NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 KA 1163

STATE OF LOUISIANA

VERSUS

COREY ODOM

Judgment Rendered: March 22, 2013

* * * * * *

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket Number 26478

Honorable Guy Holdridge, Judge Presiding

* * * * * *

Ricky L. Babin
District Attorney
Donaldsonville, LA

Counsel for Plaintiff/Appellee
State of Louisiana

Donald D. Candell
Assistant District Attorney
Gonzales, LA

Lieu T. Vo Clark
Louisiana Appellate Project
Mandeville, LA

Counsel for Defendant/Appellant
Corey Odom

* * * * * *

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

[illegible], dissents in part and assigns reasons

GUIDRY, J.

The defendant, Corey G. Odom, was charged by bill of information with one count of possession of 400 grams or more of cocaine, a violation of La. R.S. 40:967(F)(1)(c), and pled not guilty. Following a jury trial, he was found guilty as charged. He was sentenced to fifteen years at hard labor. He now appeals, contending the trial court erred in excluding evidence of the "co-defendant's" inculpatory statement which exonerated the defendant.[1] For the following reasons, we affirm the conviction and sentence.

FACTS

On January 29, 2010, at approximately 10:51 p.m., Gonzales City Police Department Corporal Dwayne Carpenter and Officer Aaron Picou noticed a vehicle occupied by two black males, travelling at 42 miles per hour in a 25 mile per hour speed zone, with its high beams on, northbound on Louisiana Highway 44 near the East Ascension High School football field in Gonzales. Sergeant Carpenter activated his police lights and siren, and the suspect vehicle slowed down and appeared to be pulling into a parking lot. However, the vehicle then quickly accelerated southbound down Louisiana Highway 44 at 80 miles per hour. Sergeant Carpenter and Officer Picou chased the vehicle. The suspect vehicle eventually pulled into a private residence, and the defendant jumped out of the passenger side of the vehicle and fell into a puddle of mud. He then attempted to flee from the scene on foot. He was apprehended approximately one to one and one-half minutes later, after throwing a white bag over a fence. The bag contained a Ziploc bag with 1 lb, 2.2 oz. of cocaine. The defendant had $51 on his person.

Sergeant Carpenter stayed with the driver of the vehicle, Jamar Howard.

---

[1] No codefendants were listed on the bill of information charging the defendant, and no one was jointly tried with him. In his brief, the defendant references the alleged inculpatory statement of "Mr. Howard." Jamar Howard was called to the stand at trial, but he exercised his right to remain silent.

Howard claimed he had not seen the police lights or heard the police siren. Thereafter, he stated he did not know the defendant, and had seen him walking and had given him a ride. Howard had $3,558 in his front pocket.

The defendant testified at trial. He conceded he had previously pled guilty to possession of cocaine. He denied being a cocaine dealer. He stated he was related to Howard. The defendant claimed he ran from the police during the incident because he was scared and because Howard threw the bag of cocaine in his lap and told him, "If you don't get out here, I'm going to kill you, you better get out here with that."

STATEMENTS OF JAMAR HOWARD

In his sole assignment of error, the defendant argues the trial court erroneously excluded the alleged out-of-court statements of Jamar Howard, which were corroborated by testimony and evidence at trial.

Louisiana Code of Evidence article 804, in pertinent part, provides:

> A. **Definition of unavailability.** Except as otherwise provided by this Code, a declarant is "unavailable as a witness" when the declarant cannot or will not appear in court and testify to the substance of his statement made outside of court. This includes situations in which the declarant:
>
> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
>
> . . .
>
> B. **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .
>
> **(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In State v. Hammons, 597 So. 2d 990, 995 (La. 1992), the supreme court recognized that La. C.E. art. 804(B)(3) was closely patterned after Fed. R. Evid. 804, and thus, the history of the federal rule was pertinent to application of the state rule. At common law, only statements against pecuniary or proprietary interest were originally admissible as hearsay exceptions because of the fear that statements against penal interest would be fabricated. Hammons, 597 So. 2d at 995-96. When the statement is one against the declarant's penal interest, the circumstances surrounding the making of the statement may be significant in determining its trustworthiness. If a declarant admits sole responsibility for a serious crime, the statement is generally prima facie against interest so as to satisfy this requirement of the rule. However, if the statement is clearly self-serving, as when the declarant is seeking favorable treatment for himself in return for cooperation, the statement may be deemed not against his interest and thus may fall outside the exception. Hammons, 597 So. 2d at 996. When the statement tending to expose the declarant to criminal liability is offered to exculpate the accused, La. C.E. art. 804(B)(3) expressly requires corroborating circumstances indicating trustworthiness. The burden of satisfying the corroboration requirement is on the accused. Hammons, 597 So. 2d at 996-97. That burden may be satisfied by evidence independent of the statement which tends, either directly or circumstantially, to establish a matter asserted by the statement. Circumstantial evidence of the veracity of the declarant as to the portion of the statement exonerating the accused is generally sufficient. Typical corroborating circumstances include statements against the declarant's interest to an unusual or devastating degree, or the declarant's repeating of consistent statements, or the fact that the declarant was not likely motivated to falsify for the benefit of the accused. Hammons, 597 So. 2d at 997.

