**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 KA 0690

STATE OF LOUISIANA

VERSUS

JAMES SPIKES, SR.

**Judgment rendered October 28, 2016.**

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Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 13-CR4-123350
Honorable Martin E. Coady, Judge

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**BEFORE: PETTIGREW, McDONALD, AND DRAKE, JJ.**

**PETTIGREW, J.**

Defendant, James Spikes, Sr., was charged by bill of information with distribution of a schedule II controlled dangerous substance (oxycodone), a violation of La. R.S. 40:967(A)(1). He pled not guilty and, following a jury trial, was found guilty as charged. The trial court denied defendant's motions for new trial and postverdict judgment of acquittal, and sentenced defendant to twenty years at hard labor, with the first two years to be served without parole, probation, or suspension of sentence. Thereafter, the State filed a habitual offender bill of information alleging defendant had three prior felony convictions.[1] Defendant pled not guilty to the habitual offender bill of information. After a hearing, the trial court adjudicated defendant a fourth-felony habitual offender, vacated the previous sentence,[2] and sentenced defendant to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence. Defendant moved for reconsideration of sentence, which the trial court denied. Defendant now appeals, alleging one counseled and two pro se assignments of error. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence.

**FACTS**

On January 28, 2013, defendant called Brian Wood and offered to sell him some "blueberries," or oxycodone. Wood had previously been arrested for distribution of oxycodone and was, at the time, working with the Washington Parish Sheriff's Office to conduct controlled narcotics purchases. After speaking with defendant, Wood contacted the Washington Parish Drug Task Force and met with Lieutenant Brent

[1] The predicate offenses set forth in the habitual offender bill of information are as follows: 1) an April 23, 1996 conviction for attempted distribution of a schedule II controlled dangerous substance under Washington Parish docket number 94-CR5-56900; 2) a May 8, 2003 conviction for distribution of a schedule II controlled dangerous substance under Washington Parish docket number 00-CR2-80722; and 3) a February 12, 2008 conviction for obstruction of justice under Washington Parish docket number 06-CR3-95345.

[2] In sentencing defendant as a fourth-felony habitual offender, the trial court misspoke and stated that defendant's "conviction" for the instant offense was to be vacated. However, the record as a whole indicates that the trial court intended only to vacate the sentence for the underlying offense. Defendant does not raise this issue on appeal, so we simply note it out of an abundance of caution.

Goings, Detective Jason Garbo, and Detective Kendal Temples to set up a controlled purchase. Detective Temples searched Wood and his vehicle before giving him $30.00 and a camera to record the transaction. Wood then went to defendant's home on East 4th Street in Bogalusa, where he purchased one tablet of oxycodone. Following the purchase, Wood returned to Lieutenant Goings, Detective Garbo, and Detective Temples, and he gave them the oxycodone and video camera. The video of the transaction, which showed defendant's face and body, was played at trial. Defendant did not testify.

**SUFFICIENCY OF EVIDENCE**

When issues are raised on appeal as to both sufficiency of evidence and other trial errors, the appellate court should first review the sufficiency of the evidence. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992). In his second pro se assignment of error, defendant contends that the evidence presented at trial was insufficient to support his conviction for distribution of a schedule II controlled dangerous substance. He argues that the State's only witness to the purchase, Brian Wood, was not credible, and that his testimony regarding the event was uncorroborated.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after 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. See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson** standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable

hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Defendant argues that Wood's credibility was tainted because he had previously been arrested for a narcotics distribution offense and because he claimed that he had successfully completed probation for another, earlier offense when that probation had been revoked.

At trial, Wood testified regarding his criminal history, which included a 2003 conviction for simple battery, a 2011 conviction for first-offense DWI, and a 2012 arrest for distribution of oxycodone. After initially testifying on direct examination that his probation had not been revoked for the first two offenses, Wood admitted on cross-examination that his probation had been revoked for the simple battery offense. He explained that his initial testimony was true as best as he could remember, but attributed his inability to recall the revocation to the amount of time that had passed.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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 fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. In the instant case, it appears that the jury at least partially believed Wood's testimony. The jury's decision to give credit to Wood's testimony occurred despite the evidence of Wood's criminal history and his misrepresentation or inability to remember it. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

During closing arguments, defense counsel suggested to the jury that the police officers did not do a thorough job of ensuring that Wood had not concealed a pill somewhere on his person or in his vehicle. Defendant reiterates this argument on appeal.

