NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0554

STATE OF LOUISIANA

VERSUS

CLIFTON JOHN TRAHAN, JR.

Judgment Rendered: October 29, 2010

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 522,341

The Honorable Timothy C. Ellender, Judge Presiding

* * * * * * * *

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* * * * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The defendant, Clifton John Trahan, Jr., was charged by amended grand jury indictment with one count of possession with intent to distribute marijuana (count I), a violation of La. R.S. 40:966(A)(1); one count of being a felon, convicted of possession with intent to distribute marijuana, in possession of a firearm (count II), a violation of La. R.S. 14:95.1(A); and one count of obstruction of justice (count III), a violation of La. R.S. 14:130.1(A)(1). He pled not guilty on all counts. Following a jury trial, he was found guilty as charged on all counts. On count I, he was initially sentenced to twenty-five years at hard labor. On count II, he was sentenced to twelve years at hard labor without benefit of parole, probation, or suspension of sentence. On count III, he was sentenced to ten years at hard labor. The trial court ordered all the sentences would run concurrently. Thereafter, the defendant agreed, in regard to his conviction on count I, he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law and, on count I, the court sentenced him to fifty years at hard labor to run concurrently with the sentences imposed in counts II and III. See La. R.S. 40:982(A). He moved for reconsideration of sentence, but the motion was denied. He now appeals, contending: (1) the evidence was insufficient; (2) the trial court erred in admitting La. Code Evid. art. 404(B) evidence; (3) the trial court erred in denying his *Batson* challenge and in failing to maintain a sufficient record to review the challenge; and (4) the sentence imposed was unconstitutionally excessive. For the following reasons, we affirm the convictions and sentences on all counts.

FACTS

On May 14, 2008, a vehicle stop occurred involving the defendant, who was driving a Ford F-250 truck on I-10, close to Orange County, Texas. The vehicle contained $112,032 cash. It also contained Hawaiian Punch, codeine and marijuana in a Hawaiian Punch bottle. It also contained a rental application for 400-A Idlewild Drive, listing "Aaron L. Butler" as the applicant, and listing the defendant as the emergency contact. There was also a napkin from Domino's Pizza, with writing on it stating, "ADD MONEY up should BE $250,000." There were also paystubs for the pay periods January 8-14, 2008, December 25-31, 2008, and January 1-7, 2009, listing "C. Trahan Trucking" as the employer, listing the defendant as the employee, and listing his address as "400 A Idlewild, Houma." There were also loose notebook pages from LaQuinta Inn, listing initials and nicknames with various amounts ranging from "400" to "20000" next to them, as well as the notation, "DEposit 3,500 in BANK." There was also a utility bill, due March 18, 2008, addressed to "Aaron Butler," with a receipt showing payment, for "400 Idlewild Dr Apt A, Houma, LA 70364-1417." There was also a "Comcast" bill, due February 27, 2008, addressed to "AARON BUTLER," with a receipt showing payment, for "400A IDLEWILD DR HOUMA LA 70364-1417." There was also a receipt for certified mail, listing the defendant's name and "400A Idlewild Dr. HOUMA, LA. 70364" in the return address section. There was also a 2008 occupational license issued to the defendant, listing his address as "515 OAKWOOD DR. HOUMA, LA 70363." His driver's license also listed his address as "515 OAKWOOD DRIVE HOUMA, LA 70363-0000." The defendant was wearing a designer watch worth $20,000. He claimed he was going to Texas to return a vehicle and to buy a Mate trailer. Subsequent police investigation

indicated the defendant had an agreement to purchase a Mate dump trailer from a company in Houston, but on numerous occasions, he had failed to "show up to make the payments." After the defendant was pulled over, Floyd Franklin, who had been following in a separate vehicle, also pulled over and repeatedly asked for a garage door opener in the defendant's possession.

Immigration and Customs Enforcement (ICE) Special Agent Joel Mata, a veteran of over three hundred fifty narcotics investigations, testified the notes on the LaQuinta Inn notebook pages were consistent with a "drug ledger," citing the use of a notebook, rather than a spreadsheet; the use of code words and nicknames, rather than complete names; and citing the fact that all the amounts were rounded. He also indicated the paycheck stubs for future dates were obviously fabricated.