Prior to the presentation of the defendant's case at trial, the defense indicated it wanted to present testimony from Nioka McKinney, the defendant's mother, that she spoke to Jamar Howard after the defendant was arrested, and Howard told her, "It's my fault. It was my stuff. I threw the stuff at [the defendant] and told him get out of the car." The trial court asked the defense if it could corroborate the alleged statement. The defense replied:

> She went to the jail – and here's another situation. She went to jail to bond him out. Mr. Howard had already posted a bond for him. If I could have got the other witness here, he also said that he was told by Mr. Howard that – I can't corroborate that. I can't - the trustworthiness of the mother … It's not great.

The trial court ruled that Nioka McKinney's statement would be insufficient to allow admission of the alleged statement of Howard, noting, "If every mother would testify and we'd have every mother on the [E]arth coming in and saying, no, somebody else did it[.]" Thereafter, the defense proffered the testimony of Nioka McKinney, to-wit:

> [Jamar Howard] was on the line. I said, ["]What's going on, Man.["] He said that they had been in jail all night. I said, ["]What happened.["] He said, ["]Man, we got busted last night.["] He said, ["I]t was all my fault, [the defendant] had nothing to do with it.["] He said, "I lost $20,000.["] He said, ["]I'm going to Ralph Stassi, that you need to find two people to get him out because I done paid the money already and I needed to find two people to sign for him with a job.["] He said ["]You need to find two people to get him out because I done paid the money already.["] And I said, ["]Well, what went on?["] He said that the police done run up on us; he said, "I went by – [."] [H]e told me it was his girlfriend house. He said ["]that's where they caught me.["] He said, ["]but man, [the defendant], had got out the car running with the stuff.["] I told him to go and [the defendant] fell and tripped. He said they chasing him. ["]Man, when they came back at the time, the police was even talking about it that time, came back.["] He said ["]they had done come – I was shocked to see them come back with the drugs. But, man, I'm going to take the full responsibility and the full wrap of that.["] He said – then after he talking about, and if not, ["]Man, he just gonna have to take his charge,["] stuff like that. And he hung up the phone on me. That was the end of that conversation at that time."

The trial court correctly excluded the proffered testimony. Jamar Howard's alleged statement against interest, as related by Nioka McKinney, was unsupported

by corroborating circumstances clearly indicating the trustworthiness of the statement. Nioka McKinney was the defendant's mother, and thus, was motivated to be less than truthful in order to prevent his conviction. See State v. Dabney, 91-2051 (La. App. 4th Cir. 3/15/94), 633 So. 2d 1369, 1379, writ denied, 94-0974 (La. 9/2/94), 643 So. 2d 139. Additionally, Howard never repeated the alleged statement against penal interest. On the night of the incident, he told the police he did not know the defendant and had "seen him walking and picked him up to give him a ride." At trial, Howard refused to testify.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C. Cr. P. art. 920, which provides that 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).

The trial court failed to impose the mandatory fine of not less than two hundred fifty thousand dollars, nor more than six hundred thousand dollars. See La. R.S. 40:967(F)(1)(c). Although the failure to impose the fine is error under La. C. Cr. P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See State v. Price, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So. 2d 1277.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA	FIRST CIRCUIT
	COURT OF APPEAL
VERSUS	STATE OF LOUISIANA
COREY ODOM	2012 KA 1163

CRAIN, J., dissents in part.

I agree with that portion of the majority opinion that affirms the conviction and the exclusion of the proffered testimony of Nioka McKinney. However, for the reasons assigned in dissent in *State v. Hollingsworth*, 12-1035 (La. App. 1 Cir. 2/15/13) (unpublished), I respectfully dissent from that portion of the majority opinion that declines to correct the sentencing error by remanding the matter to the trial court for re-sentencing.

The need for remand is further supported by the recent enactment of Louisiana Code of Criminal Procedure article 890.1, which provides in pertinent part:

> Notwithstanding any other provision of law to the contrary, if a felony or misdemeanor offense specifies a sentence with a minimum term of confinement or a minimum fine, or that the sentence shall be served without benefit of parole, probation, or suspension of sentence, the court, upon conviction, in sentencing the offender shall impose the sentence as provided in the penalty provisions for that offense . . . .

Section 890.1A(1) and A(2) permit only two exceptions to this mandate: a plea agreement and a post-conviction agreement, although those exceptions are not applicable to a crime of violence or a sex offense under Section 890.1D. Neither of the exceptions applies in the present case.

By enacting Article 890.1, the Louisiana Legislature expressly declared that the courts "shall impose the sentence" provided in the penalty provision of the applicable criminal statute. This mandatory language does not permit this court to allow an illegally lenient sentence to stand.

Louisiana Revised Statute 40:967F(1)(c) provides for a fine of not less than two hundred and fifty thousand dollars and not more than six hundred thousand dollars. Because the amount of the fine lies in the trial court's discretion, the amendment of the sentence entails more than a ministerial correction of a sentencing error. Under these circumstances, this court cannot *sua sponte* correct the sentence and should remand the case to the trial court for re-sentencing. *State v. Haynes*, 04-1893 (La. 12/10/04), 889 So. 2d 224 (per curiam).