NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1628

STATE OF LOUISIANA

VERSUS

JARVIS WAGNER

Judgment Rendered: MAY - 2 2014

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APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LAFOURCHE
STATE OF LOUISIANA
DOCKET NUMBERS 507046 AND 515898

HONORABLE F. HUGH LAROSE, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

Defendant, Jarvis Wagner, was charged by bill of information with possession of cocaine, a violation of La. R.S. 40:967(C). He pled not guilty. Following a jury trial, defendant was found guilty as charged. The trial court denied defendant's motion for postverdict judgment of acquittal/new trial, and sentenced defendant to five years imprisonment at hard labor. Subsequently, the state filed a habitual offender bill of information, alleging defendant to be a fourth-felony habitual offender.[1] Defendant initially denied the allegations of that habitual offender bill of information, but at the hearing, the state deleted the first alleged predicate, and defendant admitted to the contents of the amended habitual bill of information. The trial court set aside defendant's previous sentence for his instant conviction and sentenced defendant as a third-felony habitual offender to eight years at hard labor.[2] This sentence was imposed pursuant to a plea agreement between defendant and the state. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and habitual offender sentence.

FACTS

Around 11:00 p.m. on January 6, 2012, Thibodaux Police Officer Beau Prejean was working a D-DACTS (Data-Driven Approach to Crime and Traffic Safety) Zone in the area of St. Charles Street, in Lafourche Parish. During his patrol, Officer Prejean turned off of St. Charles Street, onto East 12th Street, to travel westbound toward Canal Boulevard. As he did so, he noticed a subject walking in the roadway of East 12th Street despite the availability of an unobstructed sidewalk on one side of the road. Officer Prejean watched the subject

[1] The state alleged defendant's predicate convictions as follows: 1) a September 24, 2002 conviction for delivery of cocaine in Harris County, Texas, under cause number 089854001010; 2) an April 18, 2007 conviction for possession of cocaine in Louisiana's 17th Judicial District Court, under docket number 409806; and 3) an October 28, 2009 conviction for possession of cocaine in Louisiana's 17th Judicial District Court, under docket number 473711.

[2] Although the trial judge did not explicitly declare it, this sentence is imposed without benefit of probation or suspension of sentence. See La. R.S. 15:529.1(G); La. R.S. 15:301.1(A).

carefully to confirm that he was not simply crossing the street to go into a yard or residence. After passing him, Officer Prejean stopped his patrol vehicle at the corner of East 12th and Narrow Streets to observe the subject in his rearview mirror. He witnessed the subject walk from the middle of the roadway on East 12th Street to the middle of the roadway on Lagarde Street. Officer Prejean made the block - turning his vehicle onto Narrow Street, then onto East 11th Street, and finally onto Lagarde Street - and stopped the subject (identified at trial as defendant) for walking in the roadway despite the availability of an unobstructed sidewalk.

Upon making contact with him, Officer Prejean asked defendant for his identification. Defendant complied, and Officer Prejean radioed his dispatcher to relay defendant's name and date of birth, and to check for outstanding warrants. As he waited for a response from his dispatcher, Officer Prejean began to speak with and observe defendant. Notably, he witnessed defendant place his right hand into his right pocket several times. Officer Prejean asked defendant, out of concern for his own safety, to refrain from placing his hands in his pockets. Soon after this request, Officer Prejean's dispatcher replied that defendant had no warrants for his arrest. However, as Officer Prejean received that message, he observed defendant again reach into his pocket and remove an object. Aided by his vehicle's spotlight and overhead street lights, Officer Prejean was able to determine that defendant had removed a cellophane baggie with a white, rock-like substance from his pocket. Believing that substance to possibly be cocaine, Officer Prejean immediately grabbed defendant's wrist and forced defendant to release the baggie onto the hood of the patrol vehicle. Defendant complied, and Officer Prejean arrested him. A subsequent chemical test revealed the white, rock-like substance to contain .11 grams of cocaine.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress the cocaine Officer Prejean seized during the stop. Specifically, defendant argues that Officer Prejean stopped him without reasonable suspicion that he was committing, or about to commit, a crime.

