NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KA 0961

STATE OF LOUISIANA

VERSUS

MELVIN OLIVER JAMES, JR.

Judgment Rendered: DEC 2 3 2015

VGW by [illegible]
JEW by [illegible]
[illegible]

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 529299-1

Honorable Martin E. Coady, Judge Presiding

* * * * * * * * * *

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* * * * * * * * * *

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

**WHIPPLE, C.J.**

The defendant, Melvin Oliver James, Jr., was charged by bill of information with possession with intent to distribute heroin, a violation of LSA-R.S. 40:966(A).[1] The defendant pled not guilty. The defendant filed motions to suppress the evidence and statement. Following a hearing, the motion to suppress both the drugs and the defendant's inculpatory statement was denied. Following a jury trial, the defendant was found guilty as charged. He was sentenced to twenty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and remand for resentencing.

## FACTS

On November 14, 2012, Detective Shane Wilkinson, with the St. Tammany Parish Sheriff's Office, received information from an anonymous caller, referred to by the detective as a source of information (SOI). The SOI told Detective Wilkinson that the defendant would be traveling from New Orleans to Slidell to sell heroin. According to the SOI, the defendant carried a gun. Detective Wilkinson contacted Detective Jason Prieto, who was with the St. Tammany Parish Sheriff's Office and assigned to the D.E.A. Task Force. Detective Prieto, in the New Orleans area, relayed the SOI's information to the officers on his team, who then set up surveillance on the defendant's house on Andry Street.

When the defendant left his house, he got into the passenger seat of a white Infiniti G37, which was driven by a female. Detective Prieto followed the car. The SOI continued to provide information to Detective Wilkinson. According to the SOI, the defendant would be traveling to the Kangaroo gas station in Slidell on Airport Road, where he would sell the heroin. As predicted by the SOI, the

[1]The defendant was also charged with disguising transactions involving drug proceeds, a violation of LSA-R.S. 40:1041(A). The State severed this count and proceeded to trial solely on the possession with intent to distribute heroin charge.

defendant arrived at the Kangaroo gas station in the Infiniti. Before any drug purchase was made, Detective Wilkinson, along with several detectives from the St. Tammany Parish Sheriff's Office, approached the car with guns drawn and removed the defendant and the driver. Detective Wilkinson observed a clear plastic bag containing a brown substance, later identified as heroin, in the door-handle recess on the inside of the passenger-side door. Detective Wilkinson seized the heroin and the defendant was placed under arrest. The defendant was searched, and another bag of heroin was found inside his pants pocket. The total amount of heroin was 8.52 grams.

The defendant did not testify at trial.

## ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to suppress the evidence. Specifically, the defendant contends: (1) there was not enough specific information from the tip to provide officers with reasonable suspicion to conduct an investigatory stop; and (2) there was no probable cause to search the vehicle.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 2009-1589 (La. 12/1/09), 25 So. 3d 746, 751. In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. State v. Chopin, 372 So. 2d 1222, 1223 n.2 (La. 1979).

The defendant argues in brief that the drugs seized should have been

suppressed because the information provided to the police by the anonymous tip (SOI) was vague and lacked any specific details except the identification of a house and that the defendant was heading to a gas station in Slidell. The defendant suggests there was "no corroboration of any illegal activity transpiring in or around the house." The defendant asserts, therefore, that based on the lack of corroboration of information provided by someone the police had never met, the "initial detention" of him at the gas station was not justified.[2] The defendant further contends that there was no probable cause to search the vehicle, and that no consent was given for the vehicle to be searched.

The Fourth Amendment to the federal constitution and Article I, § 5 of the Louisiana State Constitution protect people against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by LSA-C.Cr.P. art. 215.1, as well as by both state and federal jurisprudence. See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Reasonable suspicion for an investigatory detention is something less than probable cause and must be determined under the facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. The right to make an investigatory stop and question the particular individual detained must be based upon reasonable suspicion to believe that he has been, is, or is about to be engaged in criminal conduct. See State v. Belton, 441 So. 2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S. Ct. 2158, 80 L. Ed. 2d 543 (1984).