ICE Senior Special Agent Mark Andrew Low took the defendant into custody from the Orange County Police. At the defendant's request, Agent Low allowed the defendant to use Agent Low's cell phone. No one answered the first number the defendant entered on the phone. Someone did, however, answer the second number the defendant entered on the phone. The defendant instructed the person to break a window on the back door of "his house" or "the house," cover the window so that mosquitoes did not get in, and get "the keys." Agent Low testified that in his experience with narcotics cases, the word "keys" referred to "kilos" of cocaine or marijuana.

The State and the defense stipulated that certified records of Floyd Franklin's cell phone indicated he received a phone call from Agent Low's telephone at the time the defendant used the phone.

In May of 2008, Terrebonne Parish Narcotics Task Force Agent Steven Nathaniel Bergeron was investigating a drug network transporting and distributing large amounts of liquid codeine from California to Terrebonne Parish. Floyd Franklin was a "[s]uspect and person of interest" in connection with that case.

In connection with the instant case, Agent Bergeron went to 515 Oakwood and found the defendant's parents living there. The bed in the defendant's bedroom was made and a stack of mail was on the bed. The mail included some incoming checks, but no personal papers. The closet had a few items of clothing hanging in it, but appeared to be mostly used for storing Christmas ornaments and old board games. The defendant's neighbors had not seen him for at least thirty days.

After obtaining the necessary warrants, Agent Bergeron then went to 400-A Idlewild. The glass panel of the back door had been shattered from the outside, and two pieces of wood had been used to cover the hole. One of the pieces of wood was held up by the refrigerator, which had been pushed against the inside of the door. There was loose marijuana on the floor and on the counter tops. It was later determined to weigh two and one-half to three pounds, which Agent Bergeron indicated was, in and of itself, sufficient to distribute. There was a small scale, a digital scale with a two hundred pound capacity, a vacuum sealer, a double-stack money counter, an unplugged deep freezer, and chisels. Agent Bergeron testified, in the narcotics industry, vacuum sealers are customarily used for packaging for distribution, and deep freezers are used to store narcotics because their air-tight seal can contain the pungent odor of drugs. He also indicated chisels are used for breaking down large quantities of illegal drugs, which come tightly packed, and even a single pound of marijuana is packaged as a

"brick." There was a .357 caliber handgun in the laundry room. There were also over two hundred documents with the defendant's name on them, including: receipts; bills; a credit report; a notice of cancellation of insurance; a monetary judgment; an automobile insurance identification card; a bank statement for the period March 1, 2008 to March 31, 2008; a November, 2007 certificate of title for a 2000 Ford Excursion; a July 20, 2007 certificate of title for a 2002 BMW 745I; and a boating registration certificate.

The title for the 2000 Ford Excursion listed the seller as Lentrell Wesley, on behalf of Paragon Executive Transport (Paragon). Agent Bergeron testified that Wesley was the first cousin of Lennotch Taplett, who was the owner and operator of Paragon and a "key suspect" in the codeine investigation. Agent Bergeron also found a ledger, consistent with a "drug ledger," containing some of the same code words and nicknames found on the LaQuinta Inn notebook pages in the defendant's truck. There were also notes referencing the defendant's daughter by name, a drawing with her name on it, and a 2007-08 Terrebonne Parish Recreation, girls basketball schedule. There was also a note stating, "PEEZY U goNNA HAVE 2 lAY off DAt WEED R stAY iNsiDE if u CAN't REMEMBER 2 lock thEsE DooRs BRA MAN U should REMEMBER that NOW I DONE told U 2 MANY timEs. U must BE 2 ZONED out iN HERE." There were also "high-end electronics" in the house, including a 42-inch, flat-screen television, a 52-inch, flat-screen television, and equipment for two recording studios. There was also a notebook, containing four sentences of lyrics. Additionally, there were four garbage bags containing what appeared to be marijuana bale wrappings, with marijuana shavings in them, and with large poundage numbers on them. The numbers included "30.96," "20.00,"

"27.14," and totaled 580.46. There were approximately twelve documents in 400-A Idlewild with Butler's name on them. Those documents were not personal papers, but only bills.

