NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1305

STATE OF LOUISIANA

VERSUS

ERIC P. HAMILTON

Judgment Rendered: NOV 0 1 2013

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 507833

Honorable Raymond S. Childress, Judge

* * * * * * *

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

The defendant, Eric P. Hamilton, was charged by amended 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 by a unanimous verdict. He moved for a new trial and in arrest of judgment, but the motions were denied. Thereafter, he reurged the motions, and they were again denied. Subsequently, the State filed a habitual offender bill of information against the defendant, alleging he was a third-felony habitual offender under La. R.S. 15:529.1(A)(3)(b).[1] The defendant stipulated to the "identity" and the "due process" concerning the predicates, and the trial court adjudged him a third-felony habitual offender. He was sentenced to imprisonment for the remainder of his natural life without benefit of probation, parole, or suspension of sentence. Thereafter, he moved for a new trial, alleging "[n]ew and material evidence," and the motion was denied. He now appeals, challenging the sufficiency of the evidence; challenging the trial court's refusal to grant him a continuance; challenging the admission into evidence of cell phones; and challenging the trial court's denial of the motions for new trial. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

Rodney Navarre testified at trial. He stated he had at least five or six prior drug convictions, but had no felony arrests since 2007. He had only known the defendant for approximately one year, but had known Casey Johnson for ten years. In March of 2011, Navarre traveled to Slidell to visit his brother, who had liver cancer.

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[1] Predicate #1 was set forth as the defendant's January 29, 2002 conviction, under Twenty-second Judicial District Court Docket #335541, for possession with intent to distribute cocaine. Predicate #2 was set forth as the defendant's March 3, 1994 guilty pleas, under Orleans Parish District Court Docket #366176, to possession of over 400 grams of cocaine and possession with intent to distribute marijuana.

According to Navarre, Johnson and the defendant approached him and stated that they had a "lick" or a proposition to make some money. Navarre was instructed to follow the defendant to Vinton. Navarre then waited in Vinton while the defendant retrieved a suitcase with four kilograms of cocaine. The defendant put the cocaine in the trunk of the car that Navarre was driving. The defendant and Johnson instructed Navarre to drive the cocaine to "Javery" in North Slidell. Thereafter, the defendant and Johnson "took out in front of [Navarre]" "to see what was going on with the traffic."

After Navarre crossed the Mississippi River Bridge on I-10, he was pulled over by the police. His vehicle was searched and the drugs were discovered. He told the police he "was transporting for [the defendant and Johnson]" and agreed to deliver the drugs to the defendant and Johnson while being monitored by the police.

Navarre first delivered one kilogram of cocaine to Johnson at the Fina store on Bayou Liberty. He then delivered three kilograms of cocaine to the defendant at Top Fuel on Thompson Road in Slidell.

In regard to the delivery of drugs to the defendant, Navarre testified he saw the defendant in his green car at the agreed upon location, walked to him, and spoke to him. Navarre put the drugs in the front seat of the defendant's vehicle. Navarre indicated the defendant then put the drugs on the back seat of his vehicle. The defendant told Navarre that the defendant was "about to go to the lab and check it out." Navarre testified "the lab" was where the defendant cooked cocaine and prepared it for distribution. The defendant paid Navarre $12,000, and Navarre put the money in the center console of the vehicle he was driving. He surrendered the money to the police after the delivery.