A defendant adversely affected may move to suppress any evidence from use at a trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703(A). The state bears the burden of proof when a defendant files a motion to suppress evidence obtained without a warrant. See La. Code Crim. P. art. 703(D). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Reviewing courts should defer to the credibility findings of the trial court unless its findings are not adequately supported by reliable evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

The Fourth Amendment to the United States Constitution and Article 1, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. Measured by this standard, La. Code Crim. P. art. 215.1, as well as federal and state jurisprudence, recognizes the right of a law enforcement officer to temporarily detain and interrogate a person whom he reasonably suspects is committing, has committed, or is about to commit a crime. **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); **State v. Robertson**, 97-2960 (La. 10/20/98), 721 So.2d 1268, 1269; **State v. Belton**, 441 So.2d 1195, 1198 (La.

1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). Reasonable suspicion for an investigatory detention is something less than probable cause and must be determined under the specific facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. **Belton**, 441 So.2d at 1198.

In his brief, defendant alleges that Officer Prejean "specifically disavowed that he had any suspicion that [defendant] had committed a crime, or was in the act of committing a crime, or intended to commit a crime" at the time he instituted the stop. In fact, Officer Prejean testified specifically at the motion to suppress hearing, and at trial,[3] that he stopped defendant because of his walking in the roadway despite the presence of an unobstructed sidewalk. Officer Prejean also stated that he explicitly notified defendant of his violation upon their initial contact. On cross-examination during the motion to suppress hearing, Officer Prejean cited the law he based the stop upon as La. R.S. 32:216(A),[4] "Pedestrians on highways or interstate highways." In light of these considerations, it is clear that Officer Prejean at least had a suspicion that defendant had committed or was committing a crime at the time of the stop – namely, that he was walking in the roadway despite the presence of an unobstructed sidewalk. We must now determine whether this suspicion was reasonable under the circumstances.

In his brief, defendant argues that Officer Prejean could not have had a reasonable suspicion that he had violated La. R.S. 32:216(A) because East 12th and Lagarde Streets were not "highways," and because the City of Thibodaux had no comparable statute or ordinance prohibiting his behavior. These arguments are not persuasive. First, La. R.S. 32:1 provides the definitions for terms found in

[3] In determining whether the ruling on the motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may also consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

[4] The statute states: "Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent highway." La. R.S. 32:216(A).

Chapter 1 of Title 32, known as the "Louisiana Highway Regulatory Act" (LHRA), where La. R.S. 32:216(A) is found. For the purposes of that chapter, a "highway" is defined as the entire width between the boundary lines of every way or place of whatever nature publicly maintained and open to the use of the public for the purpose of vehicular travel, including bridges, causeways, tunnels and ferries; it is synonymous with the word "street." See La. R.S. 32:1(25). Therefore, both East 12th and Lagarde Streets qualify as "highways" under this definition.

In addressing defendant's second contention - that the City of Thibodaux had no statute or ordinance comparable to La. R.S. 32:216(A) - we note that the provisions of the LHRA, govern the operation of vehicles and pedestrians upon all highways within the state. See La. R.S. 32:21. Local municipal authorities, such as the City of Thibodaux, have the power to adopt certain local traffic regulations. See La. R.S. 32:21 & 32:41. The City of Thibodaux has in fact adopted, and criminalized violations of, all provisions of the LHRA, except those, which by their nature, have no application. See Code of Ordinances, City of Thibodaux § 20-3. Nothing about the nature of La. R.S. 32:216(A) would prohibit it from applying in this case.

