NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 0564

STATE OF LOUISIANA

VERSUS

TARVIS TRENTRELL RUDISON

Judgment Rendered: November 9, 2011

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 23,433

Honorable Brenda Bedsole Ricks, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McClendon, J. concurs with the result reached by the majority

WELCH, J.

The defendant, Tarvis Trentrell Rudison, was charged by amended bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1), and pled not guilty. Following a jury trial, he was found guilty of the responsive offense of possession of cocaine, a violation of La. R.S. 40:967(C)(2), by unanimous verdict. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging he was a fifth-felony habitual offender.[1] The defendant moved for a post verdict judgment of acquittal or, in the alternative, for a new trial, but the motion was denied. He was initially sentenced to five years at hard labor. Thereafter, pursuant to a plea agreement, the defendant agreed with the allegations of the habitual offender bill. The trial court vacated the previously imposed sentence and sentenced him to twenty years at hard labor. The defendant now appeals, contending: (1) the trial court erred in allowing the introduction into evidence of the police report; and (2) the trial court erred in sentencing him without ruling on the motion for a new trial. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On October 3, 2008, at approximately 9:00 p.m., Janet Labarre and Denham Springs City Police Officer Steven Lovett, Corporal Rodney Walker, and a reserve officer went to the residence of the defendant at 239 Maryland Street in Denham Springs. The defendant was standing in his driveway, next to a vehicle. His mother and aunt were a few feet behind him, under the carport. The carport light was on and there were streetlights in the area. According to Labarre, "[e]verything

[1] Predicate #1 was set forth as the defendant's August 8, 1998 guilty plea, under Twenty-first Judicial District Court Docket #13116, to possession with intent to distribute cocaine. Predicate #2 was set forth as the defendant's May 17, 1999 guilty plea, under Twenty-first Judicial District Court Docket #13886, to carnal knowledge of a juvenile. Predicate #3 was set forth as the defendant's May 17, 1999 guilty plea, under Twenty-first Judicial District Court Docket #13999, to simple kidnapping. Predicate #4 was set forth as the defendant's October 12, 2006 guilty plea, under Twenty-first Judicial District Court Docket #20533, to possession of cocaine.

was visible."

According to Corporal Walker, the defendant dropped a white substance near his feet and started kicking at the substance under the car. Corporal Walker recovered the white substance, which was a yellowish/white colored rock substance in a clear baggie, from under the car. The substance was subsequently determined to be 7.02 grams of cocaine. Corporal Walker turned the cocaine over to Officer Lovett. According to Corporal Walker, the area "was lit up."

Debbie Jones, the defendant's aunt, testified at trial. She indicated she also lives at the defendant's residence and was sitting under the carport at the time of the incident. She denied seeing the defendant throw down an object. However, when asked "Is it possible you just weren't looking, or is it possible it could have happened?" she replied, "It could have. I can't say that it didn't. I didn't see it happen."

INTRODUCTION INTO EVIDENCE OF POLICE REPORT

In assignment of error number 1, the defendant argues the trial court erred in allowing the introduction into evidence of the police report because the report is excluded from the public records exception to the hearsay rule by La. C.E. art. 803(8)(b)(i).

Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C). Hearsay is not admissible except as otherwise provided by the Louisiana Code of Evidence or other legislation. La. C.E. art. 802. Certain records, reports, statements, and data compilations of a public office or agency are not excluded by the hearsay rule even though the declarant is available as a witness. La. C.E. art. 803(8)(a). However, investigative reports by police and other law enforcement personnel are not included in this exemption to exclusion. See La. C.E. art. 803(8)(b)(i); **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96),

684 So.2d 439, 453, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

Officer Lovett testified at trial. The State asked him to identify State Exhibit #1, *in globo*, an envelope containing rocks of cocaine. The defense questioned why the evidence envelope had already been opened. The State indicated it had opened the evidence envelope to make a charging decision in the case. Officer Lovett indicated the envelope contained the bag of yellowish/white rock-like substance, which field-tested positive for cocaine, recovered on the night of the incident.

On cross-examination, the defense asked Officer Lovett if he had sent the evidence envelope to the crime lab in its present unsealed condition, and he answered negatively. The defense questioned how Officer Lovett could testify that the cocaine was the same cocaine he had placed into the evidence envelope.

On redirect examination, Officer Lovett identified State Exhibit #3 as his initial report. The State asked him if the Denham Springs Police Department used a numbering system to connect reports to the incidents they discussed, and he replied affirmatively. Officer Lovett then read the number from his police report and indicated the number matched the number on State Exhibit #1, *in globo*.

At the close of the case, the State offered State Exhibit #3 "for record purposes." The defense objected, arguing the report was hearsay. The trial court overruled the objection, and the defense objected to the ruling.