On cross-examination, Navarre conceded he had been convicted in 2003 for possession with intent to distribute marijuana and served three years of a six-year sentence in prison. He also conceded he had been convicted in 2007 of a narcotics

offense involving greater than 200 grams, but less than 400 grams, of a controlled dangerous substance.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues the evidence was insufficient to support the conviction because Navarre's testimony was incredible. He claims Navarre originally told investigators that he, and not the defendant, traveled to Houston to purchase narcotics; that initial police reports indicated that the $12,000 courier fee was in the defendant's vehicle; that Michelle Patton and Vincent Ocampo of the Top Fuel Gas Station testified they saw Navarre throw the duffle bag into the defendant's vehicle; that Patton did not see the defendant give Navarre anything; and that the defendant's wife testified she spoke to the defendant on March 15, 2011, at approximately 6:30 a.m., which, according to Navarre's testimony, was thirty minutes after Navarre and the defendant left to purchase drugs in Houston.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably

inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

In the instant case, the defendant was charged with possession of cocaine in excess of 400 grams, a violation of La. R.S. 40:967(F)(1)(c). To support a conviction for possession of cocaine, the State must present evidence establishing beyond a reasonable doubt that: (1) the defendant was in possession of the drug; (2) the defendant knowingly and intentionally possessed it; and (3) the amount possessed was "four hundred grams or more of cocaine or of a mixture or substance containing a detectable amount of cocaine or of its analogues as provided in Schedule II(A)(4) of R.S. 40:964." La. R.S. 40:967(F)(1)(c). Possession of narcotic drugs can be established by actual physical possession or by constructive possession. A person can be found to be in constructive possession of a controlled substance if the State can establish that he had dominion and control over the contraband, even in the absence of physical possession. **State v. Major**, 2003-3522 (La. 12/1/04), 888 So.2d 798, 802. Furthermore, guilty knowledge is an essential element of the crime of possession of cocaine. However, since knowledge is a state of mind, it need not be proven as fact, but rather may be inferred from the circumstances. **Major**, 888 So.2d at 803.

At trial, St. Tammany Parish Sheriff's Office Detective Jason Prieto testified he was on the DEA task force at the time of the offense and coordinated Navarre's monitored cocaine deliveries to the defendant and Johnson. Detective Prieto indicated due to "some miscommunication or a mistake on [his] part," he had originally thought Navarre and the defendant had traveled to Houston together, but he later determined they had actually traveled to Vinton together. Detective Prieto also indicated he had written a report indicating, "The CI stated he or she traveled to Houston, Texas early that day and was followed, in a separate vehicle, by a black

male from Slidell area and it was [the defendant]. The CI advised [the defendant] to follow him or her to Houston for the purpose of purchasing four kilos of cocaine from unknown individuals." Additionally, Detective Prieto indicated he had signed a report indicating "[the defendant] was also found in possession of drug proceeds, amounting $12,040, which was seized," but he had not written the report.

Michelle Patton testified she worked in the Top Fuel on the corner of U.S. Highway 190 and Thompson Road, but was not there on March 15, 2011. She had, however, reviewed the surveillance tape from that day. She stated the tape showed the defendant meeting with a man in another vehicle at the gas pumps and that "the other guy" (who was not the defendant) threw a duffle bag in the back window of the defendant's vehicle. She denied seeing anything placed into the vehicle from which the duffle bag had been taken. On cross-examination, Patton conceded she did not know whether or not the defendant had instructed "the other guy" to throw the duffle bag into the back of the defendant's vehicle.

Vincent Ocampo testified he was working at the Top Fuel Gas Station on U.S. Highway 190 and Thompson Road in March of 2011. He indicated the surveillance tape for March 15, 2011 had been "cleaned up" when the hard drive cleaned itself, but he had reviewed the tape before it was erased. He claimed while "the exchanges were done," the bag was thrown in the back window of one of the vehicles. On cross-examination, Ocampo conceded he did not know what was said in the three-minute conversation between the men on the surveillance tape, which occurred before the bag was allegedly thrown into the vehicle.

Sabrena Hamilton testified she was the wife of the defendant. She claimed she was in Baton Rouge on March 15, 2011, and called the defendant at approximately 6:30 a.m. According to Sabrena Hamilton, the defendant indicated he was getting two of their children ready for school and was going to take them to the bus stop.

When Navarre was asked what time he and the defendant had left St. Tammany Parish to travel to Vinton, he answered "that morning about 6:00, I think."