Under the applicable law, Officer Prejean clearly had reasonable suspicion to suspect that defendant was committing a crime at the time he instituted the stop. Officer Prejean witnessed defendant walking in the middle of the roadway on both East 12th and Lagarde Streets. Both of these streets had unobstructed sidewalks that defendant did not utilize or attempt to utilize. Lastly, Officer Prejean ensured that defendant's use of the roadway was not merely an attempt by defendant to cross the street. Having observed behavior criminalized by both state statute and city ordinance, Officer Prejean was entitled to conduct an investigatory stop of defendant pursuant to La. Code Crim. P. art. 215.1.

Defendant also argues that his stop was unlawful, even if Officer Prejean had a technical reason to stop him, because Officer Prejean had no initial intention of arresting or citing him for the offense for which he was stopped. Indeed, Officer Prejean testified that he stopped defendant as a result of his violation of La. R.S. 32:216(A), but intended to release him with only a warning if his dispatcher returned a report of no outstanding warrants.[5] Despite Officer Prejean's stated intention not to arrest or cite defendant, his decision to stop was reasonable because he had probable cause to believe that a traffic violation occurred. See **Whren v. U.S.**, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). The standard is a purely objective one that does not take into account the subjective beliefs or expectations of the detaining officer. **State v. Waters**, 2000-0356 (La. 3/12/01), 780 So.2d 1053, 1056 (per curiam). Thus, despite any subjective intentions he may have had, Officer Prejean had the right to stop defendant for his traffic violation. His ultimate discovery of the cocaine was a result of defendant's own action in removing it from his pocket.

This assignment of error is without merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant asserts that the trial court erred in denying his motion for postverdict judgment of acquittal/new trial. This assignment of error raises several specific issues which will be addressed in turn.

Challenge to Jury Venire

In his brief and his motion for postverdict judgment of acquittal/new trial, defendant challenges the composition of the jury pool. He argues that defense counsel noted only one person to be an African-American among the potential

[5] Officer Prejean also testified that he intended to fill out a "field identification card" on defendant as part of his D-DACTS patrol. He stated that these cards are routinely filled out when he performs a stop during these patrols as a way to have a record of contact in case any other criminal incidents are reported in the area.

jurors. Defendant contends that it is improbable that a fair selection of jurors would have eliminated virtually all African-American prospective jurors.

This argument is unreviewable for at least two reasons. First, there is a dearth of information in the record regarding the racial composition of the jury venire. The only statement in the record at all related to this issue is one from defense counsel himself, which he made to potential jurors immediately prior to beginning voir dire. He stated:

> As you can see both I and the Defendant are African-Americans. I thought I saw one African-American in the jury pool and there's another African-American in the courtroom who is on the staff of the District Attorney's office. Do any of you have any experiences with African-Americans that you found distasteful that would affect you in your judgments in this case?

At no point did defense counsel ask the court to note for the record that these observations reflected the actual makeup of the jury pool. Alone, the lack of a record regarding this contention is enough to preclude review of this argument.

Second, defendant failed to follow the proper procedure for seeking review of the petit jury venire. Although he objected to the jury venire's composition in his motion for postverdict judgment of acquittal/new trial, defendant failed to file a motion to quash alleging an improperly drawn, selected, or constituted petit jury venire under La. Code Crim. P. art. 532(9). Simple objection is not the method for challenging the petit jury venire. The question of whether the petit jury venire was improperly drawn or constituted is properly raised by a motion to quash under Article 532, and it must be filed before trial. See **State v. Francis**, 285 So.2d 191, 192 (La. 1973); La. Code Crim. P. arts. 521, 532, & 535(C). Because no such motion was filed prior to trial, any grounds for that potential motion were waived. See La. Code Crim. P. art. 535(D).

This portion of defendant's second assignment of error is unreviewable on appeal.

Allegation that a Juror was Intimidated

Defendant also alleges in his brief and the underlying motion that, during deliberations, at least one member of the jury sought to intimidate another juror who was "obviously unwilling to convict."

During deliberations, the jury foreman sent a question to the trial court. The question read:

> One of the jury members having trouble [sic]. Emotional and breaking down. Trying to make a decision. Can alternate jury [sic] be put on jury to replace?

