NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1560

STATE OF LOUISIANA

VERSUS

CLYDE EDWARD SMITH

TMH

Judgment Rendered: MAY - 2 2014

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On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne ,
State of Louisiana
Trial Court No. 600,641

Honorable David W. Arceneaux, Judge Presiding

* * * * *

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J. Theriot, concurs

* * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

The defendant, Clyde Edward Smith, was charged by amended bill of information with the following counts: count (I) possession with intent to distribute a Schedule II controlled dangerous substance (Hydrocodone) in violation of La. R.S. 40:967(A); count (II) possession with intent to distribute a Schedule IV controlled dangerous substance (Alprazolam); and count (III) possession with intent to distribute a Schedule IV controlled dangerous substance (Carisoprodol) violations of La. R.S. 40:969(A). The defendant pled not guilty to all counts. Following a jury trial, the defendant was found guilty as charged on counts I and II, and guilty of the responsive offense of attempted possession with intent to distribute Carisoprodol on count III, a violation of La. R.S. 40:969(A) and La R.S. 40:979, See also La. R.S. 14:27. Subsequent to trial, the state filed a habitual offender bill of information against the defendant, alleging he was a third-felony habitual offender on all counts. The defendant was adjudicated a third-felony habitual offender on all counts.

The trial court sentenced the defendant on November 18, 2011. On count (I), the defendant was sentenced to thirty years at hard labor without benefit of probation or suspension of sentence. On count (II), the defendant was sentenced to ten years at hard labor without benefit of probation or suspension of sentence. On count (III), the defendant was sentenced to five years at hard labor without benefit of probation or suspension of sentence. These sentences were ordered to run concurrently.

The defendant now appeals urging four assignments of error:

1. The evidence adduced at trial was insufficient to sustain the defendant's convictions beyond a reasonable doubt;
2. The trial court abused its discretion in denying the defendant's **Batson** challenge to the prosecution's exclusion of African-American jurors;

3. The trial court erred in denying the defendant's motion in limine to exclude the state's introduction of a "gangster rap" video in which the defendant is heard rapping about traveling to Texas to purchase prescription drugs to re-sell; and
4. The defendant's total sentence of thirty years at hard labor under La. R.S. 15:529.1 was constitutionally excessive.

For the following reasons, we affirm the convictions, habitual offender adjudications, and sentences on all counts.

FACTS

On December 23, 2010, Louisiana State Trooper, Christopher Mason, was stationed in his vehicle observing traffic while he was parked in the median of U.S. Highway 90 near LA Highway 311 in Terrebonne Parish. As Trooper Mason noticed a car traveling at a high rate of speed, he activated his radar and it indicated the car was going 89 miles-per-hour in a 70 miles-per-hour speed zone. He then made a traffic stop on the shoulder of Highway 90. After exiting his vehicle, Trooper Mason approached the driver's side of the car and advised the driver to exit and step to the rear of the car. Trooper Mason observed four occupants in the car. After exiting the car, the driver put his hands up in the air without being requested. Trooper Mason testified that this raised his suspicions, so he restrained the driver. The driver was identified as the defendant, Clyde Smith. The defendant told Trooper Mason that he was coming from Port Arthur, Texas. Trooper Mason then called for another trooper to assist him at the scene. Trooper Mason spoke with the other occupants of the car and was told that they were coming from Houston, Texas.

Louisiana State Trooper Michael Stewart later arrived on the scene. Trooper Stewart observed the passengers in the car and briefly spoke to Trooper Mason. The passenger in the front seat was identified as Ashley DeHart. She indicated that she was the owner of the car. Ms. DeHart consented to a search of the vehicle,

which was then conducted by Trooper Stewart. A black backpack was removed from the car and searched. Inside of the backpack were multiple bottles of medication, flyers and directions to numerous doctors' offices and pharmacies in the Houston area. Contained in the bottles were Hydrocodone, Alprazolam, Carisoprodol and other pills determined to be vitamins and a laxative. Some of the bottles were labeled as written for the defendant, and others were labeled as written for two other occupants of the car, namely Ms. DeHart and Jason W. Pierce. The owner of the backpack was determined to be the defendant. The defendant was arrested and transported to State Police Troop C.