Agent Bergeron also obtained a search warrant for two storage units leased by the defendant. One of the units contained recording equipment. The other unit contained the defendant's BMW, bale wrappings with suspected marijuana, and two AK-47 magazines.

Agent Bergeron testified that during his investigation of the defendant, he learned that the defendant used the nicknames "Cliff-Cat" and "Cat." Agent Bergeron subsequently searched the defendant's 18-wheeler and found a notebook page containing lyrics to a song, titled, "CAt SEts of 20." The lyrics had the same four sentences of lyrics found in the notebook in 400-A Idlewild. The lyrics included, "And no Im not a hustla Im a traffica ... get the razor chop it up ... look at me I'm a portrait of the dope game ... But the bricks still 99 percent pure[.]" There was also a card with lyrics including, "U NiggAS would like MINE MORE DOPE than u SEEiNg oN the FloRidA PipeliNE I gEt it, Do the CouNt, MOVE it out At thE Right time HERE COME ANOTHER DROP MORE THAN U SEEN IN A LifEtimE."

Valerie Rhodes managed rental property, including the house located at 400-A Idlewild Drive in Houma, for Grand Terre Real Estate. The house was located towards the end of a dead-end street. She indicated Aaron Butler, his girlfriend, two children, and the defendant were present when the rental application for the property was completed. The lease period was from December 1, 2007 to November 30, 2008, and the rent was $1,050 per month. At the signing of the lease, Butler paid a $1,050 security deposit and the first month's rent in cash. Thereafter, Rhodes was unable to contact

Butler, because the phone number he provided was disconnected. However, when she contacted the defendant because the rent for January, February, March, April, and May was late, he either paid her the rent by money order directly or she found a money order for the rent in the drop box after he told her he would "drop it off." The policy and procedures of Grand Terre Real Estate required the lessee to allow regular inspections of the leased premises, but the locks on 400-A Idlewild were changed following the signing of the lease.

Doyle Anthony Thibodeaux, formerly of the Terrebonne Parish Narcotics Division, testified concerning the defendant's arrest following circumstances "that indicated a drug transaction" in May of 1999. In connection with that offense, the defendant was convicted of possession with intent to distribute marijuana. During that incident, over two kilograms of marijuana, valued at $12,443, a scale, plastic baggies, and $326 cash were seized from an apartment rented by the defendant.

Clifton J. Trahan, Sr., the defendant's father, testified the defendant lived with him at 515 Oakwood Drive in Houma, and he did not know of him living anywhere else in 2008. He claimed that in 2006, he and his wife purchased a Peterbilt truck for the defendant to "get him started in the trucking business," and the defendant had worked in that business since that time. He had no explanation for why the defendant had paycheck stubs listing his address as 400-A Idlewild.

Aaron Butler testified that from 2007 to May, 2008, he worked as a truck driver for the defendant and lived at 400-A Idlewild. He claimed the gun found at the house belonged to him, and the defendant had no knowledge of the weapon. He claimed the studio equipment in the house also belonged to him. He claimed he purchased the large scale in the house

from a shrimper from Golden Meadow. He claimed he gave a key to the house to "Mr. Otis" to keep, but only gave a key temporarily to the defendant so that he could receive furniture deliveries for him. He claimed the defendant would buy him furniture and subtract the cost of the furniture from his pay. He claimed he had a similar arrangement with the defendant concerning the rent owed on the house. He denied any knowledge of the small scale, money counter, and small and large plastic bags found in the house. He also claimed he never saw any marijuana in the house and never saw the defendant bring any marijuana into the house.

