NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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JEW
JTP by JEW
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2018 KA 0078

STATE OF LOUISIANA

VERSUS

MARLON ROMAINE CARTER

JUDGMENT RENDERED: DEC 17 2018

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge • State of Louisiana
Docket No. 4-15-0006 • Section 7

The Honorable Beau Higginbotham, Judge Presiding

* * * * * * *

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The State of Louisiana charged the defendant, Marlon Romaine Carter, by bill of information, with possession of a firearm or carrying a concealed weapon by a convicted felon, a violation of La. R.S. 14:95.1.[1] The defendant pled not guilty and, after a trial by jury, was found guilty as charged. The State filed a habitual offender bill of information, and the defendant denied the allegations therein. The trial court denied the defendant's motion for new trial and motion for post-verdict judgment of acquittal. The defendant was adjudicated a third-felony habitual offender, and the trial court sentenced the defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.[2] The defendant now appeals, assigning error in a counseled brief to the sufficiency of the evidence, the trial court's denial of his motion for mistrial, and the constitutionality of the sentence. The defendant also filed a *pro se* brief assigning error to the timeliness of the institution of prosecution. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On the night of July 23, 2014, Officer Jory Guidry and Officer Brandon Blackwell were on patrol as assigned by the East Baton Rouge City Police Department ("EBRPD"), traveling in separate units. Officer Blackwell initiated a traffic stop after observing an individual, later identified as the defendant, riding a bicycle that did not have head-lamps or tail-lamps. Just as Officer Blackwell instructed the defendant to approach the officer, the defendant took flight initially on the bicycle, and then on foot, abandoning the bicycle. Officer Guidry, who was

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[1] The predicate conviction for the instant offense consists of a conviction of possession of cocaine, a violation of La. R.S. 40:967(C), docket no. 07WFLN125, 20th Judicial District Court, Parish of West Feliciana, State of Louisiana.

[2] The defendant's third-felony habitual offender status is based on two prior convictions in the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana: (1) aggravated battery, a violation of La. R.S. 14:34, docket no. 12-92-0035; and (2) second degree battery, a

in his unit when the defendant took flight, immediately began following the defendant, and exited his unit to engage in a foot chase when the defendant abandoned his bicycle.[3] Officer Guidry pursued the defendant as he jumped over an approximately six-foot-tall fence and entered an enclosed alley between two buildings, where he was trapped. Officer Guidry observed an illuminated cell phone in the defendant's hand as he attempted to flee and could hear another object hitting a metal roof that was located between the two buildings. Officer Guidry jumped the fence in pursuit of the defendant and used his flashlight to illuminate the area, locating the defendant crouched down behind an air conditioning unit in the alley.

Officer Guidry used his radio to inform Officer Blackwell that the defendant was trapped in the alley. Officer Blackwell quickly approached the alleyway to assist in the apprehension of the defendant, who was immediately handcuffed. As the officers did not have a key to unlock the fence, Officer Blackwell waited on the other side of the fence, and Officer Guidry removed the handcuffs to allow the defendant to jump back over the fence to be taken into custody. The defendant was initially compliant, but stopped mid-way over the fence, returning to Officer Guidry's standpoint, instead of completing the jump over the fence. As the defendant was jumping back down to the ground, Officer Guidry illuminated the area and observed a firearm on the ground near the defendant. Officer Blackwell then jumped over the fence to assist Officer Guidry in the collection of the cell phone, the firearm, and with the apprehension of the defendant. The defendant was re-handcuffed and a pat-down search was conducted. The firearm was loaded at the time.

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violation of La. R.S. 14:34.1, docket no. 07-97-0484.

[3] Officer Guidry's vehicle was equipped with a dash cam video at the time, which captured a limited view of the above-described events.

Additional officers arrived at the scene and, in order to avoid a second attempt to get the defendant over the fence, the officers went to an establishment within the vicinity to acquire a ladder. While the officers were in the process of acquiring a ladder, the defendant, who was secured at the time, became lethargic. The officers were ultimately able to guide the defendant as they used the ladder to climb over the fence. The officers notified Emergency Medical Services ("EMS") of the defendant's worsening condition, and he was transported by EMS to the Baton Rouge Mid-City Hospital.