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[2]The defendant suggests in brief there must be a link between the crime suspected and what the person stopped was actually doing. In this case, according to the defendant, "the driver was simply speeding on the highway." The defendant then references pages 63, 249 through 250. There was no testimony at the motion to suppress (or trial) about the driver speeding, and the pages cited have nothing to do with speeding or the driver. This appears to be the result of an editing error.

An anonymous tip may provide reasonable suspicion for an investigatory stop if it accurately predicts future conduct in sufficient detail to support a reasonable belief that the informant had reliable information regarding the suspect's illegal activity. See Alabama v. White, 496 U.S. 325, 332, 110 S. Ct. 2412, 2417, 110 L. Ed. 2d 301 (1990). An anonymous tip may provide probable cause for an arrest. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); see State v. Gates, 2013-1422 (La. 5/7/14), 145 So. 3d 288, 297.

In White, 496 U.S. at 330-31, 110 S. Ct. at 2416, the Court stated:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams v. Williams*, *supra*, demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a *Terry* stop. 407 U.S., at 147, 92 S.Ct., at 1923-24. Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors–quantity and quality–are considered in the "totality of the circumstances–the whole picture," *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The *Gates* Court applied its totality-of-the-circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach applies in the reasonable-suspicion context, the only difference being the level of suspicion that must be established.

In White, 496 U.S. at 327, 110 S. Ct. at 2414-15, an anonymous caller informed police that Vanessa White would leave apartment 235–C Lynwood Terrace Apartments at a particular time, get into a brown Plymouth station wagon with a broken taillight, and drive to Dobey's Motel. The tip further provided she would be in possession of cocaine in a brown attaché case; accordingly, when

police officers proceeded to the apartment building and set up surveillance, they saw a woman, carrying nothing, get into a brown Plymouth station wagon parked in front of the 235 building. Id. The officers followed the vehicle and, when White reached a point just short of the motel, the police stopped her. White consented to a search of the vehicle, and marijuana was found in the attaché case. During processing at the police station, officers found cocaine in White's purse. Id. The Court held that the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of White's car. While not every detail mentioned in the tip was verified by police prior to the stop, the Court concluded that the informant's ability to predict White's future behavior, and police corroboration of significant aspects of the tip, were sufficient to furnish reasonable suspicion for the investigatory stop. Of particular significance to the Court was the informant's prediction of White's "future behavior." White, 496 U.S. at 331-32, 110 S. Ct. at 2416-17. While anyone could have "predicted" that a car precisely matching the caller's description would be parked in front of the 235 building, the general public would have had no way of knowing that White would shortly leave the building, get into the described car, and drive the most direct route to Dobey's motel. Emphasizing the insider quality of predictive information, the Court concluded that verification of the "innocent" aspects of the anonymous tip gave police reason to believe that the allegations of criminal activity were probably true as well. See White, 496 U.S. at 332, 110 S. Ct. at 2417; State v. Robertson, 97-2960 (La. 10/20/98), 721 So. 2d 1268, 1270.

Similarly, in the instant matter, Detective Wilkinson received information from an anonymous caller, or source of information (SOI), whom the detective had never met, that a man named Melvin, later identified as the defendant, would be traveling from New Orleans to the northshore to sell heroin. The SOI said the defendant was a tall, black male with long "dreads." The SOI provided

information about the description of the house on Andry Street where the defendant would be and the vehicle in which he would be traveling. Detective Wilkinson relayed this information to Detective Prieto, who was in the New Orleans area. Detective Prieto found the house on Andry Street in the 9th Ward. Detective Prieto confirmed the description by the SOI of the defendant and the house. The address given by the SOI was one digit off, but Detective Prieto testified at trial that he and his fellow officers were able to confirm that it was 1228 rather than 1218 Andry Street.

