NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1705

STATE OF LOUISIANA

VERSUS

RICKEY LIONEL LAURANT

Judgment Rendered: APR 2 6 2013

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 517140, DIVISION "H"

HONORABLE ALLISON H. PENZATO, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

McDONALD, J.

The defendant, Rickey Lionel Laurant, was charged by bill of information with two counts of distribution of cocaine (counts 1 and 3) and one count of attempted distribution of cocaine (count 2), violations of La. R.S. 14:27, La. R.S. 40:967(A)(1), and La. R.S. 40:979(A). He pled not guilty and, following a jury trial, was found guilty as charged on all counts. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The State filed a habitual offender bill of information. A hearing was held on the matter, and the defendant was adjudicated a second-felony habitual offender. For the distribution of cocaine conviction (count 1), the defendant was sentenced to fifteen years imprisonment at hard labor, with the first two years of the sentence to be served without benefit of probation, parole, or suspension of sentence. For the attempted distribution of cocaine conviction (count 2), the defendant was sentenced to ten years imprisonment at hard labor, with the first two years to be served without the benefit of probation, parole, or suspension of sentence.[1] For the other distribution of cocaine conviction (count 3), the defendant, based on his adjudication as a second-felony habitual offender, received an enhanced sentence of thirty years imprisonment at hard labor without benefit of probation or suspension of sentence, and with the first two years of the sentence to be served without benefit of parole. The sentences were ordered to run concurrently. The defendant filed a motion to reconsider sentences, which was denied.

The defendant now appeals, designating four assignments of error. We affirm the convictions, habitual offender adjudication, and sentences.

FACTS

Detective Bill Johnson, of the St. Tammany Parish Sheriff's Office Narcotics

[1] The trial court later amended the sentence to eliminate the requirement that the first two years be served without benefit of parole, probation, or suspension of sentence.

Division, received information from a confidential informant that an individual was dealing crack cocaine in the Covington/Abita Springs area in St. Tammany Parish. Detective Johnson designated Detective Julie Boynton,[2] with the St. Tammany Parish Sheriff's Office, to pose as an undercover drug buyer. On March 22, 2011, a meeting was arranged by the confidential informant, and Detective Boynton met the defendant at a house and purchased $100 worth of crack cocaine (about six rocks) from him. Detective Boynton exchanged phone numbers with the defendant.

Subsequently, Detective Boynton and the defendant spoke several times on their cell phones to set up another purchase. On March 28, 2011, Detective Boynton met the defendant in a McDonald's parking lot on La. U.S. Highway 190. When the defendant got into the detective's car, she gave him $100 in exchange for crack cocaine. However, the defendant got out of her car after taking the money and never returned with the drugs.

On April 6, 2011, Detective Boynton met the defendant on right off of Columbia Street in Covington. The defendant got into her car and she purchased $100 worth of crack cocaine from him. She then drove for a while before the defendant told her to let him out.

The defendant did not testify at trial.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In two related assignments of error, the defendant argues that Louisiana Constitution Article I, § 17(A), which allows for non-unanimous jury verdicts, violates his right to a jury trial and his right to equal protection of the laws guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Specifically, the defendant argues that the enactment of its source

[2] We note that Boynton's name is spelled "Boyton" throughtout the transcript, but the State's brief refers to her as "Boynton".

provision in the Louisiana Constitution of 1898 "was motivated by an express and overt desire to discriminate against blacks on account of race."

It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. A party must raise the unconstitutionality in the trial court, the unconstitutionality must be specially pleaded, and the grounds outlining the basis of unconstitutionality must be particularized. See **State v. Hatton**, 2007-2377 (La. 7/1/08), 985 So.2d 709, 718-19. In the instant case, the defendant failed to raise his challenge to Louisiana Constitution Article I, § 17(A) in the trial court. The failure to preserve the issue notwithstanding, we address the defendant's argument.

The applicable conviction in the instant matter is attempted distribution of cocaine, wherein eleven of twelve jurors found the defendant guilty. The punishment for attempted distribution of cocaine is imprisonment at hard labor. See La. R.S. 14:27(D)(3), La. R.S. 40:967(B)(4)(b) & La. R.S. 40:979(A). Article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that, in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726-27 (La. 1982); **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

This court and the Louisiana Supreme Court have previously rejected the argument raised in the defendant's assignments of error. See **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, 742-43; **State v. Smith**, 2006-0820 (La.