State witness Jason Pierce testified he and the defendant had gone to Texas on December 23, 2010 to obtain prescription medication for the purpose of distribution. He and the defendant saw different doctors and purchased medication at multiple pharmacies. Pierce testified he and the defendant had been to Texas on prior occasions to buy pills.

The defendant testified at his trial. He claimed he had been shot in the face at an earlier time from which he suffers pain. He claimed he had a legal prescription and that he took hydrocortisone for his pain, and either Soma or Xanax for anxiety. He also claimed that he only knew that his medication was in his backpack when he was initially detained. He further claimed the instant trip was the only time he had gone to Texas with Jason Pierce and Ashley DeHart.

State witness, Jason Pierce testified that he and the defendant had gone to Texas on December 23, 2010 to obtain prescription medication for the purpose of distribution. He and defendant saw different doctors and purchased medication at multiple pharmacies. Pierce testified he and the defendant had been to Texas on prior occasions to buy pills.

SUFFICIENCY OF EVIDENCE

In assignment of error number one, the defendant argues that there was insufficient evidence to convict him of possession with intent to distribute the

medications found in the car. His argument is that he had lawfully obtained the medications from a licensed medical practitioner and was returning to his residence at the time of his arrest. The defendant contends that the only evidence showing his intent to distribute came from the testimony of Jason Pierce and from statements made by the defendant in a rap video performance.

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 identity of the perpetrator of that crime beyond a reasonable doubt. 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. 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 So2d 732 (quoting La. R.S. 15:438). 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.

The instant convictions arise under La. R.S. 40:967(A) and La. R.S. 40:969(A). Under those statutes, it shall be unlawful for any person knowingly or intentionally to possess with intent to distribute any controlled dangerous substance classified under certain schedules listed under La. R.S. 40:964.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in the light most favorable to the state,

could find the evidence proved beyond a reasonable doubt, as to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession with intent to distribute Hydrocodone and Alprazolam and attempted possession with intent to distribute Carisprodol, and the defendant's identity as the perpetrator of those offenses. The jury rejected defendant's claim of lack of intent to distribute the substances found in his backpack. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls. Therefore, the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). The defendant has shown no such hypothesis exists in this case.

The guilty verdicts indicate the jury accepted the testimony of the state's witness, Jason Pierce, over that of the defendant. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The fact finder may accept or reject, in whole or in part, the testimony of any witness. Moreover, 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 evidence, not its sufficiency. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. After review of the evidence presented, this Court cannot say the jury's determination was irrational under the facts and circumstances presented. 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 jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

BATSON CHALLENGES

In assignment of error number two, the defendant argues the trial court abused its discretion in denying the defendant's **Batson** challenge to the prosecution's exclusion of African-American jurors. In **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court adopted the following three-step analysis to determine whether or not the constitutional rights of a defendant or prospective jurors had been infringed by impermissible discriminatory practices. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 795.

The **Batson** explanation does not need to be persuasive. Because a trial judge's findings pertaining to purposeful discrimination turn largely on credibility evaluations, such findings ordinarily should be entitled to great deference by a reviewing court. Reasons offered to explain the exercise of peremptory challenges should be deemed race-neutral unless a discriminatory intent was inherent in those reasons. **Elie**, 936 So.2d at 795-96.

For a **Batson** challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result must ultimately be traced to a racially discriminatory purpose. Thus, the sole focus of the **Batson** inquiry is upon the intent of the prosecutor at the time he exercised his peremptory strikes. **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 287.