Detective Prieto, along with several officers, set up surveillance on the house. When there was no sign of the defendant leaving the house, the SOI informed Detective Wilkinson, who in turn relayed the information to Detective Prieto, that the defendant would not be leaving the house until a female who was at the house had left. Shortly thereafter, Detective Prieto relayed back information that a female had left the house. After some time had passed, the defendant had still not left. The SOI said the defendant was going to first walk his dog. Shortly thereafter, Detective Prieto announced that the defendant had left his house to walk his dog. The SOI then called or texted the defendant, who said he would shortly be leaving the house and going to the Kangaroo gas station on Airport Road to sell the heroin. Detective Prieto observed the defendant get into a white Infiniti, driven by a female. The detective followed the female driver, who drove to the Kangaroo gas station on Airport Road in Slidell. When she pulled into the parking lot, she did not go to a gas pump or to the front of the store to park; instead she went to the farthest end of the parking lot away from the store and parked along the curb.

Based on the foregoing, it is clear the SOI provided sufficient predictive information to establish reasonable suspicion for an investigatory stop. In Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), the Supreme Court extended Terry investigatory stops to automobiles. The SOI, who

apparently was communicating with the defendant in "real time," clearly had inside information and a special familiarity with the defendant's affairs. See Robertson, 721 So. 2d at 1270. Here, the SOI stayed in constant communication with Detective Wilkinson and continued to feed him information as events unfolded. As the Louisiana Supreme Court noted in State v. Carter, 2013-1952 (La. 12/2/13), 130 So. 3d 308, 311 (per curiam), "The informant did not merely provide the police with accurate information regarding the suspect's name and his intended destination via the intermediate stop in Monroe, and then disappear into the night." Instead, in finding that the informant's continued contact with the police was a significant factor bearing on the credibility of the informant and the reliability of his information, the Carter court opined, Id. at 311:

> The informant continued to stay in contact with the police as they acted immediately on the basis of the information he (or she) provided. Thus, when Sergeant Jordan took the cellular picture of defendant as he stepped from the bus in the Monroe Greyhound terminal and transmitted it, the informant immediately responded and confirmed defendant's identity. The informant's willingness to stay in contact with the police during the investigation offered additional assurance he was passing on trustworthy information and not just rumor or speculation, or worse, that might cause him trouble if the police found they were chasing after bad information.

The SOI in the instant matter also provided information that the defendant would be carrying a gun. During the investigatory stop, the police did not find a gun. The defendant in brief suggests the SOI's information was vague and lacked specificity because he provided the wrong address, and the defendant was not carrying a gun. This assertion is baseless. From the defendant's identity, to the house he was in, to a female leaving a house, to the defendant walking his dog, and to the defendant traveling to an identified gas station in Slidell, the SOI's information was highly specific and predictive. Nearly every aspect of the tip was independently verified before the police seized the defendant's drugs. See United States v. Walker, 7 F. 3d 26, 30-31 (2nd Cir. 1993), cert. denied, 510 U.S. 1169,

114 S. Ct. 1201, 127 L. Ed. 2d 549 (1994). Moreover, any misinformation provided by the SOI did nothing to diminish the specificity of his accurate information. See Carter, 130 So. 2d at 310-11 (finding the police had a reasonable basis for believing the unknown informant's tip was reliable despite the missing element from the informant's prediction, namely that Jeffery Carter would be waiting for the defendant in the parking lot of the bus terminal); State v. Aites, 2010-0667 (La. 5/28/10), 37 So. 3d 993 (per curiam) (finding the police had a reasonable basis for believing the anonymous tipster was reliable despite the tip being slightly inaccurate).

The defendant relies on Robertson, where the Supreme Court found there was no reasonable suspicion for an investigatory detention. In Robertson, 721 So. 2d at 1268-69, the police received an anonymous telephone call from a concerned citizen that an individual known as "Will," who drove a dark green Pontiac Grand Am with very dark tinted windows, was involved in the illegal sale of narcotics within the Magnolia Housing Development. The caller described Will as a black male, very dark complected, short, and having the appearance of a juvenile. The caller further stated that the described vehicle would be parked in the 2800 block of Magnolia Street when Will was not distributing narcotics. The police went to the location and identified a dark green Pontiac Grand Am with dark tinted windows parked in a driveway. When they observed the vehicle pull out of the driveway and begin to drive away, the officers followed the vehicle until it parked. The officers then approached the defendant and asked his name. The defendant identified himself and a canine unit was called to the scene where it alerted inside the vehicle. The police discovered a large plastic bag filled with crack cocaine underneath the ashtray.

