

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0460

STATE OF LOUISIANA

VERSUS

RUTHERFORD JONES

Judgment Rendered: SEP 10 2010

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On Appeal from the Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Docket No. 2008-178207

Honorable Edward M. Leonard, Jr., Judge Presiding

* * * * *

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State of Louisiana

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Rutherford Jones

* * * * *

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Rutherford Jones, was charged by bill of information with distribution of cocaine, a violation of LSA-R.S. 40:967(A)(1). The defendant pled not guilty and, following a jury trial, was found guilty as charged. The State subsequently filed a fourth-felony habitual offender bill of information. At the habitual offender hearing, the trial court sentenced the defendant to thirty years at hard labor without benefit of parole, probation, or suspension of sentence for the distribution of cocaine conviction. The trial court adjudicated the defendant a third-felony habitual offender, vacated the thirty-year sentence, and sentenced the defendant to life imprisonment without benefit of parole, probation, or suspension of sentence.¹ The defendant now appeals, designating two assignments of error. We affirm the conviction, habitual offender adjudication, amend the sentence, and affirm as amended.

FACTS

Detective Billy Jordan, with the St. James Parish Sheriff's Office, was assisting the St. Mary Parish Sheriff's Office by working undercover as a drug user and purchasing illegal narcotics from street-level dealers. On February 20, 2008, Detective Jordan, along with a confidential informant (CI), drove to a washateria near Friendship Alley in the Amelia area in St. Mary Parish. A pickup truck pulled near them. A man, who the CI identified as "Slim," exited the passenger side of the truck and approached Detective Jordan's vehicle. The man approached Detective Jordan, who was on the driver's side. The man was wearing a cap and a camouflage jacket. Detective Jordan paid the man one hundred dollars in exchange for five rocks of crack cocaine. The man walked away and Detective Jordan drove off. A hidden camera in Detective Jordan's vehicle recorded the drug transaction.

¹ At the habitual offender hearing, the State established the defendant had at least four prior felony convictions and was, therefore, a fourth or subsequent felony habitual offender. The prior convictions were for unauthorized entry of an inhabited dwelling, two counts of distribution of cocaine, three counts of simple burglary, and sexual battery. The trial court sentenced the defendant to life imprisonment under LSA-R.S. 15:529.1(A)(1)(b)(ii) as a third-felony habitual offender. However, it appears that a life sentence under LSA-R.S. 15:529.1(A)(1)(c)(ii) as a fourth-felony habitual offender would also have been proper.

Several weeks after the drug transaction, Lieutenant Billy White and Lieutenant Scott Anslum, both with the St. Mary Parish Sheriff's Office, were patrolling together near Friendship Alley where they saw the defendant walking. Lieutenant Anslum called the defendant "Slim" and told him they needed to talk to him. The officers spoke with the defendant, who identified himself as Wilbur Jones. One of the officers then took a picture of the defendant. Subsequent to this incident, the officers again came into contact with the defendant near Friendship Alley and took another picture of him. The defendant lived on Friendship Alley.

Lieutenant Anslum assembled a six-person photographic array, which contained the first picture taken of the defendant by the officers when they were near Friendship Alley. On April 9, 2008, about seven weeks after the drug transaction, Detective Jordan identified the defendant as the person who sold him the crack cocaine. Detective Jordan testified at trial and identified the defendant in open court as the person who sold him the cocaine.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was insufficient to support the guilty verdict. Specifically, the defendant contends that the State failed to prove his identity as the suspect involved in the drug transaction with Detective Jordan.

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 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 also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207, p. 10 (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, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. **State v. Hughes**, 05-0992, pp. 5-6 (La. 11/29/06), 943 So.2d 1047, 1051.

The defendant asserts that Detective Jordan's identification of him was unreliable because he has been bald for many years and the cocaine seller had hair on his head; his nickname is "Shine," yet the person who sold the cocaine was referred to as "Slim"; and all his front teeth are missing, yet Detective Jordan did not recall that the person who sold him drugs was "toothless."

The testimony at trial established that Detective Jordan conducted a face-to-face drug transaction in daylight with excellent visibility with a person who Detective Jordan later identified as the defendant. About seven weeks after the drug buy, Detective Jordan identified the defendant in a six-person photographic lineup as the person who sold him crack cocaine. According to Detective Jordan and Lieutenant Anslum, who assembled the photographic lineup, Detective Jordan's identification of the defendant was immediate. Detective Jordan also identified the defendant in court as the person who sold him the drugs. When asked during direct examination if he was positive that it was the defendant who sold him the cocaine, Detective Jordan responded that "[w]ithout a doubt" it was the defendant. Detective Jordan testified that the defendant "stuck in [his] mind" because he had the worst smelling breath he had ever smelled on a human being in his life.