LAW AND DISCUSSION

PRO SE ASSIGNMENT OF ERROR

In the sole *pro se* assignment of error, the defendant argues that his constitutional rights were violated due to the State's failure to timely file a bill of information to institute prosecution in this case. The defendant contends that he was arrested on July 24, 2014,[4] and that the State filed the bill of information on July 28, 2016, over two years after his arrest. The defendant notes that he was arraigned on July 29, 2016, and argues that the record does not support any viable reasons for any delays in this matter. Citing his incarceration, indigence, and lack of assistance of counsel, the defendant argues that he did not voluntarily, knowingly, nor intelligently waive his constitutional right to a speedy trial. The defendant contends that he filed a motion for speedy trial, invoked his speedy trial rights on numerous occasions, and that he remained incarcerated from his arrest. The defendant argues that he should have been released from custody, noting that the commencement of trial exceeded the 120-day time limitation provided for in La. C.Cr.P. art. 701(D)(1)(a). The defendant argues that the State violated his right to a speedy trial without holding a contradictory hearing to prove just cause, as

[4] The record indicates that the defendant was arrested on July 23, 2014; however, the defendant alleges in his *pro se* brief that he was arrested on July 24, 2014.

required by law. Thus, the defendant contends that the State is in violation of La. C.Cr.P. art. 701. The defendant further argues that he satisfied the four factors provided in **Barker v. Wingo**, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972) and that his conviction must be reversed. Finally, the defendant also argues that he was denied his rights pursuant to La. C.Cr.P. art. 230.1.

At the outset we note that La. C.Cr.P. art. 701, which provides the statutory right to a speedy trial, merely authorizes pre-trial relief.[5] The remedy for a speedy trial violation under Article 701 is limited to release from incarceration without bail, or release of the bail obligation for one not incarcerated. Once a defendant has been convicted, any allegation of a violation is moot. **State v. Odom**, 2003-1772 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 593, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026.

In addition to the Article 701 limitations, La. C.Cr.P. art. 578(A)(2) provides for a two-year time limitation from the date of institution of the prosecution within which the trial of a defendant accused of a non-capital felony must be commenced. In this case, as the defendant notes, the bill of information was filed on July 28, 2016. Under La. C.Cr.P. art. 578, the State had until July 28, 2018, to commence trial, and the trial commenced March 6, 2017. Thus, to the extent that the defendant's claim is based on Article 578(A)(2), it has no merit, as the trial commenced well before the two-year period lapsed.

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[5] The record reflects that the trial court granted a motion for speedy trial filed by the defendant prior to the institution of prosecution in this case. That motion is not raised as error in the instant appeal. Moreover, this court and the Louisiana Supreme Court denied and/or did not consider several applications for supervisory writ of review filed by the defendant that included complaints similar to the issue raised herein in the defendant's *pro se* brief. See **State v. Carter**, 2017-1184 (La. App. 1st Cir. 12/1/17), 2017WL5956697 (*unpublished writ action*); **State v. Carter**, 2017-1046 (La. App. 1st Cir. 10/30/17), 2017WL4883191 (*unpublished writ action*); **State v. Carter**, 2017-0587 (La. App. 1st Cir. 7/7/17), 2017WL2889296 (*unpublished writ action*), writ denied sub nom., 2017-1358 (La. 3/23/18), 238 So.3d 980. Although a pretrial determination does not absolutely preclude a different decision on appeal, judicial efficiency demands that this court accord great deference to its pretrial decisions unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result. See **State v. Humphrey**, 412 So.2d 507, 523 (La. 1982) (*on rehearing*); **State v. Patterson**, 2008-0416 (La. App. 1st Cir. 9/26/08), 995 So.2d 38, 40.