The motion to suppress the evidence was denied, and the Robertson court reversed the Fourth Circuit. Finding that the tip coupled with the corroboration by

the police did not provide reasonable suspicion to stop the defendant, the Supreme Court, 721 So. 2d at 1270, made the following observations:

> [I]t is true that the officers were able to corroborate certain aspects of the anonymous tip, including defendant's name, his physical description and the location of the described vehicle. The tip, however, contained no predictive information from which the officers could reasonably determine that the informant had "inside information" or a "special familiarity" with defendant's affairs. In particular, the tip failed to predict the specific time period in which defendant would be engaged in illegal activity. It simply stated that drugs would be in the vehicle when not parked at a certain location. Because it is likely that defendant's use of the vehicle included non-illegal activity, the allegation that defendant would be engaged in illegal activity whenever the vehicle was moving was far too general. Since the tip did not provide sufficiently particular information concerning defendant's future actions, an important basis for forming reasonable suspicion was absent. The officers, therefore, lacked reasonable grounds to believe that the informant possessed reliable information about defendant's alleged illegal activities.

Robertson is distinguishable from the instant matter. In the case at hand, the caller, from surveillance to arrest, stayed in contact with the detectives and provided detailed information, including where the defendant would be traveling and what drugs he would be selling at a particular time and place. In Robertson, the caller described the vehicle, but provided no further predictive information; in fact, the caller described where the vehicle would be when the defendant was *not* selling drugs. Unlike the generalized information provided in Robertson, the caller in the case at hand provided information from which the detectives could reasonably determine that the SOI had "inside information" or a "special familiarity" with the defendant's affairs.

The defendant also argues in brief that the police did not have probable cause to search the vehicle. The heroin in the car was seized pursuant to the plain view doctrine; accordingly, probable cause was not required for seizure of the drugs. Detective Wilkinson testified at the motion to suppress hearing that in the gas station parking lot, he approached the car on the passenger side, where the defendant was sitting. The detective opened the door while other officers moved in

and removed the defendant from the car. In the recess of the door handle inside the passenger door, Detective Wilkinson saw a small, clear bag containing a brown, powdery substance. At this point, Detective Wilkinson had probable cause to believe the substance was heroin, and, as such, seized the package and indicated the defendant was under arrest. He also testified that he had training and experience in identifying heroin. More heroin on the defendant's person was then seized pursuant to a valid search incident to arrest. See State v. Surtain, 2009-1835 (La. 3/16/10), 31 So. 3d 1037, 1043.

Detective Wilkinson testified at the motion to suppress that the gas station was in a high-crime area. Detective Wilkinson and the other detectives at the gas station had information the defendant was getting ready to sell drugs, and regardless of the misinformation about the defendant having a gun, the police had no way of knowing this. Furthermore, guns and drugs frequently go hand-in-hand. State v. Warren, 2005-2248 (La. 2/22/07), 949 So. 2d 1215, 1229. See United States v. Trullo, 809 F. 2d 108, 113 (1st Cir. 1987), cert. denied, 482 U.S. 916, 107 S. Ct. 3191, 96 L. Ed. 2d 679 (1987). Detective Wilkinson could not know if any guns or other weapons were already inside of the car (not necessarily on the defendant's person); nor could they know if the driver herself was armed. Further, they could not know if the buyer coming to the scene would have been armed. This dangerous, highly unpredictable situation, fraught with many unknown variables, was in fact why the police intervened before any drug deal could be consummated. Detective Wilkinson elaborated on this during cross-examination at the motion to suppress hearing:

> Q. Now, at the gas station, y'all never made contact with the suspected buyer, correct? I mean, you didn't wait for the deal to go down and someone to show up?
> A. No, sir.
>
> Q. Okay. What was the reason for that? Y'all were just tired of waiting out there, or –

> A. No, sir. If this subject is supposed to have a firearm on him and we don't want something to happen in regards to an actual narcotics transaction to go where we have no control and we are not directly involved with it. If we can't monitor and understand that it's not going good and we can't move in, it's just not a good thing to do at that point.

