

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2012 KA 1785**

**STATE OF LOUISIANA**

**VERSUS**

**PATRICK D. JAMES**

*Handwritten signatures: JMC, WJH, TAJ*

**Judgment Rendered:** JUN 07 2013

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On Appeal from the Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
No. 518531

Honorable Allison H. Penzato, Judge Presiding

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**BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.**

**McCLENDON, J.**

Defendant, Patrick D. James, was charged by bill of information with one count of possession with intent to distribute a schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967A(1) (count one), and one count of introduction of contraband into a penal institution, a violation of LSA-R.S. 14:402 (count two). He pled not guilty. The state nol-prossed the charge on count two and proceeded to trial on count one only. After a jury trial, defendant was convicted of the responsive offense of possession of cocaine, a violation of LSA-R.S. 40:967C. The trial court subsequently denied defendant's motion for post-verdict judgment of acquittal. The state filed a habitual offender bill of information alleging defendant to be a fourth-felony habitual offender.<sup>1</sup> Defendant stipulated to the allegations of the habitual offender bill of information and, accordingly, the trial court adjudicated him to be a fourth-felony habitual offender. The trial court sentenced defendant to twenty years at hard labor, without benefit of probation or suspension of sentence. Defendant now appeals, alleging two assignments of error regarding his jury's non-unanimous verdict. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence.

**FACTS**

On December 30, 2011, defendant was processed into the St. Tammany Parish Jail from a halfway house. He was housed in the K Dorm, a pre-trustee area where inmates wait to be assigned a job. On December 31, 2011, correctional officers performed a "shakedown" of the K Dorm to search for contraband. Correctional Officer James Wigstrom searched defendant's belongings and discovered a rip in the pillow of his mattress. Upon further examination of the tear, Officer Wigstrom found a hard, rock-like substance

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<sup>1</sup> The predicate felony offenses alleged in this habitual offender bill of information were: 1) a December 5, 2006 conviction, under docket number 414498 in St. Tammany Parish, for second-offense possession of a schedule I controlled dangerous substance (marijuana), a violation of LSA-R.S. 40:966E(2); 2) a November 13, 2007 conviction, under docket number 435249 in St. Tammany Parish, for possession of a schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967C; and 3) a July 27, 2011 conviction, under docket number 508784 in St. Tammany Parish, for possession of a schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967C.

wrapped in clear plastic. Chemical testing revealed the substance to be 4.22 grams of crack cocaine.

At trial, the state introduced surveillance videos depicting defendant's intake into the jail. One video showed that while defendant was searched upon his arrival to the jail, his mesh bag of belongings was not. Further, an additional video appeared to show defendant, having been left alone, exchange his assigned mattress for a mattress with a large tear on its rear. After deliberating, the jury returned a non-unanimous conviction for possession of cocaine.

### **NON-UNANIMOUS JURY VERDICT**

In two related assignments of error, defendant argues that Louisiana Constitution Article I, § 17(A), that allows for non-unanimous jury verdicts, violates the right to a jury trial and the right to equal protection of the laws guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.<sup>2</sup> Specifically, defendant argues that the enactment of its source provision in the Louisiana Constitution of 1898 was motivated by an express and overt desire to discriminate on account of race.

Possession of cocaine with intent to distribute is punishable by imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 40:967B(4)(b). Article I, § 17(A) and Louisiana Code of Criminal Procedure article 782A provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a non-unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972);

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<sup>2</sup> We question whether the defendant properly raised the issue in the court below, reserving it for appellate review, because he did not file any pretrial or posttrial motions to declare the complained-of provision to be unconstitutional. Nevertheless, out of an abundance of caution, we will address the merits of these assignments of error.

**State v. Belgard**, 410 So.2d 720, 726-27 (La. 1982); **State v. Shanks**, 97-1885 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 164-65.

This court and the Louisiana Supreme Court have previously rejected the argument raised in defendant's assignments of error. See **State v. Bertrand**, 08-2215, 08-2311 (La. 3/17/09), 6 So.3d 738, 742-43; **State v. Smith**, 06-0820 (La. App. 1 Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352. In **Bertrand**, the Louisiana Supreme Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.<sup>3</sup> Moreover, the **Bertrand** court rejected the argument that non-unanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also rejected that argument in **Apodaca**.<sup>4</sup> Although **Apodaca** was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 6 So.3d at 742-43. Thus, Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782A are not unconstitutional and, therefore, not in violation of defendant's federal constitutional rights.

Accordingly, these assignments of error are without merit.

### **CONCLUSION**

For the foregoing reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

### **CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.**

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<sup>3</sup> In **Bertrand**, the court only considered Article 782, while defendant in the instant case attacks Article I, § 17(A) itself. We find this approach to be a distinction without a difference because Article 782 closely tracks the language of Article I, § 17(A).

<sup>4</sup> **Apodaca** involved a challenge to the non-unanimous jury verdict provision of Oregon's state constitution. **Johnson v. Louisiana**, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with **Apodaca**, also upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.