After a thorough review of the record, we are convinced the evidence presented herein, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession of cocaine in excess of 400 grams and the defendant's identity as a perpetrator of that offense. The verdict rendered in this case indicates the jury rejected the defendant's theory that the drugs belonged to Navarre, rather than him. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. Further, the verdict rendered against the defendant indicates the jury accepted the testimony of Navarre and rejected contradictory testimony, if any, from other witnesses. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this Court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Additionally, in reviewing the evidence, we cannot say that the fact finder's determination was irrational under the facts and circumstances presented to him. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting 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 fact finder. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*).

This assignment of error is without merit.

DENIAL OF CONTINUANCE

In assignment of error number 2, the defendant argues the trial court abused its discretion in denying his motion to continue, filed on October 10, 2011, because the time between counsel's enrollment and the commencement of trial was so minimal as to shock the conscience and call into question the basic fairness of the proceedings.

The granting or denial of a motion for continuance rests within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of a clear abuse of discretion. **State v. Albert**, 96-1991 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1360.

On October 10, 2011, the day of trial, the defendant moved for a continuance. (R. 38). He alleged he had filed a supplemental motion for discovery, requesting extremely material evidence. The supplemental motion for discovery, also filed October 10, 2011, requested "[a]ny and all documents, statements and recordings, particularly any and all surveillance video footage from the Top Fuel Gas Station located at 2297 Hwy 190, Slidell, Louisiana 70460, on March 15, 2011" and "[a]ny and all documents, statements and recordings, particularly any and all Radio Dispatch Logs in this matter."

At the hearing on the motion, the court noted it was the second time the matter had been set on the docket.[2] In regard to the request for the surveillance tape, the State indicated the Sheriff's Office had sent someone to attempt to obtain the tape. In regard to the request for radio dispatch logs, the State indicated no such logs existed

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[2] The case was originally set to begin trial on August 22, 2011. On motion of the defense, the trial was continued to September 19, 2011 and, thereafter, to October 10, 2011.

because no dispatches had been made to the scene prior to the arrest. Defense counsel, Peter John, indicated he had been retained around August 26, 2011, "the 404(B)" was filed on October 3, 2011, and the defense needed to draft a response. Additionally, he indicated he wanted to subpoena the cell phone records of the "co-defendant."[3] The State responded that the cell phone records "may or may not show anything" and "telling where the cell phone is without a SIM card, nobody can do that." Further, the State argued the cell phone records "are not going to show anything" because all of the calls were made once Navarre got close to St. Tammany Parish. Additionally, the State argued the drug transaction was on the "KEL tape," so there was no surprise to the defense even without the surveillance tape. The State also pointed out witnesses were coming from Texas and from Baton Rouge for the case. The court asked the defense if it was attempting to subpoena its own client's records to determine if they showed whether or not he traveled to Texas as alleged by the confidential informant, and the defense answered affirmatively. The court denied the request for continuance, noting that the issues raised by the defense could have been addressed at a pretrial conference "a month ago," and finding, in any event, that the claims regarding cell phone records did not appear relevant.

There was no clear abuse of discretion in the denial of the motion for continuance. The case relied upon by the defense—**State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832, 856-57—recognized that the denial of a motion for continuance on grounds of counsel's lack of preparedness normally does not warrant reversal unless counsel shows specific prejudice, but the specific prejudice requirement has been disregarded where the preparation time was so minimal as to call into question the basic fairness of the proceeding. The court in **Snyder** also held that when preparation time is unreasonably short, counsel has been diligent,

[3] There was no codefendant in this matter. Presumably, the defense was referring to Navarre.

and there is a general allegation of prejudice, denial of a motion for continuance is an abuse of discretion. **Snyder**, 750 So.2d at 856. Unlike the cases referenced in **Snyder**, where defense counsel had three days or less to prepare for trial, defense counsel herein was enrolled in the case approximately six weeks prior to trial. Further, the motion for continuance was based on the need to obtain supplemental discovery. The supplemental motion for discovery requested surveillance footage that no longer existed and radio dispatch records that never existed. The cell phone records mentioned at the hearing, which may or may not have been relevant, were always available to the defense because they were the defendant's records.