Following conviction, the defense moved for a new trial, arguing the trial court allowed hearsay evidence to be admitted over the objection of counsel. At the hearing on the motion, the defense argued the report was inadmissible under La. C.E. art. 803(8)(b)(i), and had prejudiced the defendant because it indicated the police were at the scene due to a parole violation by the defendant. The State argued the police report had been admitted "for record purposes only," and that the jury never read the report. The State indicated it used the police report only to

respond to the claim of the defense that the cocaine in court was not the same evidence seized at the scene. The court indicated that when evidence was published to the jury, it was not left on the railing for jurors to view as they walked by, but rather, the court would have the bailiff present it to the first juror and ask them to view it and pass it to the next juror, and then have the bailiff collect the evidence after it had been viewed by all the jurors. The court indicated that "anything else" that was introduced was provided to the deputy clerk, and she did not leave any items on the railing for jurors to view.

The defense "disagreed" with the court, claiming it had seen the jurors walk up to the exhibits and view them. The court stated, "That has never happened in any of the trials in almost 14 years." The clerk of court indicated that the court minutes reflected that State Exhibit #1 was "published to the jury," but that State Exhibit #3 was "introduced." The court denied the motion for new trial, and the defense objected to the ruling.

Following the filing of the briefs, the record was supplemented with a complete sentencing transcript of August 2, 2010. On that date, defense counsel indicated he had been mistaken in believing that the police report had been presented to the jury.

Confrontation errors are subject to a harmless-error analysis. **Delaware v. Van Arsdall**, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986). The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination were fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. **Van Arsdall**, 475 U.S. at 684, 106 S.Ct. at 1438. Factors to be considered by the reviewing court include "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and, of course, the overall strength of the prosecution's case." **Van Arsdall**, 475 U.S. at 684, 106 S.Ct. at 1438; **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990). The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); **State v. Broadway**, 96-2659 (La. 10/19/99), 753 So.2d 801, 817, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000).

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. C.E. 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. A preponderance of the evidence is sufficient. 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. **Berry**, 684 So.2d at 455.

We do not reach the issue of whether the admission of the police report "for record purposes" violated La. C.E. art. 803(8)(b)(i). The record indicates the report was never viewed by the jury. Further, in regard to hearsay, if any, from the report being used to identify State Exhibit #1, *in globo*, during the testimony of Officer Lovett, we note Corporal Walker testified there was no doubt in his mind that State Exhibit #1, *in globo*, was the substance the defendant dropped and that Corporal Walker recovered. Accordingly, error, if any, in the admission of the police report was harmless beyond a reasonable doubt as the guilty verdict was surely unattributable to the admission of the police report for "record purposes." See La. C.Cr.P. art. 921.

This assignment of error is without merit.

RULING ON MOTION FOR NEW TRIAL

In assignment of error number 2, the defendant argues "the transcript within the record for August 2, 2010" does not reflect a ruling on the motion for new trial.

The minutes of August 2, 2010, indicate that the trial court denied the motion for a post verdict judgment of acquittal or alternatively motion for a new trial, and the defense objected to the ruling. The original transcript of the proceedings of August 2, 2010, filed with this court, failed to reflect a ruling on the motion at issue. The State informed this court that it believed the August 2, 2010 transcript was incomplete, and requested that the record be supplemented with a complete transcript of the date in question. The supplemental transcript of August 2, 2010, indicates that the trial court denied the motion at issue.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note our review for error is pursuant to La. C.Cr.P. art. 920, which provides the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920(2).

In the instant case, the trial court failed to advise the defendant of his right to remain silent prior to accepting his agreement to the allegations of the habitual offender bill.

In **State v. Griffin**, 525 So.2d 705 (La. App. 1st Cir. 1988), the defendant was separately charged with simple burglary, a violation of La. R.S. 14:62, and with possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1. Pursuant to a plea agreement for ten-year concurrent sentences on each count, he pled guilty and agreed to stipulate to being a second-felony habitual offender. Thereafter, the State filed two separate habitual offender bills of information

against the defendant, alleging he was a second-felony habitual offender. **Griffin**, 525 So.2d at 706. At the habitual-offender hearing, the State, defense counsel, and the defendant all agreed that the allegations of the multiple-offender bills were correct. **Griffin**, 525 So.2d at 706-07. Thereafter, the trial court adjudged the defendant a second-felony habitual offender and sentenced him in accordance with the plea agreement. On appeal, this court found that the trial court's failure to advise the defendant of the specific allegations contained in the habitual offender bills of information, his right to be tried as to the truth of the allegations, and his right to remain silent, before obtaining the stipulations to the habitual offender bills of information, constituted error under La. C.Cr.P. art. 920(2), requiring that the habitual offender adjudications and sentences be vacated. **Griffin**, 525 So.2d at 707.

Unlike the defendant in **Griffin**, however, the instant defendant received the statutory minimum sentence as a fourth or subsequent-felony habitual offender and does not challenge his sentence on appeal. Absent the plea agreement in this case, he was exposed to a life sentence.[2] See La. R.S. 15:529.1(A)(1)(c)(i) (prior to amendment by 2010 La. Acts Nos. 911, § 1 and 973, § 2). Thus, the trial court's failure to comply with **Griffin** was not inherently prejudicial to the defendant. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (*en banc*), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

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

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

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[2] In connection with the plea agreement, the State also *nol-prossed* three additional charges against the defendant.