Moreover, Detective Wilkinson did not need probable cause to open the car door; rather, with the reasonable suspicion he had acquired to make the investigatory stop, Detective Wilkinson had the authority to open the car door and order the defendant out of the car. In State v. Cure, 2011-2238 (La. 7/2/12), 93 So. 3d 1268, 1270 (per curiam), cert. denied, __ U.S. __, 133 S. Ct. 549, 184 L. Ed. 2d 357 (2012), our supreme court found that the detective had reasonable suspicion to initiate an investigatory stop of the vehicle and its occupants, and that he and another detective also had the authority to order both the driver and the passenger to step out of the car, even assuming they lacked any particularized and articulable basis for believing that the occupants posed a risk to their safety. The court then found in Cure, 93 So. 3d at 1271, that:

> Given [the detective's] lawful authority to order the occupants out of the car, we fail to see how her act in opening the door of the Camry, thereby asserting unquestioned command of the situation, even marginally increased the degree of intrusiveness on the privacy interests of the driver occasioned by the officer's direct order to exit the vehicle. [The detective] did not attempt to enter the vehicle physically, and one way or the other, the door would open, thereby exposing the interior of the vehicle, including what the driver ... had on his lap.

Under the plain view doctrine, if police are lawfully in a position from which they view an object that has an incriminating nature that is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. Horton v. California, 496 U.S. 128, 136-137, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112 (1990); State v. Leger, 2005-0011 (La. 7/10/06), 936 So. 2d 108, 155, cert. denied, 549 U.S. 1221, 127 S. Ct. 1279, 167 L. Ed. 2d 100 (2007). Because there was prior justification for the police intrusion into the

vehicle for safety purposes and to remove the defendant, and it was immediately apparent to Detective Wilkinson without close inspection that there was contraband inside the passenger door, the "plain view" exception to the warrant requirement applies, so that the seizure of the heroin was permissible. See State v. Arnold, 2011-0626 (La. 4/27/11), 60 So. 3d 599 (per curiam).

Based on the foregoing, we find that the trial court did not err or abuse its discretion in denying the motion to suppress. Accordingly, this assignment of error is without merit.

## ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in denying his motion for postverdict judgment of acquittal/new trial. Specifically, the defendant contends that the State failed to prove he intended to distribute the heroin.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

In his brief, the defendant concedes that he was in possession of heroin. He contends, however, that the possession was for personal use only, and that all of the evidence "indicated possession and none of it indicated sales."

It is well settled that intent to distribute may be inferred from the circumstances. Factors useful in determining whether the State's circumstantial evidence is sufficient to prove intent to distribute include: (1) whether the defendant ever distributed or attempted to distribute illegal drugs; (2) whether the drug was in a form usually associated with distribution; (3) whether the amount was such to create a presumption of intent to distribute; (4) expert or other testimony that the amount found in the defendant's actual or constructive possession was inconsistent with personal use; and (5) the presence of other paraphernalia evidencing intent to distribute. In the absence of circumstances from which an intent to distribute may be inferred, mere possession of drugs is not evidence of intent to distribute unless the quantity is so large that no other inference is reasonable. For mere possession to establish intent to distribute, the State must prove the amount of the drug in the possession of the accused and/or the manner in which it was carried is inconsistent with personal use only. State v. Smith, 2003-0917 (La. App. 1st Cir. 12/31/03), 868 So. 2d 794, 800. Distribution can include the mere delivery of a controlled dangerous substance by physical delivery. See LSA-R.S. 40:961(14).