This assignment of error is without merit.

IMPROPER ADMISSION OF EVIDENCE

In assignment of error number 3, the defendant argues the trial court erred in allowing evidence to be admitted that he was in possession of six cell phones at the time of the offense because that evidence was irrelevant, highly prejudicial, and without proper foundation.

On redirect examination, the State asked Detective Prieto how many cell phones were obtained from the defendant, and he replied, "I believe there were six, six phones in his car." At the bench, the defense stated, "[t]his line of questioning, Counsel has gone with, I'm going to pass to have the opportunity to take a shot at impeach because of this cell phones. So if we're going to continue going into that, I'm going to establish that some of those phones came from the shed, an old car and other places; not to what you said, that he seized them from my client." The court advised the defense that if it wanted to object that the evidence regarding the cell phones was outside the scope of cross-examination, the court would sustain the objection and order the last comment of Detective Prieto stricken from the record. The defense replied, "[o]r let him ask it and I can clean it up if I'm allowed to ask him some questions."

The defendant failed to object to the challenged testimony. Accordingly, he failed to preserve the issue of Detective Prieto's improper testimony, if any, for review. See La. Code Evid. art. 103(A)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection ... appears of record, stating the specific ground of objection"); La. Code Crim. P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence"). The grounds for objection must be sufficiently brought to the court's attention to allow it the opportunity to make the proper ruling and prevent or cure any error. See **State v. Trahan**, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 704.

This assignment of error is without merit.

MOTION FOR MISTRIAL

In assignment of error number 4, the defendant argues the trial court erred in denying the motion for mistrial after Deputy Boynton testified concerning the drug transaction.

Louisiana Code of Criminal Procedure article 770 provides:

> 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:
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> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;
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> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
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> (3) The failure of the defendant to testify in his own defense; or
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> (4) The refusal of the judge to direct a verdict.
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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.

Additionally, La. C.C.P. art. 771 provides, in pertinent part:

> In the following cases, upon the request of the defendant ... the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
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> . . .
>
> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
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> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by La. Code Crim. P. arts. 770 or 771. La. Code Crim. P. art. 775. A mistrial is a drastic remedy which should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for a mistrial will not be disturbed on appeal without an abuse of that discretion. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

On rebuttal, the State presented testimony from St. Tammany Parish Sheriff's Office Detective Julie Boynton. She testified she was part of the surveillance team that participated in the arrest of the defendant on March 15, 2011. She was parked close to the defendant's vehicle during the incident. She testified Navarre walked over to the defendant's vehicle and spoke to the defendant. The State then asked, "[w]hat happened after that?," and the defense

asked for a side bar. The defense argued Detective Boynton's name was never disclosed to the defense, complained of "trial by ambush," and moved for a mistrial. The trial court ruled it would strike the testimony of Detective Boynton. Thereafter, the court instructed the jury:

> Ladies and gentlemen, I will direct you to – or direct the record to be the testimony of this witness will be stricken from the record and you're not to contemplate or consider any of the testimony given by this previous witness.

There was no abuse of discretion in denying the motion for mistrial. Presentation of testimony from Detective Boynton did not provide a basis for a mandatory mistrial under La. Code Crim. P. art. 770. At most, the testimony from this undisclosed witness implicated the discretionary mistrial provisions of La. Code Crim. P. art 771(2) as "irrelevant or immaterial and of such a nature that it might create prejudice against the defendant... in the mind of the jury." Consistent with Article 771, the trial court promptly admonished the jury to disregard Detective Boynton's testimony. Additionally, under Article 775, the challenged testimony did not make it impossible for the defendant to obtain a fair trial. The defense objected before Detective Boynton made any reference to the defendant accepting the drugs from Navarre or paying him for them, and her testimony placing him at the gas station was cumulative of other evidence at trial.