Besides these statutory provisions, the right to a speedy trial is guaranteed by both the federal (U.S. Const. amend. VI) and state (La. Const. art. I, § 16) constitutions, and the proper method for raising the claim of a denial of the constitutional right to a speedy trial is by a motion to quash. **State v. Gordon**, 2004-0633 (La. App. 1st Cir. 10/29/04), 896 So.2d 1053, 1063, writ denied, 2004-3144 (La. 4/1/05), 897 So.2d 600. The defendant filed a motion for speedy trial on July 13, 2015. He filed a *pro se* motion to quash on August 5, 2016, about one week after institution of prosecution and arraignment, based on the claim that the State violated his constitutional right to a speedy trial. The defendant filed subsequent *pro se* motions to quash on August 24, 2016, October 20, 2016, and November 7, 2016. However, his motion to quash claims were based on Article 701 and Article 578 and were filed within months of the institution of prosecution on July 28, 2016. Further, a review of the defendant's claims reveals that the defendant's constitutional speedy trial rights were not violated.

In **Barker**, 407 U.S. at 530, 92 S.Ct. at 2192, the United States Supreme Court identified four factors to determine whether a particular defendant had been deprived of his right to a speedy trial, namely: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The Louisiana Supreme Court has explained:

> The first of the **Barker** factors, the length of the delay, is a threshold requirement for courts reviewing speedy trial claims. This factor serves as a "triggering mechanism." Unless the delay in a given case is "presumptively prejudicial," further inquiry into the other **Barker** factors is unnecessary. However, when a court finds that the delay was "presumptively prejudicial," the court must then consider the other three factors. [Citations omitted.]

State v. Love, 2000-3347 (La. 5/23/03), 847 So.2d 1198, 1210.

In this case, the length of the delay from the filing date of the motion for speedy trial to the commencement of trial was about one year and eight months.

The record shows that the trial court denied the defendant's August 5, 2016 motion to quash on September 29, 2016, pursuant to La. C.Cr.P. art. 572(A)(1).[6] Subsequently, numerous *pro se* and counseled motions were filed by the defendant, including the abovementioned motions to quash, a motion to recuse, and a motion to suppress filed on February 10, 2017, less than one month before the trial. Additionally, several joint motions and defense motions to continue were filed in this matter. Further, the defendant has failed to specifically allege or show any prejudice in this case. Thus, applying the **Barker** analysis to the present case, we find no violation of the defendant's constitutional speedy trial rights.

As noted, the defendant also alleges error as to the trial court's failure to comply with the mandatory requirements of La. C.Cr.P. art. 230.1. The defendant specifically alleges that his first court appearance for arraignment was after the seventy-two hour delay in Article 230.1 had expired. Thus, the defendant argues the trial court had no jurisdiction over the offense charged and that the bill of information was not properly filed. This argument is without merit. Subsection (D) of Article 230.1 specifically provides that: "The failure of the sheriff or law enforcement officer to comply with the requirements herein shall have no effect whatsoever upon the validity of the proceedings thereafter against the defendant." See also **State v. Guzman**, 362 So.2d 744, 750 (La. 1978), cert. denied, 443 U.S. 912, 99 S.Ct. 3103, 61 L.Ed.2d 876 (1979). Based on the foregoing discussion, the sole *pro se* assignment of error lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE

In counseled assignment of error number one, the defendant argues that the evidence is insufficient to support the verdict of possession of a firearm or carrying a concealed weapon by a convicted felon. While the defendant does not contest

[6] The offense of possession of a firearm by a convicted felon is a felony necessarily punishable at hard labor. La. R.S. 14:95.1(B). Thus, under La. C.Cr.P. art. 572(A)(1), the State had six years from the date of the crime to institute prosecution.