During Wood's direct examination, the State played for the jury the video of the alleged drug transaction between Wood and defendant. The video clearly depicts that

Wood gave cash to defendant, who then handed Wood an unidentified object from what appears to be a piece of cellophane or a small plastic baggie. While the video does not show exactly what Wood received from defendant, it does partially corroborate Wood's testimony concerning the circumstances of the transaction.

Both Detective Garbo and Detective Temples testified that Wood's person and vehicle were searched for contraband prior to the transaction. Lieutenant Goings conducted surveillance on Wood as he drove to and from defendant's home. Lieutenant Goings admitted that he could not actually see Wood walk into defendant's home because of its relative location to the street, but the video does not appear to show any suspicious activity by Wood during this brief window of time.

When a case involves circumstantial evidence, and the jury 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. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). In the instant case, the jury was presented with, and reasonably rejected, the hypothesis of innocence now advanced by defendant on appeal. Based on our review of the record, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 2006-0207 at 14, 946 So.2d at 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, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). We are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the prosecution, could have found the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was guilty of distribution of a schedule II controlled dangerous substance.

This assignment of error is without merit.

**EXCESSIVE SENTENCE**

In his sole counseled assignment of error, defendant contends that his habitual offender sentence of life imprisonment is excessive. He argues that a lesser sentence is more appropriate in light of the small quantity of narcotics sold and the trial court's initial sentence of only 20 years imprisonment for the underlying offense.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Hurst**, 99-2868, p. 10 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of a manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

In the instant case, defendant was adjudicated a fourth-felony habitual offender. If a defendant's fourth felony and two of his prior felonies are violations of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, he shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence. See La. R.S. 15:529.1(A)(4)(b). Here, defendant's first, second, and fourth felonies are violations of the Uniform Controlled Dangerous Substances Law that were punishable by imprisonment for ten years or more. See La. R.S. 14:27(D)(3), 40:961(23) (1993), 40:967(B)(1) (1993), 40:967(B)(4)(b) (following amendment by 1997 La. Acts No. 1284, §1), & 40:979(A). Therefore, defendant's fourth-felony habitual offender sentence of life imprisonment at

hard labor, without the benefit of parole, probation, or suspension of sentence, was mandatory under La. R.S. 15:529.1(A)(4)(b).

Even though a sentence is the statutory mandatory minimum sentence, it may still be constitutionally excessive if it makes no "measurable contribution to acceptable goals of punishment" or amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime." **State v. Dorthey**, 623 So.2d 1276, 1280-1281 (La. 1993). In order for a defendant to rebut the presumption that a mandatory minimum sentence is constitutional, he must "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

**State v. Johnson**, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676 (quoting **State v. Young**, 94-1636, pp. 5-6 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 528).

Departures downward from the minimum sentence should only occur in rare situations. See **Johnson**, 97-1906 at 9, 709 So.2d at 677. At the time he orally moved for reconsideration of sentence, defense counsel argued that the trial court should look to **Dorthey** and impose the original twenty-year sentence, departing downward from the mandatory life sentence. The trial court noted its familiarity with **Dorthey** but declined to reduce defendant's sentence, noting that he "has chosen to have a career in the drug business, illegal drug business." On appeal, defendant also argues that his sentence is disproportionate when considering the quantity of drugs sold.

We have reviewed the record and find that it supports the sentence imposed. Based on our review, we cannot say that the trial court erred or abused its discretion in imposing the mandatory sentence under La. R.S. 15:529.1(A)(4)(b). At the time of the habitual offender sentencing, the trial court was aware of the facts surrounding the instant case, as well as defendant's prior criminal history, including a pending charge for first degree murder. Other than asking for relief under **Dorthey**, defendant failed to "clearly and convincingly" demonstrate to the trial court how he might be "exceptional."

