STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 KA 1678

STATE OF LOUISIANA

VERSUS

BERNARD TERRELL FORREST

Judgment Rendered: SEP 21 2017

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 528,961

Honorable William J. Burris, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

HIGGINBOTHAM, J.

The defendant, Bernard Terrell Forrest, was charged by bill of information with possession with intent to distribute a Schedule I controlled dangerous substance (marijuana and/or synthetic cannabinoids), a violation of Louisiana Revised Statutes 40:966A (count one); and possession of 400 grams or more of cocaine, a violation of Louisiana Revised Statutes 40:967F(1)(c) (count two). He pled not guilty and, following a jury trial, was found guilty as charged on both counts. The State filed a habitual offender bill of information seeking to enhance the penalty imposed on count two.[1] After a hearing, the defendant was adjudicated a fourth-felony habitual offender. Prior to sentencing, the defendant made an oral motion for a new trial, which the district court denied. The defendant was then sentenced to ten years at hard labor on count one and to life imprisonment without the benefit of probation, parole, or suspension of sentence on count two. The defendant moved for reconsideration of sentence, but the motion was denied. The district court ordered the two sentences to run concurrently. The defendant now appeals, filing a counseled and a pro se brief challenging the sufficiency of the evidence and his sentences.

FACTS

In October 2012, Louisiana State Police Troop L Trooper John Heath Miller received information that resulted in a narcotics investigation targeting the defendant. Special Agent Scott Brownlie with the Drug Enforcement Administration ("DEA") in New Orleans also participated in the investigation. During the course of the investigation, Trooper Miller obtained the defendant's

[1] The defendant's predicate offenses include: (1) an October 11, 2005, conviction for possession of cocaine under Twenty-Second Judicial District Court ("22nd JDC"), Washington Parish, docket number 02-CR8-84705; (2) a June 20, 2007, conviction for distribution of cocaine under 22nd JDC, Washington Parish, docket number 00-CR8-80733; and (3) a June 20, 2007, conviction for felony battery of a police officer with injury requiring medical attention under 22nd JDC, Washington Parish, docket number 04-CR8-91527.

cellular telephone number. On October 24, 2012, Trooper Miller learned additional information related to the investigation of the defendant from DEA agents based in Houston, Texas. Supplementing the information that he had already obtained with the new information from agents in Houston, Trooper Miller prepared an affidavit seeking global positioning system ("GPS") data for the defendant's cellular telephone and presented it to a federal magistrate judge. On October 24, 2012, the magistrate judge signed the order granting authority to obtain GPS data from the defendant's cellular telephone provider for a period of thirty days. After obtaining the order Trooper Miller and Agent Brownlie traveled to Houston, joined the Houston DEA agents, and located the defendant. They maintained visual surveillance of the defendant and learned that he was staying at a Quality Inn Hotel and operating a 2012 blue Chevrolet Traverse. Trooper Miller and Agent Brownlie maintained visual surveillance on the defendant from October 24, 2012, through October 26, 2012, before returning to Louisiana. During that timeframe, Trooper Miller did not recall seeing any other individuals inside of the Traverse.

On October 28, 2012, as Trooper Miller monitored GPS data from the defendant's cellular telephone, he noticed that the defendant was travelling east along Interstate 10. He contacted Agent Brownlie, and the two decided to reestablish visual surveillance. Trooper Miller subsequently located the Traverse travelling east on Interstate 10 in East Baton Rouge Parish near the lakes at Louisiana State University. The defendant proceeded onto Interstate 12 and exited at Sherwood Forest. There, he drove through the drive-through window at a Raising Cane's restaurant before driving to an apartment complex nearby. The defendant exited his vehicle and entered an apartment. Trooper Miller maintained visual surveillance of the Traverse while the defendant was inside the apartment. Thereafter, the defendant reentered Interstate 12 and upon arrival in St. Tammany Parish, was stopped by

Louisiana State Police Troop L Trooper Patrick Dunn, who was contacted for assistance by Trooper Miller.