the predicate conviction, he argues that the State did not prove that he was in actual or constructive possession of the firearm retrieved. The defendant contends that the State failed to prove that he knew the gun was in his presence or that he had the intent to possess it. The defendant notes that he was not observed with the weapon. The defendant further claims that the dash cam recording shows him riding his bicycle, running, and jumping a fence, but does not depict a bulge in his clothing or show him holding a gun in place. Similarly, the defendant argues that considering the logistics, he could not have been in possession of the gun while holding a cell phone, riding his bicycle, running, and jumping a fence. The defendant notes that he was not wearing a holster or belt to secure a weapon when apprehended. The defendant further contends that Officer Guidry testified that the scene was a high foot-traffic area and further notes that homeless men slept in the area. Thus, the defendant argues that someone else could have discarded the firearm. Finally, the defendant notes that there was no physical evidence linking him to the firearm.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The constitutional standard for testing the sufficiency of the evidence, enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime charged and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See **State v. Jones**, 596 So.2d 1360, 1369 (La. App. 1st Cir.), writ denied, 598 So.2d 373 (La. 1992); see also La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. 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 fact finder 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. 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 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).

Louisiana Revised Statutes 14:95.1(A) makes it unlawful for any person who has been convicted of certain felonies to possess a firearm. To prove a violation of La. R.S. 14:95.1, the State must prove: (1) the defendant's status as a convicted felon; and (2) that the defendant was in possession of a firearm. **State v. Loper**, 2010-0582 (La. App. 1st Cir. 10/29/10), 48 So.3d 1263, 1266. The State must also prove that ten years have not elapsed since the date of completion of the punishment for the prior felony conviction. See La. R.S. 14:95.1(C). Thus, a violation of La. R.S. 14:95.1 by the defendant required no more than that he had a prior felony conviction and was in possession of a firearm. In this case, the defendant does not contest his predicate conviction.

Louisiana Revised Statutes 14:95.1 does not make "actual" possession a necessary element of the offense or specifically require that the defendant have the firearm on his person to be in violation. "Constructive" possession satisfies the possessory element of the offense. **State v. Day**, 410 So.2d 741, 743 (La. 1982). Constructive possession occurs when the firearm is subject to the defendant's dominion and control. **State v. Plain**, 99-1112 (La. App. 1st Cir. 2/18/00), 752 So.2d 337, 340.

Constructive possession contains an element of awareness or knowledge that the firearm is present and the general intent to possess it. General intent exists

when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2). Although the existence of intent is a question of fact, it may be inferred from the circumstances of the transaction. Mere presence in an area where a firearm is found, or mere association with an individual found to be in possession of a firearm, does not necessarily establish possession. See **State v. Johnson**, 2003-1228 (La. 4/14/04), 870 So.2d 995, 998–99. Whether the proof is sufficient to establish possession turns on the facts of each case. See **State v. Harris**, 94-0970 (La. 12/8/94), 647 So.2d 337, 338-39 (*per curiam*); **State v. Bell**, 566 So.2d 959, 959-60 (La. 1990) (*per curiam*). Further, guilty knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. **Johnson**, 870 So.2d at 998.

According to Officer Guidry and Officer Blackwell, other individuals were traversing the area on foot when the defendant took flight. As the defendant jumped over the fence, Officer Guidry observed an illuminated cell phone in the defendant's hand.[7] Office Guidry observed as the cell phone slid down to the ground, and heard an object hit the metal roof located between the two buildings surrounding the alleyway. Officer Guidry described the sound of the object hitting the roof as a "metal-on-metal" impact. Just before the gun was discovered, Officer Guidry instructed the defendant to jump back over the fence. In describing that portion of the dash cam footage, Officer Guidry testified, "halfway through climbing, his body language changes as you see me illuminate my flashlight[,] and he's mostly over the fence[,] and he goes back onto the side that I am, as opposed to coming over. And that's at the same time that I found the gun where he was standing." Officer Guidry testified that the firearm was discovered within the

defendant's personal space, "a foot or two feet away from where [the defendant] was standing," as he landed back on the side of the fence where Officer Guidry was positioned. The officer further noted that the ground was damp and that the gun landed in an upright position, "like it had fallen from something and stuck into the mud." Officer Guidry and Officer Blackwell testified that no one else besides the defendant and the officers were within the immediate vicinity of the evidence.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the fact finder, is sufficient to support a factual conclusion. **State v. Marshall**, 2004-3139 (La. 11/29/06), 943 So.2d 362, 369, cert. denied, 552 U.S. 905, 128 S.Ct. 239, 169 L.Ed.2d 179 (2007). 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 fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