Otis Davis testified Aaron Butler was his friend and the defendant's friend. Davis claimed he had seen the defendant at 400-A Idlewild once or twice. He claimed during April and May of 2008, he (Davis) had a key to the house and would "bring girls over there." He claimed the marijuana found in the house belonged to him. He also claimed one of the scales, the money counter, and the small plastic bags found in the house belonged to him.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues there was insufficient evidence to support the convictions for possession with intent to distribute marijuana and possession of a firearm by a convicted felon because he was not in actual possession of either the marijuana or the gun found at 400-A Idlewild and the State failed to establish his constructive possession of those items. He also argues there was insufficient evidence to support the obstruction of justice conviction because the State failed to establish evidence of the corpus delecti of that charge independently from his uncorroborated confession (the telephone call) made on Agent Low's cell phone.

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. *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, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *Wright*, 98-0601 at p. 3, 730 So.2d at 487.

As applicable here, it is unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled dangerous substance classified in Schedule I. La. R.S. 40:966(A)(1). Marijuana is a controlled dangerous substance classified in Schedule I. See La. R.S. 40:964, Schedule I(C)(22) (prior to amendment by 2008 La. Acts No. 67, § 1).

The State is not required to show actual possession of drugs by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous

substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. *State v. Smith*, 2003-0917, pp. 5-6 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

A determination of whether or not there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. *Smith*, 2003-0917 at p. 6, 868 So.2d at 799.

It is unlawful for any person "who has been convicted of ... any violation of the Uniform Controlled Dangerous Substances Law ... which is a felony ... to possess a firearm or carry a concealed weapon." La. R.S. 14:95.1(A). Possession with intent to distribute marijuana is a violation of the Uniform Controlled Dangerous Substances Law which is a felony. La. R.S. 14:2(A)(4); 40:966(B)(3). Whether the proof is sufficient to establish possession under La. R.S. 14:95.1 turns on the facts of each case. Further, guilty knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. *State v. Johnson*, 2003-1228, p. 5 (La. 4/14/04), 870 So.2d 995, 998. Constructive possession of a firearm occurs when the firearm is subject to the defendant's dominion and control. Louisiana cases hold that a defendant's dominion and control over a weapon

constitutes constructive possession even if it is only temporary and even if the control is shared. However, mere presence of a defendant in the area of the contraband or other evidence seized alone does not prove that he exercised dominion and control over the evidence and therefore had it in his constructive possession. *Johnson*, 2003-1228 at pp. 5-6, 870 So.2d at 998-99.

La. R.S. 14:130.1, in pertinent part, provides:

> A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as hereinafter described:
>
> (1) Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to a criminal investigation or proceeding. Tampering with evidence shall include the intentional alteration, movement, removal, or addition of any object or substance either:
>
> (a) At the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation by state, local, or United States law enforcement officers[.]

Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. *State v. Henderson*, 99-1945, p. 3 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

It is well settled that an accused party cannot be legally convicted on his own uncorroborated confession without proof that a crime has been committed by someone; in other words, without proof of the corpus delicti. The corpus delicti must be proven by evidence which the jury may reasonably accept as establishing that fact beyond a reasonable doubt. *State v. Willie*, 410 So.2d 1019, 1029 (La. 1982).

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession with intent to distribute marijuana, possession of a firearm by a convicted felon, and obstruction of justice, and the defendant's identity as the perpetrator of those offenses. The jury rejected the defendant's theory that he had no knowledge of either the marijuana or gun at 400-A Idlewild and that his telephone call did not concern removal of "keys" of marijuana from the home. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case.

The State presented testimony that the defendant had dominion and control of the marijuana and weapon found in 400-A Idlewild and that he was not merely associated with that house. The defendant presented testimony to the contrary. Additionally, the State did not rely solely on the defendant's telephone call to establish the corpus delicti of the obstruction of justice

charge, but rather corroborated that evidence with physical evidence of the removal of marijuana from the house and testimony concerning the manner in which the house had been broken into, which was exactly as the defendant had directed in his telephone call. The verdict rendered against the defendant indicates the jury accepted the testimony offered against him and rejected the testimony offered in his favor. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, where 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. *State v. Johnson*, 99-0385, pp. 9-10 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. *State v. Glynn*, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Moreover, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See *State v. Ordodi*, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. *State v. Calloway*, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In assignment of error number 2, the defendant argues his alleged illegal possession of codeine was not probative on the issue of whether or

not he possessed with intent to distribute marijuana, possessed a firearm, or obstructed justice; but was more prejudicial than probative, and thus, should not have been admitted at trial. He also argues the events preceding the execution of the search warrant for 400-A Idlewild should have been presented in a "minimized and substantially less prejudicial manner." He also argues admission of the facts concerning the predicate possession with intent to distribute marijuana conviction were more prejudicial than probative.