App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352. In **Bertrand,** the Louisiana Supreme Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and further, that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.[3] Moreover, the **Bertrand** court rejected the argument that non-unanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also rejected that argument in **Apodaca**.[4] Although **Apodaca** was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance, making it apparent that its holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 6 So.3d at 742-43. Thus, Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) are not unconstitutional and, therefore, their imposition is not in violation of the defendant's federal constitutional rights.

Accordingly, these assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the evidence was insufficient to support the conviction for attempted distribution of cocaine. Specifically, the defendant contends that since he only took Detective Boynton's money but never returned with drugs, his actions amounted to only a misdemeanor theft. The defendant does not challenge his other two convictions for distribution of cocaine.

A conviction based on insufficient evidence cannot stand as it violates Due

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[3] In **Bertrand**, the court only considered Article 782, while the defendant in the instant case attacks Article I, § 17(A) itself. We find this approach to be a distinction without a difference because Article 782 closely tracks the language of Article I, § 17(A).

[4] **Apodaca**, as in the instant matter, involved a challenge to the non-unanimous jury verdict provision of Oregon's state constitution. **Johnson v. Louisiana**, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with **Apodaca**, also upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

A defendant is guilty of the crime of distribution of cocaine if he knowingly or intentionally distributes cocaine. La. R.S. 40:967(A)(1). Only general criminal intent is required. Such intent is established by mere proof of voluntary distribution. **State v. Chatman**, 599 So.2d 335, 345 (La. App. 1st Cir. 1992).

"Distribute" means to deliver a controlled dangerous substance whether by physical delivery, administering, subterfuge, furnishing a prescription, or by filling, packaging, labeling or compounding the substance pursuant to the lawful order of a practitioner. La. R.S. 40:961(14). Pursuant to La. R.S. 14:27, an attempt is defined, in pertinent part, as follows:

> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
>
> B. (1) Mere preparation to commit a crime shall not be sufficient to constitute an attempt[.]

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). Although specific intent may be proven by direct evidence, such as statements by the defendant, it need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. See **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982); **State v. Hicks**, 554 So.2d 1298, 1302 (La. App. 1st Cir. 1989), writ denied, 559 So.2d 1374 (La. 1990), and writ denied, 604 So.2d 1297 (La. 1992). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986).

Thus, to be found guilty of attempted distribution of cocaine, a defendant must have a specific intent to distribute cocaine and do or omit an act for the purpose of and tending directly toward the accomplishing of his object. **Chatman**, 599 So.2d at 346.

The defendant argues in his brief that there was no evidence that he intended to, or tried to, obtain and deliver cocaine to Detective Boynton. According to the defendant, since he took the $100 from the detective, left, and never returned with any drugs, his actions amounted to misdemeanor theft, not attempted distribution of cocaine.

According to Detective Boynton's testimony, she and the defendant exchanged phone numbers at the first drug buy. Before meeting at the McDonald's parking lot for the second drug buy, the detective and the defendant spoke three separate times on the phone about when and where to meet to conduct another drug

transaction. All three calls were played for the jury. On the first call, the defendant wanted to meet Detective Boynton in a high-crime area in Abita Springs. She told the defendant she was uncomfortable with going to an area by herself she was not familiar with. The defendant told the detective that she was his "clientele," she was how he made money, and that he would kill to protect her and his interests. On the third call, the detective asked the defendant if he would have the drugs on him when they met. The defendant told her he would not. He explained he needed to get the money first to get the drugs. When she inquired about how long it would take him to go get the drugs, he replied that it would not take more than fifteen minutes.