The verdict rendered in this case indicates that the jury inferred constructive possession of the recovered firearm in this case. Not only was the gun recovered from the ground close to where the defendant was standing, easily accessible by the defendant, by stopping mid-way over the fence to return to the location of the gun, the defendant tended to show his awareness of the firearm's location. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662. The jury could have reasonably inferred that the gun fell or was dropped or thrown from the defendant's person as he jumped the fence, consistent with the noise heard by Officer Guidry at that point. An appellate court errs by substituting

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[7] The limited view provided by the dash cam video footage was consistent with Officer Guidry's

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 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*). A court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder. See **State v. Mire**, 2014-2295 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814, at *4 (*per curiam*).

Based on our careful review of the record, we are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the State, could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the offense of possession of a firearm or carrying a concealed weapon by a convicted felon. Accordingly, counseled assignment of error number one lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In counseled assignment of error number two, the defendant argues that the trial court erred in denying his motion for mistrial based on the admission of other crimes evidence. The defendant specifically notes that the defense sought a mistrial after Officer Guidry testified that he retrieved a piece of plastic from the defendant's person that appeared to have been chewed through. The defendant argues that the referenced testimony was an attempt to elicit irrelevant evidence of drug possession. The defendant notes that while the trial court warned the State to discontinue such testimony, the trial court did not admonish the jury to disregard the testimony already presented. The defendant notes that plastic baggies are

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testimony.

associated with drugs, and further notes Officer Guidry's testimony that an ambulance was called shortly after the defendant's detention, as the defendant became less alert. The defendant contends that the jury could have concluded that the defendant became sick from ingesting a portion of the plastic baggie along with any drugs contained therein to avoid being caught in possession of drugs. Finally, the defendant argues that the other crimes evidence was not harmless as the jury could have concluded that if he possessed drugs, he could have possessed the firearm.

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. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. **State v. Lockett**, 99-0917 (La. App. 1st Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So.2d 115.

Mistrial is a drastic remedy and warranted only when substantial prejudice will otherwise result to the accused to deprive him of a fair trial. **State v. Booker**, 2002-1269 (La. App. 1st Cir. 2/14/03), 839 So.2d 455, 467, writ denied, 2003-1145 (La. 10/31/03), 857 So.2d 476. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518 (La. 1/17/01), 776 So.2d 443, 454. The trial court may grant a mistrial for certain inappropriate remarks that come within La. C.Cr.P. art. 770, which provides in pertinent part:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> [...]

> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> [...]
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> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

Louisiana Code of Evidence article 404(B)(1) provides:

> 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.

Accordingly, under La. C.E. art. 404(B)(1), evidence of other crimes, wrongs or acts may be introduced when it relates to conduct, formerly referred to as *res gestae*, that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Res gestae events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the State could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence to insure that the purpose served by admission of other crimes evidence is not to depict defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (*per curiam*). For other crimes evidence to be admissible under the integral-act exception (formerly known as *res gestae*), the evidence must bear such a close relationship with the charged

crime that the indictment or information as to the charged crime can fairly be said to have given notice of the other crime evidence as well. **State v. Odenbaugh**, 2010-0268 (La. 12/6/11), 82 So.3d 215, 251, cert. denied, 568 U.S. 829, 133 S.Ct. 410, 184 L.Ed.2d 51 (2012). 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. C.E. 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 before, during, or after the commission of the crime, if a continuous chain of events is evident under the circumstances. **State v. Kimble**, 407 So.2d 693, 698 (La. 1981); **State v. Taylor**, 2001-1638 (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). Integral act (*res gestae*) evidence in Louisiana also incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. See **Colomb**, 747 So.2d at 1076. Thus, "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**, 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).). The Louisiana Supreme Court has held that evidence of multiple crimes committed in a single course of conduct is admissible as *res gestae* at the trial of the accused for the commission of one or more, but not all of the crimes, committed in his course of conduct. **State v. Washington**, 407 So.2d 1138, 1145 (La. 1981); **State v.**

Meads, 98-1388 (La. App. 1st Cir. 4/1/99), 734 So.2d 792, 797, writ denied, 99-1328 (La. 10/15/99), 748 So.2d 465.