The heroin seized from the defendant's pocket after his arrest consisted of seven small baggies of heroin, all contained within one larger plastic baggie. The total weight of the seven baggies of heroin was 3.93 grams. The bags of heroin in this form were consistent with packaging intended for distribution. See State v. Patin, 2013-618 (La. App. 5th Cir. 9/24/14), 150 So. 3d 435, 438. The defendant was also in possession of $526.00. The possession of large sums of cash may be considered circumstantial evidence of intent to distribute. See State ex rel. B.L.,

2002-923 (La. App. 5th Cir. 1/28/03), 839 So. 2d 246, 248. The clear plastic bag found inside the car door contained 4.59 grams of heroin. The total amount of heroin, therefore, possessed by the defendant was just over 8.5 grams. Detective Wilkinson testified at trial that the average dose of heroin is 1/10 of one gram. See State v. Robinson, 46,091 (La. App. 2nd Cir. 4/20/11), 63 So. 3d 1113, 1117, writs denied, 2011-0901, 1016 (La. 11/23/11), 76 So. 3d 1148, 1149 (where a sergeant, an expert in the sale and distribution of narcotics, testified that a person who possessed more than two grams of heroin, with nothing to inject the heroin, would more likely be a dealer rather than a user); State v. Collins, 2009-283 (La. App. 5th Cir. 12/8/09), 30 So.3d 72, 79, writ denied, 2010-0034 (La. 9/3/10), 44 So. 3d 696 (where a sergeant testified that 1.85 grams was inconsistent with personal use only).

Moreover, the defendant admitted that he was at the gas station to sell heroin. Detective Prieto testified at trial that he interviewed the defendant at the Covington Law Enforcement Complex. According to Detective Prieto, after he Mirandized[3] the defendant, the defendant told him that he was traveling to the Slidell area to deliver heroin and then to go shopping. The defendant further stated that he had owned a small restaurant business that had failed due to the BP oil spill and that he needed to make ends meet by selling drugs. Detective Wilkinson testified at trial that when the defendant was arrested and Mirandized at the gas station, he explained to the defendant why the police were there and why he was being arrested. The defendant told Detective Wilkinson that "y'all got me on everything." The defendant also said that the bag of heroin inside the car door was

[3]Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. Miranda v. Arizona, 384 U.S. 436, 444-445, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

the one he planned to sell. The defendant's cell phone had been removed and when it rang, Detective Wilkinson asked the defendant who was calling. The defendant responded it was the "junkie" he was meeting to sell the heroin to. Thus, the defendant confessed to possessing heroin with the intent to distribute it, and the confession was corroborated with testimonial and physical evidence. See State v. Clay, 623 So. 2d 211, 216-17 (La. App. 2nd Cir. 1993).

The trier of fact is free to 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 the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83.

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 which raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that the defendant was in possession of heroin and that he traveled to Slidell with the intention to sell the heroin. In finding the defendant guilty, the jury clearly rejected the defense's theory of innocence. See Moten, 510 So. 2d at 61.

After a thorough review of the record, we find that the evidence supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light

most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of possession with intent to distribute heroin. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

Accordingly, the trial court did not err in denying the defendant's motion for postverdict judgment of acquittal/new trial. This assignment of error is without merit.

## SENTENCING ERROR

The trial court sentenced the defendant to twenty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentence for conviction for possession with intent to distribute heroin shall be without benefit of probation or suspension of sentence for at least five years of the sentence. See LSA-R.S. 40:966(A) & (B)(1) (prior to 2014 amendment). There is no parole restriction under LSA-R.S. 40:966(B)(1). Thus, the inclusion of the parole restriction rendered this sentence illegal. The sentencing herein involves discretion. Specifically, pursuant to LSA-R.S. 40:966(B)(1), the sentencing range is five to fifty years imprisonment. To the extent that amending the defendant's sentence entails more than a ministerial correction of a sentencing error, a *sua sponte* correction by a court of appeal is not permitted under the jurisprudence. See State v. Haynes, 2004-1893 (La. 12/10/04), 889 So. 2d 224 (per curiam). Because of the sentencing discretion involved, we vacate the sentence and remand for resentencing.

## CONCLUSION

For the above and foregoing reasons, the defendant's conviction is affirmed.

The sentence is hereby vacated, and the matter is remanded to the trial court for resentencing.

**CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.**