Louisiana Code Evidence art. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

La. Code Evid. art. 404, in pertinent part, provides:

> **B. Other crimes, wrongs, or acts.** (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. However, La. Code Evid. art. 404(B)(1) authorizes the admission of evidence of other crimes, wrongs, or acts when the evidence "relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." In *State v. Brewington*, 601 So.2d 656, 657 (La. 1992) (per curiam), the Louisiana

Supreme Court indicated its approval of the admission of other crimes evidence, under this portion of La. Code Evid. art. 404(B)(1), "when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it."

The res gestae doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. *State v. Taylor*, 2001-1638, pp. 10-11 (La. 1/14/03), 838 So.2d 729, 741, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). Further, the res gestae doctrine incorporates a rule of narrative completeness by which, "the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." *Taylor*, 2001-1638 at pp. 12-13, 838 So.2d at 743 (quoting *Old Chief v. United States*, 519 U.S. 172, 188, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997)).

Prior to trial, the State filed a notice of other crimes evidence setting forth its intent to introduce the evidence outlined in the motion to show that the defendant had the opportunity, intent, preparation, plan, knowledge, identity and/or as proof of motive and/or as evidence showing lack of mistake. Additionally, the State gave notice that some of the evidence it sought to introduce related to conduct that constituted an integral part of the act or transaction that was the subject of the proceedings. The notice set forth that the State would introduce: all evidence concerning the defendant's traffic stop and subsequent arrest occurring on or about May 15, 2008 in Orange, Texas,

including, but not limited to: the bottles of codeine, the $112,032 of U.S. currency, statements made by the defendant to law enforcement, a $20,000 watch, and evidence of phone calls made to Floyd Franklin on Senior Special Agent Mark Low's phone; all evidence concerning the defendant's arrest and conviction of January 5, 2000, for possession with intent to distribute marijuana; and all evidence seized, pursuant to search warrants at 400-A Idlewild, 515 Oakwood Drive, 206 Venture Boulevard, unit 105, 112 Edgewood Boulevard, and 135 Crozier Drive. The defense moved to exclude the other crimes evidence, arguing the potential prejudice to the defendant was not outweighed by the probative value of the other crimes evidence. Following hearings, the trial court denied the motion to exclude other crimes evidence.

The trial court did not abuse its discretion in denying the motion to exclude other crimes evidence. Evidence of the defendant's possession of codeine was related and intertwined with the possession with intent to distribute marijuana charge to such an extent that the State could not have accurately presented its case without reference to the evidence. This evidence constituted an integral part of the defendant's crime and was part of the res gestae. Additionally, assuming arguendo, the balancing test of La. Code Evid. art. 403 is applicable to integral act evidence admissible under La. Code Evid. art. 404(B),[1] that test was satisfied in this matter. The defendant's possession of codeine was probative of his connection to Floyd Franklin, Lentrell Wesley, and Lennotch Taplett. The defendant called Franklin and instructed him to break into 400-A Idlewild and get "the keys." Wesley and Taplett were connected to the defendant through the title for the 2000 Ford Excursion,

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[1] The Louisiana Supreme Court has left open the question of the applicability of the Article 403 test to integral act evidence admissible under La. Code Evid. art. 404(B). See *State v. Colomb*, 98-2813, pp. 4-5 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam).

which was found at 400-A Idlewild. The State was required to present evidence concerning the items connecting the defendant to 400-A Idlewild to establish the defendant's constructive possession of the marijuana and gun found at that residence. The facts concerning the predicate possession with intent to distribute marijuana offense were highly probative on the issue of the defendant's intent, preparation, and plan in the instant offense possession with intent to distribute marijuana, because the prior offense also involved marijuana, a scale, and plastic baggies in leased premises connected to the defendant. Additionally, the State was required to establish the defendant's commission of the predicate offense possession with intent to distribute marijuana as an element of the instant offense possession of a firearm by a convicted felon charge. Accordingly, the prejudicial effect to the defendant from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence.