The Louisiana Supreme Court has left open the question of whether *res gestae* evidence presented under La. C.E. art. 404(B)(1) must pass the balancing test of Article 403. See **Colomb**, 747 So.2d at 1076. Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. **State v. Germain**, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. **Id.**; see also **Old Chief**, 519 U.S. at 180, 117 S.Ct. at 650 ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

Herein, Officer Guidry testified that during the pat-down search conducted after the defendant was taken into custody, a small baggie that appeared to have been chewed through was located on the defendant's person. At that point, the defense moved for a mistrial on the basis of the admission of other crimes evidence. As noted by the defendant, the trial court denied the motion for mistrial and instructed the State to discontinue such references, to which the State and witness complied.

We note that the defendant did not request an admonition in this case. Further, assuming that the plastic baggie and testimony regarding the defendant's condition could have been regarded as evidence of another crime, we conclude that the testimony at issue was an integral part of the case. See La. C.E. art. 404(B)(1). The police officers' observations and items recovered at the scene simultaneously to the cell phone and the firearm used to support the defendant's conviction herein constituted an integral part of the crime and was part of the *res gestae*. To have

disallowed evidence of the full picture of what occurred during the apprehension would have deprived the State's case of its narrative momentum and cohesiveness. Further, assuming for sake of argument that the balancing test of La. C.E. art. 403 is applicable to integral act evidence admissible under La. C.E. art. 404(B)(1), that test was satisfied in this matter. The facts were unambiguous, included the police officers' personal observations, and the brief testimony at issue did not present any danger of confusion. Accordingly, the effect to the defendant from the challenged testimony did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence. Thus, we find no merit to counseled assignment of error number two.

COUNSELED ASSIGNMENT OF ERROR NUMBER THREE

In counseled assignment of error number three, the defendant argues that the mandatory life sentence was excessive in this case. The defendant contends that he was being stopped for a mere traffic violation. The defendant further notes that the crime for which he was convicted did not involve the use of a gun, only the recovery of a discarded gun. While the defendant concedes that the law in effect at the time of the instant offense mandated a life sentence in this case, he argues that a review of the sentence should take into consideration the changes in the Habitual Offender Law providing that a mandatory life sentence is no longer required for the same class of offenders. The defendant further notes that the jury verdict was based on a ten of twelve vote by the jurors. The defendant concludes that the life sentence imposed in this case should shock anyone's sense of justice.

Both the United States and Louisiana constitutions prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; La. Const. art. I, § 20. A sentence is generally considered excessive if it is grossly disproportionate to the offense or imposes needless and purposeless pain and suffering. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992). To determine whether a penalty is excessive, we

must determine whether the penalty is so grossly disproportionate to the severity of the crime as to shock our sense of justice. **State v. Bonanno**, 384 So.2d 355, 358 (La. 1980).

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeless imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he is duty bound to reduce the sentence to one that would not be constitutionally excessive.

However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that, "the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional." **Dorthey**, 623 So.2d at 1278 (Citations omitted).

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 709 So.2d at 676 (Citation omitted).

Herein, the defendant was sentenced as a third-felony offender under La. R.S. 15:529.1(A)(3)(b) (prior to amendment by 2017 La. Acts No. 257, § 1 and 2017 La. Acts No. 282, § 1 (eff. Nov. 1, 2017)). The applicable version of that statutory provision states, in pertinent part, "[i]f the third felony and the two prior felonies are felonies defined as a crime of violence under R.S. 14:2(B) ... or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence." The instant offense is a crime punishable by imprisonment for more than twelve years, and the defendant's prior felonies—aggravated battery and second degree battery—are crimes of violence pursuant to La. R.S. 14:2(B). Thus, upon the third-felony habitual offender adjudication, the defendant was subject to a mandatory life sentence without benefit of parole, probation, or suspension of sentence and was sentenced accordingly.