Initially, we note a problem with the record in addressing this issue on appeal. There is no designation of the race of the potential jurors except for a few comments by the attorneys in voir dire and arguments to the court. The only

instance where the potential juror's race was recognized is the defendant's attorney noting in a discussion with the court for the record that prospective juror Lonigan Valentine was black. There was also a dialog during voir dire in which the prosecutor spoke with prospective jurors. The following exchange took place:

> **Mr. Degate** (The prosecutor): The last question I have is a difficult subject but it's one that I'm duty bound to discuss, and that's the issue of race. Obviously I'm a white prosecutor and the defendant appears to be a black male. Because of that situation, because of race, the question that I have is whether or not that will cause you any biases in your decision whatsoever? Maybe you feel that the [s]tate is out to get the defendant because he is of a particular race. And I apologize for having to ask this question, but I have to do it to make sure I can get a fair jury. So, Mr. Ray, since I picked on you earlier you appear to be an African-American male. Would that cause you
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> **Mr. Ray** (juror): I can take it.
>
> **Mr. Degate**: Would that cause you any biases whatsoever?
>
> **Mr. Ray**: No.
>
> **Mr. Degate**: All right. Ms. Burns?
>
> **Ms. Burns** (juror): No.
>
> **Mr. Degate**: All right. Mr. Celestine?
>
> **Mr. Celestine** (juror): No.
>
> **Mr. Degate**: All right. And I take you all at your word. The flip side, anybody who's not an African-American on the jury would that cause you any biases in this case?"

(No responses)

Despite the difficulties in determining the racial makeup of the jury venire, we note that the trial court indicated that it would assume for the purposes of the challenge that there was a pattern of striking black potential jurors. This ruling was made at the time of the first **Batson** challenge. When we look at the trial court's statement, coupled with the portions of the record shown above, we can conclude the first prong of the **Batson** requirements has been met. The state was then required to provide race-neutral explanations for using peremptory challenges when objections were made by the defendant.

The defendant has argued the use of peremptory challenges on prospective jurors Nakita Williams and Lonigan Valentine were improper. Ms. Williams and Mr. Valentine were included on the second panel called for voir dire. Nakita Williams responded to questioning by the court that she was 25 years old, unmarried and worked in customer service at Home Depot. In response to questions from the prosecutor, Ms. Williams indicated her personal beliefs would give her reservations about judging the guilt or innocence of someone. When the trial court asked her if she might actually vote not guilty even if the state proved its case, she answered "I might." After further questioning, she indicated she would follow the law presented to her by the court. When the state exercised a peremptory challenge, a **Batson** objection was made by the defendant. After being asked by the trial court to give a race-neutral reason for why a peremptory challenge was being used against Ms. Williams, the state indicated it was because of her answer to the question of whether she would enter a verdict of guilty. The court denied the objection and found the challenge to be race-neutral, saying "He (the prosecutor) says it's because of her hesitancy in her willingness to convict the defendant even if the [s]tate proves its case beyond a reasonable doubt because of her initially expressed fears that defendant might have to go to jail and her initially expressed reservations about judging people."

Lonigan Valentine stated he worked for Gas & Supply in Houma as a truck driver. He was 50 years old and unmarried. In the voir dire conducted by the state, the jury panel was asked "Has anybody had a family member or someone that you would consider close to you, or yourself, arrested for a crime?" The state then further inquired "Anyone else ever been arrested for a crime personally or issued a misdemeanor summons, other than a traffic ticket?" Mr. Valentine did not respond to either of these questions. The defendant made a **Batson** objection when the state excused Mr. Valentine with a peremptory challenge. The race-neutral reason given for the challenge was that Mr. Valentine had not been truthful when

he failed to offer that he had been charged with simple battery and issued a summons in 2009. During a bench conference, a review of the District Attorney's records was done by the trial court and counsel for the defendant. The court and both parties noted the existence of the charge and summons. After this review, the trial court found this to be a reasonable basis for the exercise of the peremptory challenge.

We find the trial court did not abuse its discretion in denying the **Batson** challenges against prospective jurors Williams and Valentine. The defendant failed to prove purposeful discrimination, and the state articulated verifiable and legitimate explanations for striking these minority prospective jurors.