This assignment of error is without merit.

BATSON

In assignment of error number 3, the defendant argues the trial court erred in denying his challenge to the venire composition under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and erred in failing to record the racial make-up of the venire.

Batson held an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. *Id.,* 476 U.S. at 84, 106 S.Ct. at 1716. See also La. Code Crim. P. art. 795(C)-(E). If the defendant makes a prima facie showing of discriminatory strikes, the burden shifts to the State to offer racially-neutral explanations for the challenged members. The neutral explanation must be one which is clear,

reasonable, specific, legitimate and related to the particular case at bar. *State v. Elie*, 2005-1569, p. 5 (La. 7/10/06), 936 So.2d 791, 795.

If the race-neutral explanation is tendered, the trial court must decide, in step three of the *Batson* analysis, whether the defendant has proven purposeful discrimination. A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. *Id.* The *Batson* explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. *Id.*

In order to satisfy *Batson's* first step, a moving party need only produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *Id. Batson's* admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. The one relevant circumstance for a trial judge to consider is whether the State articulated verifiable and legitimate explanations for striking other minority jurors. *Id.* The failure of one or more of the State's articulated reasons for striking a prospective juror does not compel a trial judge to find that the State's remaining articulated race-neutral reasons necessarily cloaked discriminatory intent. *Elie*, 2005-1569 at pp. 6-7 (La. 7/10/06), 936 So.2d at 796.

In the instant case, following the completion of jury selection, the swearing of the jurors, and the discharge of the jury venire, the defense made a *Batson* objection to the venire composition and "the actual jury empanel." The

defense argued, "The venire resulted in one African American being seated on the jury." The State replied it did not recall excusing a single African American from the jury, and noted one African American had been selected as a juror. The court ruled:

> All right, first of all, the Court notes that there were no objections made during the selection process, at the table, with regards to *Batson*. Secondly, I wasn't paying attention to what color any of the jurors were, and so I have no idea who was black and who was white. I don't know how many black people they had; and I don't know how many white people they had; and I don't know how many Indian people they had.
>
> Perhaps we should, in the future, make note of that, when we pull a panel, and ask them what their nationality is. So, for those reasons, your Motion is denied, sir.

Initially, we note a "*Batson*" challenge was the incorrect objection to attack either the composition of the jury venire or the jury selected in this case. The State's exercise of peremptory challenges during voir dire had nothing to do with the composition of the jury venire. The proper method to challenge the jury venire as improperly drawn, selected, or constituted, is by a pretrial motion to quash. See La. Code Crim. P. art. 532(9). Further, if the State excused no African Americans from the jury, it could not have exercised a peremptory challenge to exclude a prospective juror because they were African American. In any event, the trial court correctly denied the defendant's objections as untimely. See La. Code Crim. P. art. 841(A).

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 4, the defendant argues the sentence imposed on the instant offense possession with intent to distribute marijuana was excessive and argues, "While the trial court gave specific reasons for its original sentence of twenty-five years, the trial court gave no reason other than

an apparent misunderstanding of the law, for the fifty[-]year sentence imposed."

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. *State v. Hurst*, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. *Hurst*, 99-2868 at pp. 10-11, 797 So.2d at 83.