The trial court brought the jury into the courtroom and informed them that no alternate would be placed, and that the six of them constituted the jury. The trial court further instructed the jury that all six of them must agree to render a verdict. The transcript reflects that the jury exited the courtroom to continue deliberations, putting the court in recess. The following entry in the transcript is an announcement from the trial court that the jury had reached a verdict.

Defendant contends that this question from the jury indicates that someone sought to intimidate a juror who was "obviously unwilling to convict." However, once again, there is no evidence in the record to support this claim. On its face, the question indicates only that one juror was struggling with his or her ability to make a decision. The note alone does not clearly identify the exact reasons for that struggle, nor does it suggest that the particular juror was leaning toward acquittal. Defendant has provided no specific evidence of coercion or intimidation among the jurors.

This portion of defendant's second assignment of error is without merit.

Chain of Custody

Defendant also alleged that the testimony regarding the chain of custody and weighing of the cocaine seized from defendant was "weird." He claims that there

are no records regarding who handled the package of cocaine. Defendant also asserts that there were irregularities with respect to the weight of the cocaine.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. La. Code Evid. art. 901(A). For admission, it suffices if the custodial evidence establishes that it was more probable than not that the object is the one connected to the case. Moreover, any lack of positive identification or a defect in the chain of custody goes to the weight of the evidence rather than its admissibility. Ultimately, a chain of custody or connexity of the physical evidence is a factual matter to be determined by the jury. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 455, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

In the instant case, Officer Prejean testified that as soon as he saw the cellophane-wrapped cocaine in defendant's hand, he caused defendant to release the drugs onto the hood of his patrol vehicle. As he placed defendant under arrest, Officer Prejean directed fellow Thibodaux Police Officer Clint Dempster to place the evidence inside a plastic evidence bag. Officer Dempster then placed that plastic evidence bag into Officer Prejean's patrol vehicle. Upon his arrival at the police station, Officer Prejean first secured defendant. He then began to process the evidence, first weighing it on a digital scale, and subsequently placing it into a larger, sealed evidence bag. He filled out the pertinent information on that bag, initialed the seal, and placed the bag into an evidence envelope, which he also sealed and initialed. Officer Prejean then took the sealed evidence envelope to Corporal Patrick Oliver, the evidence custodian. Corporal Oliver later transported the evidence envelope to the Louisiana State Police Crime Lab, where Natalie Tabary performed the analysis of the substance. After the testing was complete, Corporal Oliver traveled to the crime lab to retrieve the envelope, which he then

logged back into evidence. Corporal Oliver brought the sealed evidence envelope to court on the day of defendant's trial.

The identification of evidence sought to be admitted at trial may be visual, by testimony at trial that the object exhibited is the one related to the case, or it may be identified by a chain of custody, by establishing the custody of the object from the time it was seized to the time it was offered into evidence. See **Berry**, 684 So.2d at 455. Here, the state clearly established the chain of custody of the evidence from Officer Prejean, to Officer Dempster, back to Officer Prejean, to Corporal Oliver, to Natalie Tabary, and finally back to Corporal Oliver, who transported it to the courtroom.

Defendant also appears to take issue with the weighing of the evidence. He asserts that Officer Prejean says he weighed the drugs, but that he did not remember what he did or when he did it. However, Officer Prejean plainly testified that he did in fact weigh the evidence, and that he did so immediately after he secured defendant at the police station.

Defendant also complains that the weight recorded on the "packet" is identical to the weight that the crime lab technician testified as being the weight of the contents outside of the packet. In doing so, defendant appears to insinuate that the weight recorded on the "packet" is the weight recorded by Officer Prejean when he weighed the cocaine while it was still wrapped with cellophane. He implicitly argues, then, that the weight of the unwrapped cocaine – recorded by the crime lab technician – should be less than that written on the "packet." However, while Officer Prejean testified that he recorded the weight of the evidence, he never stated that he did so upon any "packet" containing the evidence. He also testified that he did not recall whether he had taken the cocaine out of its wrapper when he weighed it. Moreover, nothing in the record excludes the possibility that someone wrote the crime-lab-measured weight of the cocaine on the "packet."