The defendant's brief also discusses the exercise of peremptory challenges by the state to Ms. Geraldine Boudreaux and two additional unidentified African-American jurors. The record shows no **Batson** objections were made by the defendant to any potential jurors other than Ms. Williams and Mr. Valentine. Defendant admits this in his own brief. However, we recognize that a **Batson** objection is **timely** if it is made before the jury is empaneled and sworn. **State v. Green,** 655 So.2d at 285; **State v. Williams,** 524 So.2d 746 (La. 1988) (per curium); see also La. Code Crim. P. art. 795B(1) (mandating that "[p]eremptory challenges shall be exercised prior to the swearing of the jury panel"). The issue of the timeliness of **Batson** objections is difficult because a pattern of discrimination may not become evident in early stages of voir dire. While counsel should preferably make the objection as soon as the discriminatory pattern is evident, contemporaneous objections are not always feasible because a pattern of invidious discrimination may not be evident until jury selection is complete. **State v. Duncan**, 99-2615 (La. 10/16/01), 802 So.2d 533, 546, cert. denied, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002).

In the instant case, the defendant made a "global objection"[1] after the state used a peremptory challenge on Ms. Williams. Our review of the record shows counsel for defendant asked no individual questions to Ms. Boudreaux in voir dire. No objection was made by defendant at the time the state exercised the peremptory challenge to her inclusion on the jury. Despite no objection being made, the state indicated the challenge was being made because Ms. Boudreaux was employed at the Terrebonne Addictive Disorders Clinic (TADAC).

We note from the record the trial court conducted an introductory colloquy with Ms. Boudreaux when her panel was first questioned on voir dire. At that time, Ms. Boudreaux related her employment status and indicated that she possibly knew some of the people in the courtroom through her work. The state then carried out a lengthy voir dire with Ms. Boudreaux. We note with particularity Ms. Boudreaux's testimony that she would like to serve and be unbiased but was not sure she could. She related she wanted to be honest and stated, "I do this every day and we hear all, everything." The trial court also did not abuse its discretion in denying the objection to the peremptory challenge against Ms. Boudreaux. The defendant failed to prove purposeful discrimination, and the state articulated a verifiable and legitimate explanation for striking this minority prospective juror.

This assignment of error is without merit.

PREJUDICIAL EFFECT

In assignment of error number 3, the defendant claims that the trial court erred in denying the defendant's motion in limine to exclude the state's introduction of "gangster rap" videos in which the defendant is heard rapping about traveling to Texas to purchase prescription drugs to re-sell. On May 9, 2011, the state filed a notice of its intent to use an inculpatory statement in accordance

[1] See **State v. Duncan**, 802 So.2d at 545-46.

with La. Code Crim. P. art. 768.[2] The notice showed the state intended to offer statements contained in the state's file. A copy of the file had been made available to the defendant through open-file discovery. The notice also stated "Additionally, the [s]tate intends to introduce into evidence all statements in the recordings set forth on or in the enclosed compact disc or DVD." The defendant filed a motion in limine seeking to exclude the material from being introduced into evidence, citing La. Code Evid. art. 403, which states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. **State v. Hills**, 99-1750 (La. 5/16/00), 761 So.2d 516, 520. Under La. Code Evid. art. 404(B)[3], evidence of other crimes, wrongs, or acts is not admissible to show a person acted in conformity therewith. The article does contain certain exceptions to the general rule allowing admission for other purposes. Among these other purposes are proof of motive, opportunity, intent, preparation, plan, or knowledge. Any inculpatory evidence is "prejudicial" to the defendant, especially when it is "probative" to a high degree. As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior

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[2] "Unless the defendant has been granted pretrial discovery, if the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence."

[3] "La. Code Evid. art. 404(B) provides:

> **Other crimes, wrongs, or acts.** (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

misconduct only when it is unduly and unfairly prejudicial. **State v. Germain**, 433 So.2d 110, 118 (La. 1983); see also **Old Chief v. United States**, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder in declaring guilt on a ground different from proof specific to the offense charged.") **State v. Rose**, 2006-0402 (La. 2/22/07), 949 So.2d 1236, 1244.