This assignment of error is without merit.

MOTION FOR NEW TRIAL

In assignment of error number 5, the defendant argues the trial court erred in denying his motion for new trial based on posttrial discovery of cell phone records which "eviscerate[d] the credibility of [Navarre]."

La. Code Crim. P. art. 851, in pertinent part, provides:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

> The court, on motion of the defendant, shall grant a new trial whenever:
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> . . .
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> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing: (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it would probably have produced a different verdict. **State v. Smith**, 96-0961 (La. App. 1st Cir. 6/20/97), 697 So.2d 39, 43. In evaluating whether or not the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different from that rendered at trial. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Maize**, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

The defendant was convicted on October 12, 2011. On September 7, 2012, he moved for a new trial alleging "[n]ew and material evidence." On January 14, 2013, he filed a supplemental motion for new trial, alleging the September 7, 2012 motion was based on receipt of his phone records from Verizon Wireless, and the supplemental motion was based on the receipt of the phone records of Navarre. The supplemental motion set forth:

> Like the records previously submitted to the Court as part of Defendant's Motion for New Trial, the instant Sprint records bear strongly on Navarre's credibility as well as demonstrate that the State's factual contentions at trial – namely that Navarre and

> Defendant conspired to purchase narcotics from the Houston area and travel, in tandem, through Louisiana – are patently false.

At the hearing on the motion, the defense stated it had subpoenaed two witnesses, both cell phone records custodians, but the representative from Sprint was testifying at another trial in Tulsa, Oklahoma. The defense offered to proffer the substance of the testimony from the unavailable witness.

In the proffer, the defense set forth that the Verizon Wireless records concerned the defendant's cell phone, and Jasmine Tell would have testified the records were kept in the ordinary course of business and indicated "[the defendant] and [the defendant's] cell phone were in the St. Tammany Parish area the entire 24-hour day of March 15, 2011; the very same time that [the defendant] was said to have been travelling from Covington, to Houston, back to Covington, and purchasing drugs." The defense also set forth in the proffer that the Sprint records concerned Navarre's cell phone, and Debra Lewis would have testified the records were kept in the ordinary course of business and indicated Navarre's phone calls on the morning of March 15, 2011, and continuing into the afternoon, originated from the Houston area and indicated he traveled in an eastward direction that day.

Additionally, in the proffer, the defense set forth: Natalie Perkins would have testified that on the morning of March 15, 2011, the defendant was at her residence providing lawn care; Demetrius Smith would have testified that on March 15, 2011, the defendant went to Smith's address with approximately $12,000 in an unsuccessful attempt to salvage and prevent foreclosure of Smith's property; and Casey Johnson would have testified that prior to March 15, 2011, he had neither met, nor spoken to the defendant.

The State argued, regardless of what the records showed, there was no doubt that the defendant had in his possession multiple kilograms of cocaine and gave Navarre $12,500 for the drugs. The State also argued there were multiple cell

phones in the case, and anything that happened before the drug deal with the cell phones was irrelevant and would have nothing to do with the verdict. The court noted the issue was whether the new evidence was so material that it ought to produce a different result than the verdict that was reached by the jury that heard the testimony of the various witnesses at trial. The court found multiple cell phones were involved in the case, and the evidence offered in support of the motion for new trial failed to reach the threshold for the granting of the motion, and thus, the motion was denied.

There was no clear abuse of discretion in denying the motion for new trial based on newly discovered evidence. Newly discovered evidence affecting only a witness's credibility ordinarily will not support a motion for a new trial, because new evidence which is merely cumulative or impeaching is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial. **State v. Johnson**, 98-1407 (La. App. 1st Cir. 4/1/99), 734 So.2d 800, 808, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439.

This assignment of error is without merit.

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

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.