Any person who violates La. R.S. 40:966(A) with respect to a substance classified in Schedule I which is marijuana shall upon conviction be sentenced to a term of imprisonment at hard labor for not less than five nor more than thirty years, and pay a fine of not more than fifty thousand

dollars. La. R.S. 40:966(B). Any person convicted of any offense under the Uniform Controlled Dangerous Substances Law, if the offense is a second or subsequent offense, shall be sentenced to a term of imprisonment that is twice that otherwise authorized or to payment of a fine that is twice that otherwise authorized, or both. If the conviction is for an offense punishable under R.S. 40:966(B), and if it is the offender's second or subsequent offense, the court may impose in addition to any term of imprisonment and fine, twice the special parole term otherwise authorized. La. R.S. 40:982(A). In regard to his conviction on the instant offense possession with intent to distribute marijuana, the defendant agreed he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law, and the trial court sentenced him to fifty years at hard labor.

Contrary to the defendant's argument, the sentencing transcript reveals no "misunderstanding" by the trial court of the applicable penalty. The court explained the penalty to the defendant as follows:

> The minimum and maximum sentence provided by law is imprisonment at law from ten – at hard labor from ten to sixty years with a payment of a fine from zero to one hundred thousand dollars. The court may also impose twice the special parole term other than what is authorized for the crime of possession with intent to distribute marijuana.

Additionally, the court indicated it was aware that, in sentencing the defendant under La. R.S. 40:982(A), it did not have to double the sentence imposed for the instant offense possession with intent to distribute marijuana prior to the defendant's agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law.

While the court did not set forth reasons for the sentence it imposed following the defendant's agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law,

moments earlier, it set forth reasons in sentencing the defendant prior to his agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law. The court found: there was an undue risk that during the period of a suspended sentence or probation, the defendant would commit another crime; the defendant had a propensity to involve himself in the drug world, as witnessed by his previous conviction; although there were only two and one-half pounds of marijuana found in 400-A Idlewild, it was obvious from the other sacks that were there, as well as the defendant's telephone call and the professional dollar counting machine, that "a whole lot more" marijuana had been moved out of the house; it was obvious to the court that the defendant needed correctional treatment or a custodial environment that could most effectively be provided by his commitment to an institution; the defendant was smart and it was a shame that his good intelligence had been wasted upon criminal activity; a lesser sentence would deprecate the seriousness of the defendant's crime; and the offense was a controlled dangerous substance offense, and the defendant obtained substantial income or resources from ongoing drug activities.

There was no error in the court not repeating the reasons for sentence it had set forth moments earlier, at the same sentencing hearing, for the same offense. A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence on the instant offense possession with intent to distribute marijuana after the defendant's agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law. See La. Code Crim. P. art. 894.1 (A)(1), (A)(2), (A)(3), B(15) & (B)(21). Further, the sentence imposed was not

grossly disproportionate to the severity of the offense and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

FAILURE TO VACATE ORIGINAL SENTENCE FOR POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA

In addition to his assignments of error, the defendant argues the trial court failed to expressly vacate the sentence it imposed for the possession with intent to distribute marijuana conviction after sentencing him for that offense after his agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law.

The defendant is correct. Prior to the defendant's agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law, the court sentenced him on the instant offense possession with intent to distribute marijuana conviction to twenty-five years at hard labor. Following his agreement that he had previously been convicted for an offense under the Uniform Controlled Dangerous Substances Law, the court sentenced the defendant, under La. R.S. 40:982(A), to fifty years at hard labor. We note the State advised the court that the sentence imposed under La. R.S. 40:982(A) would "vitiate or vacate by law the first sentence." Although it is apparent from the court's actions that it intended to vacate the original sentence, out of an abundance of caution, we vacate the original twenty-five year sentence. See *State v. Meneses*, 98-0699, p. 2 n.1 (La. App. 1st Cir. 2/23/99), 731 So.2d 375, 376 n.1.

REVIEW FOR ERROR

The defendant requests that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record

for such errors, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

In sentencing on the possession of a firearm by a convicted felon conviction, the trial court failed to impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars. See La. R.S. 14:95.1(B). Although the failure to impose the fine is error under La. Code Crim. P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See *State v. Price*, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

DECREE

We affirm the defendant's sentences and convictions on all counts.

CONVICTIONS AND SENTENCES AFFIRMED.