Logically, it falls to the trial court in its gatekeeping function to determine the independent relevancy of such evidence and balance its probative value against its prejudicial effect. See La. Code Evid. art. 403; **Huddleston v. United States**, 485 U.S. 681, 690–91, 108 S.Ct. 1496, 1502, 99 L.Ed.2d 771 (1988). Upon finding such relevance, the court must then balance all the pertinent factors weighing in favor of and against its admissibility. See C. McCormick, *Evidence* § 190, 768 (6th ed. 2006). In this analysis, the court seeks to answer the question: Is this evidence so related to the crime on trial or a material issue or defense therein that, if admitted, its relevancy will outweigh the prejudicial effect, which the defendant will necessarily be burdened with?

The trial court's answer to this question and its corresponding ruling on the admissibility of the additional other crimes evidence will not be disturbed absent an abuse of discretion. **State v. Garcia**, 2009-1578 (La. 11/16/12), 108 So.3d 1, 39, cert. denied, **Garcia v. Louisiana**, ___ U.S. ___, 133 S.Ct. 2863, 186 L.Ed.2d 926 (2013).

At the hearing on the motion in limine, the state provided the court with a compact disc containing three rap videos and a "behind the scenes" video made by the defendant and other individuals. The state had taken the videos from the internet website YouTube. The videos were performances made by a group which identified itself as the "Rico Gang." The defendant was the lead performer in one of the videos and one of the main "hosts" of the behind the scenes video. On the

disc, the videos are named "Rico – We Go Hard;" "Rico – I'm Ill;" "Rico – BMF Freestyle;" and "Rico – Behind Scenes." After the hearing on the motion in limine, the trial court ruled the state would only be allowed to introduce the last two videos, "BMF Freestyle" and "Behind Scenes." In allowing the evidence to be admitted, the trial court noted "the probative value of what is reflected by those two tapes, I think does outweigh any prejudice that might otherwise be present."

Among the inculpatory statements made in the "BMF Freestyle" video are the defendant saying in conjunction with another performer "We both go to Texas get it from the same people, The Rico gang selling coke and pills like its legal." The defendant later says "I think I'm Domino's, yeah, Pizza Hut, yeah, cause I deliver." Also included is the statement "another trip to Texas, b---- I'm going doctor shopping." In the "Behind the Scenes" video, the defendant states to the camera "And we really do that s--- we talk about. Like we really take those trips...." The probative value of the statements is clear.

It is self-evident that a party seeking to introduce evidence over an objection bears the burden of showing that it is relevant. However, it is equally self-evident that once that burden is met, the burden shifts to the party opposing the introduction of the evidence to show that the evidence is inadmissible under La. C.E. art. 403 because its probative value is substantially outweighed by its prejudicial effect. **State v. Jones**, 2003-0829 (La. App. 4th Cir. 12/15/04), 891 So.2d 760, 767, writ denied, 2005-0124 (La. 11/28/05), 916 So.2d 140.

In the instant case, state witness Jason Pierce testified he and the defendant had gone to Texas on December 23, 2010 to obtain prescription medication for the purpose of distribution. He and the defendant saw different doctors and purchased medication at multiple pharmacies. Pierce testified he and the defendant had been to Texas on prior occasions to buy pills. The defendant testified that the video statements were only meant as entertainment and touched "on those topics that I see that happen around me." The statements show proof of motive, intent,

preparation, plan, and knowledge. As such, the statements are admissible under La. Code Evid. art. 404(B). We note the trial court instructed the jury as follows:

> If you find that a defendant made a statement, you must also determine the weight or value that the statement should be accorded, if any. In determining the weight or value to be accorded a statement made by a defendant, you should consider all the circumstances under which the statement was made. In making that determination, you should consider whether the statement was made freely and voluntarily, without the influence fear, duress, threats, intimidation, inducement, or promises.