On cross-examination of Detective Jordan, defense counsel suggested that the video of the drug transaction showed the seller had hair on his head. Detective Jordan responded that the seller was wearing a hat. When asked if he could tell from the video if the seller had hair under his ball cap, Detective Jordan responded, "Yes, it looks like he does have at least patches of hair." On the cross-examination of Lieutenant White, he was shown the video of the drug buy and asked if the seller had hair on his head. Lieutenant White responded, "Appears to." Several pictures of the defendant were introduced into evidence. The pictures show the defendant is bald. Two of the pictures, which were the State's exhibits, were taken of the defendant weeks after the drug transaction with Detective Jordan. It is not clear when a third picture of the defendant, which was a defense exhibit, was taken, although it appears the defendant was in jail at the time.

Two witnesses for the defendant testified. Oralee Smith, the defendant's mother, testified that it had been over twenty years since the defendant had hair on his head. Betty Pesson, who worked for the St. Mary Parish Sheriff's Department, testified that over the past ten years of seeing the defendant coming into the station and being booked, she had never known him to have hair on his head. On cross-examination, Betty testified that the last time she saw the defendant being booked in jail was about ten years ago.

Our review of the video of the drug transaction revealed nothing about whether or not the seller was bald. The transaction was very brief, and the seller, who was wearing a baseball cap, appeared on camera a few times only momentarily. There were some views of the side of the seller's head as he turned, but because of poor video quality, the video does not clearly show whether the seller had hair on the sides of his head.

On cross-examination of Detective Jordan, defense counsel asked him if he recognized anything about the defendant's mouth. Detective Jordan did not remember anything in particular about his mouth. Defense counsel showed him the picture of the defendant smiling and asked, "Did you notice, you notice that

he doesn't have any teeth in his mouth?" Detective Jordan replied that he thought the defendant did not have teeth in the lineup picture either. Defense counsel noted that Detective Jordan had not put anything in his notes about the defendant's teeth. Detective Jordan testified that the drug transaction took about twenty seconds. On redirect examination, Detective Jordan testified that, during the drug transaction, the defendant was not smiling showing his teeth, but was "kind of nervous" and "trying to be as quick as possible."

The CI and Lieutenant Anslum referred to the defendant as "Slim." Oralee Smith testified the defendant's nickname was "Shine" and that everyone called him that all his life. She stated that everyone in Amelia knew him as "Shine" and that he had never been called "Slim." She further testified that letters she wrote to the defendant while he was in jail were addressed, "Hey Shine."

The foregoing characteristics of the defendant were factual determinations based on witness credibility and the weighing of the evidence. We do not find irrational the jury's credibility calls and evidence weighing in regard to Detective Jordan's testimony and the evidence introduced at trial. The trier of fact makes credibility determinations, and may, within the bounds of rationality, accept or reject the testimony of any witness. Despite the defendant's assertion of alleged discrepancies with his nickname and whether he was bald and toothless, Detective Jordan's testimony was not clearly unworthy of belief. See State v. Bright, 98-0398, pp. 23-24 (La. 4/11/00), 776 So.2d 1134, 1148, post-conviction relief granted on other grounds, 02-2793 (La. 5/25/04), 875 So.2d 37.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding the alleged inconsistencies, the jury found the defendant guilty. When there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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, pp. 5-6 (La. App. 1 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, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1 Cir. 1985).

In finding the defendant guilty, it is clear the jury rejected the defense's theory of misidentification. A reasonable juror could have determined that the video of the drug transaction did not resolve whether or not the seller had patches of hair on the sides of his head, or that the seller did have hair and shaved it off, and that, in any event, Detective Jordan's testimony was credible enough to establish the defendant's guilt. A reasonable juror could have also determined from the evidence that the defendant clearly was not toothless. Thus, despite the hyperbolic descriptions of the defendant's oral condition (defense counsel suggested to Detective Jordan that the defendant did not have any teeth in his mouth, and the defendant in his appeal brief stated that all of his front teeth were missing and that he was "toothless"), the photographic evidence indicates the defendant had front teeth. In Defendant's Exhibit 1, the defendant appeared to be missing two or three top teeth. In State's Exhibit 7, the defendant appeared to be missing a single top tooth. Further, the drug transaction was very brief, and the defendant barely spoke. Accordingly, a reasonable juror could have determined that nothing under these circumstances would have called to Detective Jordan's attention the defendant's teeth.

Finally, a reasonable juror could have determined that, while "Shine" may have been the defendant's actual nickname, the CI and detectives referred to the defendant as "Slim" because it is a colloquialism. It would not be uncommon to refer to a thin person as "Slim" regardless of his real name or actual nickname.

The defendant's arrest record indicated the defendant was five feet, seven inches tall and 160 pounds with a thin build.