Finally, while defense counsel thoroughly cross-examined Officer Prejean on the procedures he took to weigh the evidence, he never specifically objected to the introduction of the cocaine for any reason regarding its weight.

Considering all of the above, we find that the trial court did not err or abuse its discretion in allowing the jury to view this evidence and make its own inferences. The state clearly established a chain of custody for the evidence, and any doubts regarding that chain of custody - including the weighing procedures - speak to the weight of the evidence, not its admissibility.

This portion of defendant's second assignment of error is without merit.

Sufficiency of the Evidence/Credibility of Officer Prejean's Testimony

Finally, defendant argues that the evidence submitted at trial was insufficient to support his conviction. Primarily, defendant argues that Officer Prejean testified to facts that "defied common sense," and which were calculated to justify a illegal stop. He also argues as a minor point that the amount of the substance seized was insufficient even to be tested.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also 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(B), 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 the overall evidence

excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

In the instant case, defendant was charged with possession of cocaine, a violation of La. R.S. 40:967(C). To support a conviction for possession of cocaine, the state must present evidence establishing beyond a reasonable doubt that: 1) the defendant was in possession of the drug, and 2) the defendant knowingly and intentionally possessed it. La. R.S. 40:967(C).

Defendant first contends that it would be a near physical impossibility for Officer Prejean to have observed defendant from his patrol car's position at the intersection of East 12th and Narrow Streets, and then to maneuver his vehicle quickly enough to stop defendant on Lagarde Street, ten to fifteen feet from that street's intersection with East 12th Street, as Officer Prejean testified. Defendant instead argues that he was stopped in the front of his mother's home on Lagarde Street, which he represents was farther from the intersection than Officer Prejean stated. Thus, defendant contends that Officer Prejean's testimony was not credible.

A review of the testimony reveals that Officer Prejean stated he stopped defendant on Lagarde Street, ten to fifteen feet from the stop sign at the intersection of East 12th and Lagarde Streets. In identifying a picture of Lagarde Street presented as State Exhibit 1, Officer Prejean also noted an "X" that he had drawn to mark the approximate location of where he stopped defendant. Officer Prejean again estimated this mark to be approximately ten to fifteen feet from the intersection. Defendant testified on his own behalf at trial. He stated that he was near his mother's house, which he estimated at thirty to forty feet down Lagarde Street, when Officer Prejean stopped him. Based on this slight discrepancy between Officer Prejean's and defendant's testimonies, defendant would have us find the totality of Officer Prejean's testimony to be incredible.

Where there is conflicting testimony about factual matters, the resolution of which depends upon the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given to testimony is not subject to appellate review. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. See **State v. Williams**, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135.

In the instant case, there was conflicting testimony about the location of the stop, which itself is not relevant to the required elements of defendant's charged offense. Defendant nonetheless cites this incongruent testimony as a basis for discarding all of Officer Prejean's testimony. The jury obviously elected to believe Officer Prejean as a credible witness to defendant's possession of cocaine, whether or not it believed his account of where the stop took place. Because this decision was one regarding credibility, not sufficiency, it is not subject to appellate review.

Lastly, defendant would have us find that the evidence presented at trial was insufficient on the basis that the "so-called" cocaine seized was "barely visible" and because he doubted that there were "sufficient traces even to be tested." However, through the crime lab technician's testimony, the state clearly put forth sufficient evidence at trial that the substance seized was .11 grams of cocaine. Defendant offered no evidence to controvert the conclusion that this substance was in fact cocaine. Further, he does not challenge on appeal that he knowingly and intentionally possessed that substance.

This portion of defendant's second assignment of error is without merit.

The entirety of defendant's second assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.