In the weighing of the conflicting testimony, the statements in the videos corroborate the testimony of the state's witness. There is ample evidence to show the jury did not base its decision only on the statements made by the defendant. The defendant has not shown an abuse of discretion by the trial court.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 4, defendant argues the sentence of thirty years at hard labor without benefit of probation or suspension of sentence imposed for his conviction on count I was constitutionally excessive. He does not challenge the sentences imposed on counts II and III.

Subsequent to the convictions in the instant case, but prior to sentencing, the state filed a bill of information to have the defendant declared a habitual offender on all counts. At the habitual offender hearing, the defendant agreed that he was the person involved in the previous offenses. Thereafter, the defendant was adjudicated a third-felony habitual offender. The trial court then imposed sentence under the provisions of La. R.S. 15:529.1(A)(3)(a), which, in pertinent part, provides:

> (3) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (a) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction;

On count I, the defendant was convicted of possession with intent to distribute a Schedule II controlled dangerous substance (Hydrocodone). The applicable penalty provision for a first conviction is contained in La. R.S. 40:967(B)(1), which, in pertinent part, states:

> (1) A substance classified in Schedule II ... which is a narcotic drug,[4] ... shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty years; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars.

The maximum sentence for a third-felony habitual offender under the pertinent statutes was sixty years at hard labor without benefit of probation or suspension of sentence.[5] The minimum sentence was twenty years hard labor without benefit of probation or suspension of sentence. The trial court imposed a sentence of thirty years at hard labor without benefit of probation or suspension of sentence.

Prior to imposing the sentence, the trial court considered the defendant's age, which was thirty-one years at the time. The trial court noted that although the defendant was adjudicated a third-felony offender for purposes of the habitual offender statute, he actually had four felony convictions since 1996. Of these, two involved violations of the controlled dangerous substance law, and two involved the attempted possession of a weapon. The trial court stated the defendant's behavior and convictions "indicate to the Court a conscious decision by [the defendant] to disregard the criminal laws of the State of Louisiana and engage in a consistent and deliberate pattern of criminal activity." We note that the defendant was convicted in this case as a distributor, not a user. We further note that drug

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[4] La R.S. 40:961 Definitions:

(26) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
(a) Opium, coca leaves, and opiates.

Hydrocodone is an opiate. See La. R.S. 40:964, Schedule II(A)(1)(l)

[5] See La. R.S. 15:529.1(G).

offenses are not victimless crimes. Indeed, as noted by the Louisiana Supreme Court, drug offenses affect not only the user, but society in general through higher medical costs, higher unemployment rates, loss of tax revenue from those unemployed, and associated crimes. Moreover, this Court will not set aside a sentence on the ground of excessiveness if the record supports the sentence imposed. La. Code Crim. P. art. 881.4(D). Considering the great discretion afforded to the trial court in fashioning the defendant's punishment and bearing in mind the nature of the crime, we find that the record provides ample justification for the sentence imposed on count I. The sentence is not grossly disproportionate to the severity of the offenses or shocking to the sense of justice and, therefore, is not unconstitutionally excessive.

The defendant argues in his brief that the trial court erred when it did not order a presentence investigation report ("PSI"). Ordering a presentence investigation report is discretionary with the trial court; there is no mandate that a PSI be ordered. See La. Code Crim. P. art. 875(A)(1) ("the court *may* order . . ."). Such an investigation is an aid to the court and not a right of the accused. The trial court's failure to order a PSI will not be reversed absent an abuse of discretion. **State v. Wimberly**, 618 So.2d 908, 914 (La. App. 1st Cir.), writ denied, 624 So.2d 1229 (La. 1993). In the present case, the trial court allowed the defendant to make a prolonged statement at his hearing on the motion for new trial and allowed defense counsel to argue and the opportunity to present a sentencing memorandum prior to imposing sentence. We find no abuse of discretion by the trial court.

This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the convictions, habitual offense adjudications and sentences on all counts.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS AND SENTENCES AFFIRMED.