The State's evidence negated any reasonable probability that the defendant was not properly identified as the suspect selling crack cocaine to Detective Jordan. Detective Jordan identified the defendant in court as the person who sold him drugs and picked him from a photographic lineup. The testimony of a single undercover police officer is sufficient to convict a defendant charged with drug distribution. **State v. Conway**, 588 So.2d 1369, 1373 (La. App. 2 Cir. 1991). See **State v. Christy**, 509 So.2d 829, 831 (La. App. 1 Cir.), writ denied, 513 So.2d 296 (La. 1987). Furthermore, the guilty verdict returned in this case indicates the jury believed the testimony of the State's witnesses and rejected the defense's theory of misidentification. See **State v. Andrews**, 94-0842, p. 7 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 453.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and 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 every reasonable hypothesis of innocence, that the defendant was guilty of distribution of cocaine.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in excusing a juror, David Mitchell, after being sworn and replacing him with the alternate juror. Specifically, the defendant contends the trial court granted the State's cause challenge of Mitchell as punishment to the defendant for attempting to communicate with Mitchell. The only available remedy, according to the defendant, was to grant a mistrial.

After all jurors were sworn in, but prior to opening statements, the trial court became aware that the defendant attempted to communicate with a juror. The prosecutor informed the trial court:

I understand the defendant lip sank [sic], he didn't speak out loud, but he moved his lips toward David Mitchell, one of the jurors, at the end of the day as he, as Mr. Mitchell was leaving and Mr. Mitchell responded with a gesture as if, you know, he understood or he didn't understand.

After asking if anyone else had anything to say, the trial court stated:

Well, I do. I noticed, not after court was over, but while court was still in session and we were in process of still selecting the jury, I noticed the defendant mouthing words toward one of the jurors and gesturing toward one of the jurors. I did not think that was appropriate. I could not tell at that point [who] the juror might be. He might be aiming that toward if any one in particular and after several seconds he ceased doing it. I only saw him doing it for a short period of time. But there definitely was between the defendant and at least one of the jurors an attempted communication of some sort. So, if that is the same incident that the deputy saw I don't know, but I know I did see it and I thought it was inappropriate.

The prosecutor then called Deputy Blake Bourgeois with the St. Mary Parish Sheriff's Office who, as a court security officer on duty, witnessed the incident:

Q. And, at the end of the day, did you see the defendant move his lips in the direction of the juror with the yellow shirt?

A. Yes, I did.

Q. Okay. Did you see the juror in the yellow shirt respond after the defendant moved his lips towards -

A. Yes, I did. That's how I was able to identify him.

Q. Okay. That's how you were able to perceive that communication took place?

A. Right.

Q. Okay.

A. I saw the defendant moving his lips and I looked back to see who he was communicating with and I noticed it was a gentleman in a yellow shirt and he acknowledge [sic] he, he just kind of bowed his head like yes.

Q. Okay.

A. And that's the only expression - I tried to read his lips but I couldn't.

Q. Okay. And did you hear any sound?

A. No.

Q. Okay. So you couldn't hear them talking?

A. No.

Q. You just saw lip movement -

A. Right.

Q. - and a response by the -

A. Right.

Q. - juror in the yellow shirt.

The trial court then questioned Deputy Bourgeois:

Q. Where was the defendant seated when you - where was he when you sa[w] him do that?

- A. He was turned toward the jury leaving the room and he was turned towards them.
- Q. Was -
- A. And I happen to notice his mouth -
- Q. Was he standing or seated?
- A. He was seated.
- Q. He was seated. And where was the juror?
- A. Approximate[ly], right behind Judge Conery (Indicating).²
- Q. Okay. You're indicating in the audience of the -
- A. They were walking out. They were all walking out.

Following this, the prosecutor called David Mitchell and the following exchange took place:

- Q. Mr. Mitchell, can you state your name for the record?
- A. David Mitchell.
- Q. Okay. Were you in court yesterday?
- A. Yes, sir.
- Q. Okay. And, were you sworn as a member of the jury yesterday?
- A. Yes, sir.
- Q. Okay. What color was your shirt?
- A. Gold.
- Q. Okay. Was it a bright -
- A. Well, bright yellow.
- Q. Okay. Yesterday as you were leaving, did you see the defendant Mr. Rutherford Jones look at you?
- A. Well, he - well, yeah.
- Q. Okay. Now, when you just did that you shrugged your shoulders right there. What, what do you mean well, yeah? Did he move his mouth as if he was speaking? Without making a noise, did he lip sink [sic] anything to you?
- A. I wasn't, wasn't paying attention.
- Q. Okay.
- A. Really.
- Q. But - okay, did he make any movement towards you as you were walking out in communication?
- A. Well, not really. I was -
- Q. Okay. What do you mean by not really?
- A. He was just, I mean, I was -
- Q. I'm not - there's nothing you did wrong, okay?
- A. Yeah.
- Q. We're just trying to clarify something. The - Deputy Bourgeois was here and he stated that the defendant . . . looked at you and lip sink [sic], didn't make a noise, but just gestured toward you and lip sink [sic] with his mouth and you acknowledged him and just nodded and walked off. Do you recall the defendant doing that?
- A. Well, I- yeah. But I didn't really -
- Q. Okay. Okay.
- A. - notice what he was saying.
- Q. Okay. All right.