When they met at the McDonald's parking lot, the defendant got into the detective's car, and she gave him $100 for crack cocaine. The defendant appeared to become suspicious about Detective Boynton not having house keys on the key ring for her ignition key. The detective said the ring was loose and that the keys would fall off. They spoke a bit more, before the defendant got out of the car with the $100 and left. Detective Boynton waited for about thirty minutes for the defendant to return with the drugs. He never returned. While waiting, she called the defendant on his cell phone four times, but each time got his voice mail.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that, based on the physical evidence and Detective Boynton's testimony, the defendant met with the detective for the sole purpose of selling her crack cocaine. In the defendant's doing acts tending directly toward the

accomplishing of his object (the distribution of cocaine) clearly established all of the elements of attempted distribution of cocaine. The defendant spoke with Detective Boynton on three separate occasions to set up the second drug buy, he met her at the agreed-upon location, and he took her money, which she gave him to buy the agreed-upon crack cocaine. As such, there was overwhelming circumstantial evidence of the defendant's specific intent to distribute cocaine. See **Chatman**, 599 So.2d at 346. See also **Ordodi**, 946 So.2d at 655-64 (in which the defendant's convictions for two counts of attempted armed robbery were confirmed where the defendant, wearing a cap and sunglasses, walked into two banks with a gun in his pocket and a bag, but never removed the gun or made any demand for money before walking back out of the banks).

In finding the defendant guilty, the jury clearly rejected the defense's theory of innocence. The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify and presented no rebuttal testimony. See **Moten**, 510 So.2d at 61-62. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La.

10/17/00), 772 So.2d 78, 83.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of the hypotheses of innocence suggested by the defense at trial, that the defendant was guilty of attempted distribution of cocaine. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues that his sentences are excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire

checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect that the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The goal of La. Code Crim. P. art 894.1 is not rigid or mechanical compliance with its provisions, but rather the articulation of the factual basis for a sentence. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

In the instant matter, the defendant faced a maximum sentence of thirty years at hard labor on count 1 and was sentenced to fifteen years at hard labor. See La. R.S. 40:967(B)(4)(b). On count 2, he faced a maximum sentence of fifteen years at hard labor and was sentenced to ten years at hard labor. See La. R.S. 40:967(B)(4)(b), La. R.S. 40:979(A), & La. R.S. 14:27(D)(3). On count 3, as a second-felony habitual offender, he faced a maximum enhanced sentence of sixty years at hard labor and was sentenced to thirty years at hard labor. See La. R.S. 40:967(B)(4)(b) & La. R.S. 15:529.1(A)(1). The defendant argues in his brief that the trial court did not order a presentence investigation report (PSI), and that it did not adequately comply with La. Code Crim. P. art. 894.1 since it did not consider

the defendant's personal history and potential for rehabilitation.

Regarding the PSI, the defendant made no mention in his written motion to reconsider sentence of the trial court's decision not to order a PSI. The defendant's failure to include this specific ground in his motion to reconsider sentence precludes his urging it for the first time on appeal. See La. Code Crim. P. art. 881.1(E). Moreover, the ordering of a PSI lies within the discretion of the trial court. See La. Code Crim. P. art. 875(A)(1); **State v. Johnson**, 604 So.2d 685, 698 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

Regarding the applicable factors in sentencing, it is clear in its reasons for the sentence that the trial court thoroughly considered La. Code Crim. P. art. 894.1 in arriving at an appropriate sentence. After noting the defendant had a previous conviction for unauthorized entry of an inhabited dwelling, the trial court stated in pertinent part:

> Twenty-one years of age. . . . Defendant is now being sentenced in accordance with the sentencing provisions of 894.1. And I will enumerate those sentencing considerations when I conclude my sentencing in this particular matter.
>
> * * * *
>
> As I indicated earlier, in connection with each of the sentences imposed today, the Court considers the provisions of Code of Criminal Procedure Article 894.1. The Court finds the following:
>
> There's an undue risk that during any suspended sentence of probation, the defendant would commit another crime. The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution.
>
> The offenses in the instant case involved controlled dangerous substances. And the evidence presented at the trial indicated that the offender obtained substantial income from ongoing drug activities. In fact, the testimony and the evidence presented at the trial reflected that he was in the business of selling narcotics. He referred to the officer to which he sold the drugs as his client. And he indicated that, quote, You remember how I make my money, unquote.
>
> So, it was apparent to this Court following the trial of this case that in fact, as an aggravating factor in this particular case, that this defendant obtained substantial income from his ongoing drug activities.
>
> The Court also finds that a lesser sentence would deprecate the seriousness of the defendant's crime.

Considering the trial court's review of the circumstances, the nature of the crimes, and the fact the defendant's overall thirty-year sentence was only half of the maximum sentence allowable under the law, we find no abuse of discretion by the trial court. Accordingly, the sentences imposed by the trial court are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.