. 2d 566, 568 (Fla. 2d DCA 1974) (refusing to apply the Voelker exception where the basic inference was not established to the exclusion of one other reasonable inference). Because the jury's guilty verdict necessarily rests on an impermissible pyramiding of inferences, Mr. Evans' conviction is unsupportable.

I concede that the unusual circumstances attendant on the deputies' discovery of Mr. Evans in the bathroom of the Kutner residence lend a certain appeal to the intuitive leap required to presume his guilt. However, "intuition is not a substitute for evidence under our jurisprudence" and " 'guilt cannot rest on mere probabilities.' " Davis, 761 So. 2d at 1159 (quoting Arant v. State, 256 So. 2d 515, 516 (Fla. 1st DCA 1972)). For the reasons outlined above, the evidence presented by the State was insufficient to prove that Mr. Evans had knowledge of or dominion and control over the cocaine found in the east bedroom of Mr. Kutner's residence. Accordingly, I would reverse Mr. Evans' judgment and sentence and remand with instructions for his discharge.