The court may disqualify a prospective petit juror from service in a particular case when for any reason doubt exists as to the competency of the

² It is unclear why the reference is to Judge Conery.

prospective juror to serve in the case. LSA-C.Cr.P. art. 787. Alternate jurors, in the order in which they are called, shall replace jurors who become unable to perform or disqualified from performing their duties. LSA-C.Cr.P. art. 789(A). A juror shall not be challenged for cause after having been temporarily accepted pursuant to Paragraph A of Article 788 unless the challenging party shows that the cause was not known to him prior to that time. LSA-C.Cr.P. art. 795(A). If it is discovered after a juror has been accepted and sworn, that he is incompetent to serve, the court may, at any time before the first witness is sworn, order the juror removed and the panel completed in the ordinary course. LSA-C.Cr.P. art. 796.

In granting the cause challenge to Mitchell, the trial court stated:

Well, the real issue is whether or not a defendant in [sic] attempt to influence a juror and get away with it. That's the real issue. And the deputy testified that he saw this gesture after the Court already said that it saw the defendant doing the same thin[g] while the jurors were seated in the box. So, this Court finds that the defendant deliberately tried communicating with the jury or a juror, and now we know specifically what juror he was attempting to, to communicate with in violation of any order of the Court or in violation of any statute that requires the jurors be isolated from such influence.

The defendant himself violated, violated those, those rules and now having found that he violated them with respect to juror Mitchell I'm going to grant the challenge to Mr. Mitchell and replace him with the alternate juror who was selected without opposition by both sides.

We agree with the trial court's ruling. Substantial deference is to be accorded a trial court's determination that a particular juror is unfit for service; in reviewing such determinations, the standard is whether the trial court's finding was fairly supported by the record. Absent a clear showing of abuse of discretion, the trial court's ruling as to the qualifications of a juror to serve should not be disturbed on appeal. **State v. Letulier**, 97-1360, p. 9 (La. 7/8/98), 750 So.2d 784, 790. It is necessary to give to the trial court the authority to dismiss prospective jurors in order to protect the proceedings from potential error. Although LSA-C.Cr.P. art. 787 gives to the trial court broad powers in determining the qualifications of prospective jurors, this article should

be read *in pari materia* with LSA-C.Cr.P. arts. 797 and 798 which set forth grounds upon which a juror may be challenged for cause. **State v. Carr**, 618 So.2d 1098, 1105 (La. App. 1 Cir.), writ granted in part on other grounds, denied in part, 629 So.2d 378 (La. 1993) (per curiam), writ denied, 94-0670 (La. 4/4/94), 635 So.2d 1116. See Letulier, 97-1360 at p. 8, 750 So.2d at 789-90. The trial court has discretion to utilize the service of an alternate juror, rather than to grant a mistrial, upon a proper finding that this is the best course of action. **State v. Fuller**, 454 So.2d 119, 123 (La. 1984).

The testimony clearly established a communication or attempted communication between the defendant and Mitchell. The trial court itself witnessed the exchange between the two and found it inappropriate. In replacing Mitchell with the alternate juror, whom neither party challenged, the trial court was not punishing the defendant, as asserted, but rather was protecting the proceedings from potential error. The trial court's finding that Mitchell should be removed was supported by the record.

We find no abuse of discretion in the trial court's ruling. Accordingly, this assignment of error is without merit.

SENTENCING ERROR

The sentence for a conviction of distribution of cocaine is necessarily at hard labor. See La. R.S. 40:967(B)(4)(b). Accordingly, the defendant's life sentence under the Habitual Offender Law must also be at hard labor. See State v. Bruins, 407 So.2d 685, 687 (La. 1981). In sentencing the defendant, the trial court failed to provide that his life sentence was to be served at hard labor.³ Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, LSA-C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, LSA-C.Cr.P.

³ The minutes reflect the trial court sentenced the defendant to life at hard labor under LSA-R.S. 15:529.1. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

882(A) authorizes correction by the appellate court.⁴ We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentence. See State v. Price, 05-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since a sentence at hard labor was the only sentence that could be imposed, we correct the sentence by providing that it be served at hard labor.

**CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED;
SENTENCE AMENDED TO PROVIDE THAT IT BE SERVED AT HARD
LABOR, AND AFFIRMED AS AMENDED.**

⁴ "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." LSA-Cr.P. art. 882(A).