The trial court ordered a presentence investigation report ("PSI"), prior to imposing sentence in this case which details the defendant's lengthy criminal history spanning from 1990 to 2014. The defendant's criminal history includes convictions for violent offenses such as aggravated battery and second degree battery. As further noted in the PSI report, the defendant has been arrested sixteen times for crimes against the person ranging from simple battery to a 2014 arrest for second degree murder. Further the defendant has a history of probation revocation.

While the penalty was revised after the defendant's offenses, we note that the Louisiana Supreme Court has held that a defendant should be sentenced pursuant to the version of La. R.S. 15:529.1 in effect at the time of the commission of the charged offense. See **State v. Parker**, 2003-0924 (La. 4/14/04), 871 So.2d 317, 326. Further, in 2018 La. Acts No. 542, § 1 (eff. Aug. 1, 2018), the Legislature recently enacted La. R.S. 15:529.1(K), thereby codifying the **Parker**

holding in pertinent part as follows: "(1) Except as provided in Paragraph (2) of this Subsection,[8] notwithstanding any provision of law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed." But cf. **State v. Williams**, 2017-1753 (La. 6/15/18), 245 So.3d 1042 (*per curiam*) (The supreme court, prior to the August 1, 2018 effective date of La. R.S. 15:529.1(K), remanded the case for resentencing in accordance with the Habitual Offender Law as amended by 2017 La. Acts No. 282, § 1 (eff. Nov. 1, 2017), which was enacted while the defendant's appeal therein was pending).[9] We note that the Legislature's recent enactment of Subsection K to La. R.S. 15:529.1 of the Habitual Offender Law may be fairly described as legislatively overruling **State v. Williams**, 2017-1753 (La. 6/15/18), 245 So.3d 1042 (*per curiam*). Thus, 2018 La. Acts No. 542, § 1 (eff. Aug. 1, 2018) preempts any debate over the retroactivity of 2017 La. Acts No. 257, § 1 and 2017 La. Acts No. 282, § 1 (eff. Nov. 1, 2017).

We find that the defendant in this case has not met his burden of rebutting the presumption of constitutionality of his sentence. The record is devoid of any evidence that the defendant is the type of offender contemplated by the Louisiana Supreme Court in **Dorthey**, warranting a downward deviation from the mandatory sentence provided for the instant offense. The defendant failed to clearly and convincingly show that because of unusual circumstances he was a victim of the

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[8] We note that a 10-year cleansing period remains applicable to the instant case, as the defendant's predicate convictions, as noted above, consist of crimes of violence. See La. R.S. 15:529.1(C)(2) (as amended by 2017 La. Acts No. 257, § 1 and 2017 La. Acts No. 282, § 1 (eff. Nov. 1, 2017)).

[9] The habitual offender statute was significantly amended in 2017. See 2017 La. Acts No. 257, § 1 and 2017 La. Acts No. 282, § 1 (eff. Nov. 1, 2017). In enacting those amendments, the Legislature provided that Acts 257 and 282 "shall become effective November 1, 2017, and shall have prospective application only to offenders whose convictions became final on or after November 1, 2017." See 2017 La. Acts No. 257, § 2 and 2017 La. Acts No. 282, § 2. We are aware of **State v. Williams**, 2017-1753 (La. 6/15/18), 245 So.3d 1042 (*per curiam*) and **State v. Purvis**, 2017-1013 (La. App. 3d Cir. 4/18/18), 244 So.3d 496, which gave limited retroactive application to the 2017 amendments. However, we consider those decisions abrogated by the 2018 enactment of La. R.S. 15:529.1(K)(1). See 2018 La. Acts No. 542, § 1 (eff. Aug. 1, 2018); see also **State v. Floyd**, 52,183 (La. App. 2d Cir. 8/15/18), 254 So.3d 38, 43 n.2.

Legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, the mandatory life sentence was not excessive. Accordingly, counseled assignment of error number three lacks merit.

DECREE

For the foregoing reasons, the defendant's conviction, habitual offender adjudication, and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.