See **Johnson**, 97-1906 at 8, 709 So.2d at 676. He did not cite any unusual or exceptional circumstances to show that he is a victim of the legislature's failure to assign a sentence meaningfully tailored to his culpability, to the circumstances of his case, and to his status as a fourth-felony habitual offender. Therefore, there was no reason for the trial court to deviate from the mandatory minimum sentence.

These assignments of error are without merit.

**MOTION FOR NEW TRIAL**

In his remaining pro se assignment of error, defendant contends that the trial court erred in denying his motion for new trial without hearing arguments or giving reasons for the denial. He asserts that the motion for new trial should have been granted because the trial court erroneously: 1) compelled defendant to show his tattoos during trial; 2) failed to grant a mistrial in regards to the prosecutor entering the jury deliberation process; and 3) failed to grant a mistrial when the jury could not reach a verdict and then compounded this error by instructing the jury members of their duty to reach a verdict.

To the extent that defendant makes an argument regarding the process by which his motion for new trial was denied without argument by defense counsel, we note this contention is meritless. Prior to sentencing, defense counsel reminded the trial court that he had filed a motion for new trial and postverdict judgment of acquittal. Defense counsel informed the trial court that he would submit on those pleadings. Therefore, defendant waived his right to an argument on these motions. Furthermore, if the reading of a motion for new trial imparts to the trial judge sufficient knowledge to enable him to intelligently dispose of the matter, he cannot be arbitrarily required to delay his ruling for the purpose of further hearing or argument. See **State v. Brisban**, 2000-3437, p. 11 (La. 2/26/02), 809 So.2d 923, 931 (quoting **State v. Varnado**, 154 La. 575, 97 So. 865, 868 (1923)). We turn next to the merits of the trial court's ruling on the motion for new trial.

***Display of Tattoos***

Following the State's presentation of the video evidence of the drug transaction, the prosecutor requested permission from the trial court to have defendant remove his shirt and display his tattoos to the jury. In doing so, the State intended to show that defendant had the same arm tattoos as the individual who appeared on the video. Defense counsel objected, but the trial court ruled that defendant could be compelled to show his tattoos. In his motion for new trial and on appeal, defendant contends that this ruling was erroneous and prejudicial.

The privilege against compulsory self-incrimination relates only to testimonial compulsion. It protects the accused's communications, whatever form they might take, and prevents the compulsion of responses that are also communications, for example, compliance with a subpoena to produce one's papers. However, the privilege does not require an exclusion of the accused's body as evidence when it may be material. **Schmerber v. California**, 384 U.S. 757, 763-764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966). In particular, the Louisiana Supreme Court has explicitly ruled that an accused may be compelled to exhibit his tattoos to the jury. See **State v. Wilson**, 329 So.2d 680, 680-681 (La. 1976).

This portion of defendant's assignment of error is without merit.

***Mistrial for Prosecutorial Involvement in Jury Deliberations***

During deliberations, the jury requested to review the video of the alleged drug transaction. The trial court granted this request over defense counsel's objection. After the video was played, the trial court instructed the jury to continue to deliberate. At that time, the prosecutor stated, "Can I just ask if we can play it once more for them because it does go rather quickly[?]" Defense counsel asked to approach the bench, and the jury exited the courtroom. Defense counsel then objected and moved for a mistrial on the basis that the prosecutor "enter[ed] the jury deliberation process." The trial court stated that it would not grant a mistrial but called the prosecutor's statement "inappropriate." The video was not replayed as the prosecutor requested.

It is unclear on what grounds defendant is asserting a mistrial should be granted. Defense counsel cited no codal or jurisprudential authority for his request for a mistrial either in his in-court objection or his written motion for new trial. Defendant's pro se brief is similarly devoid of any authority that supports his argument.

Presumably, defense counsel had in mind the generalized mistrial provision of La. Code Crim. P. art. 775 (emphasis added): "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 Article 770 or 771." However, defendant has made no showing that the prosecutor's statement in any way made it impossible for him to obtain a fair trial. The statement was not a comment on the contents of the video, and it did not result in the video being replayed for the jury. As a result, we see no appreciable way in which the prosecutor can be said to have entered into the jury deliberation process. The trial court did not err or abuse its discretion in denying defense counsel's motion for a mistrial.

This portion of defendant's assignment of error is without merit.

***Mistrial for Instructing the Jury to Reach a Verdict***

Following the above communication from the jury regarding the video, the trial court received another note from the jury. The exact contents of this note are not reproduced in the record, but the trial court responded to it as follows:

> BY THE COURT:
> Have a seat, please.
> I received a note from you, I will not read it to everyone since you're in the middle of deliberations, as to Ms. Markow, you all will be deliberating, it will finish today one way or the other, so don't worry about tomorrow.
> You guys have been deliberating about an hour-and-a-half, roughly at this point. I will have to ask you to please go back, listen to each other, try to reach a verdict. It has been a while but I ask you you [sic] did hear all morning testimony. Further deliberations please go back consider each other's views, and –
>
> BY [JUROR]:
> Can we ask you a question[?]
>
> BY THE COURT:
> No, ma'am.

BY [JUROR]:
I didn't think so.

BY THE COURT:
It is in your hands now. I would ask you to deliberate, see if you can deliberate further to reach a verdict in this case.
Thank you.

Following this instruction, the jury returned to the jury room to deliberate. Defense counsel then made an "objection" to the trial court's "talk to the jury" on the ground that it seemed like the trial court was instructing the jury that they had to return with a verdict. The trial court noted defense counsel's objection, denied it, and stated that it had simply asked the jury to consider their verdict further. Defense counsel never specifically asked for a "mistrial" in relation to this conversation, and the jury's next communication with the trial court was to announce that it had reached a verdict.

Again, defense counsel did not cite – either in court or in the motion for new trial – any particular authority for its objection to the trial court's statement. Defendant's pro se brief is similarly lacking in any support for his claim.

Presumably, defense counsel objected to the trial court's statement as an **Allen**[3] charge. An **Allen** charge is an instruction acknowledged to be calculated to dynamite jury deadlocks and achieve jury unanimity. **State v. Nicholson**, 315 So.2d 639, 641 (La. 1975). Such a charge, and any coercive modification thereof, is banned in the courts of Louisiana. **Id.** An **Allen** charge emphasizes that the jury has a duty to decide the matter at hand, which implies that the trial judge will not accept a mistrial in the case. Additionally, when the duty to reach a verdict is coupled with the trial court's admonition that those in the minority should reconsider their position, there exists an almost overwhelming pressure to conform to the majority's view. **State v. Washington**, 93-2221, p. 11 (La. App. 1 Cir. 11/10/94), 646 So.2d 448, 454-455.

The trial court was clearly aware of the nature of an **Allen** charge, stating, "I purposely stayed away from an **Allen**, dynamite charge." The trial court was correct

[3] **Allen v. United States**, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

that it gave no such prohibited charge in this matter. The trial court did not admonish the minority members of the jury to reexamine the reasonableness of their opinion or adherence to their original convictions. Further, the trial court did not state that it would not accept a mistrial. The charge does not appear coercive in its total context and does not rise to an **Allen/Nicholson** level, nor was it so fundamentally unfair that it deprived defendant of due process. See **State v. Le**, 2013-0611 (La. App. 1 Cir. 11/4/13), 2013 WL 5935677, p. 6 (unpublished), writ denied, 2013-2828 (La. 5/23/14), 140 So.3d 724. At the time the jury communicated with the trial court concerning the apparent inability to reach a verdict, they had been deliberating for a relatively short amount of time. The trial court's instruction recognized this fact and asked the jurors to consult with one another again, to consider each other's views, and to continue to deliberate to see *if* they could reach a verdict. This instruction was wholly appropriate.

This final portion of defendant's assignment of error is without merit.

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