According to Trooper Dunn, around 5:00 p.m. on October 28, 2012, Trooper Miller advised him of the location of the Traverse. Trooper Dunn was parked in his marked police unit on the shoulder of the eastbound lane of Interstate 12 when he saw a vehicle that matched the description given to him by Trooper Miller. Trooper Dunn noticed that the Traverse crossed the fog line and followed another vehicle too closely. Trooper Dunn then activated his unit's lights and proceeded to stop the Traverse. When Trooper Dunn activated his lights, his dashboard camera began recording. The defendant came to a stop on the shoulder of the interstate. Trooper Miller advised Trooper Dunn that contraband may be inside of the spare tire in the Traverse. The defendant consented to a search of the vehicle. Upon inspection, Trooper Dunn noticed that the spare tire was not the same size as the other tires on the vehicle and was also partially dry-rotted with a rusted rim. His partner, Trooper Timothy Mannino, approached and observed the defendant. According to Trooper Mannino, when Trooper Dunn turned his attention to the spare tire, the defendant's breathing became labored. Trooper Dunn cut the spare tire open and found bundles of contraband inside. Specifically, Trooper Dunn located packets of synthetic marijuana, 483.88 grams of cocaine, and 222.54 grams of marijuana. The defendant also had $770 on his person.

Trooper Miller stopped at the scene during the course of the traffic stop and learned that the Traverse was a rental vehicle, which he testified are often used by narcotics traffickers. Trooper Miller testified that he could not recall the identity of the individual who rented the Traverse. A video of the traffic stop was recorded on Trooper Dunn's dashboard camera and played for the jury at trial.

After he was placed under arrest and advised of his **Miranda** rights,[2] the defendant was transported to Troop L where Trooper Miller read the defendant a **Miranda** rights form. While Trooper Miller was reviewing the rights form with the defendant, the defendant said that "he had no one to blame but [himself]." Thereafter, the defendant's attitude changed and said he did not want to talk.

Some of the evidence located in the spare tire of the Traverse was analyzed and tested for the presence of controlled dangerous substances. The results indicated that one of the Ziploc bags contained 483.88 grams of cocaine. The other Ziploc bag contained 222.54 grams of marijuana. Seven factory-sealed KUSH herbal incense packets containing "green vegetable material" were sent to the lab, and one was tested. That packet was labeled "KUSH Pineapple," and the test results revealed that it contained (1-pentylindol-3-yl)-(2,2,3,3-tetramethylcyclopropyl) methanone. The analyst who conducted the tests testified that the KUSH packet contained UR-144, which is a synthetic cannabinoid.

The evidence was also tested for latent fingerprints. The Ziploc bag containing cocaine was wrapped in clear plastic wrap. No fingerprints were located on the clear plastic wrap, but two fingerprints were lifted from the Ziploc bag. One of the two fingerprints on the Ziploc bag matched that of the defendant's right middle finger, and the other matched the defendant's left little finger.

SUFFICIENCY OF THE EVIDENCE

In his first counseled and pro se assignments of error, the defendant contends that the evidence presented by the State was insufficient. Specifically, the defendant argues that he was not aware of the hidden drugs and that the "only evidence that the State presented to show [his] knowledge of the drugs was a fingerprint that could have been placed on the [Z]iploc bag before the drugs were placed inside." The

[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

defendant also complains that the State failed to establish the identity of the person who rented the vehicle, who had access to the vehicle during the two days prior to the arrest, and when the spare tire was changed. In his pro se brief, the defendant complains that "no one testified as to seeing [him] with any of the drugs; or even placing any of the drugs in the spare tire of the rental vehicle."

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

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

As applicable here, it is unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled dangerous substance as classified in Schedule I. See La. R.S. 40:966A(1). Marijuana and synthetic cannabinoids are controlled dangerous substances classified in Schedule I. See La. R.S. 40:964, Schedule I(C)(19) & (F). It is also unlawful for any person to knowingly or

intentionally possess a controlled dangerous substance as classified in Schedule II. See La. R.S. 40:967C. Cocaine is a controlled dangerous substance classified in Schedule II. See La. R.S. 40:964, Schedule II(A)(4).

The State is not required to show actual possession of drugs by a defendant in order to convict. Constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 2003-0917 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

A determination of whether there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. **Smith**, 868 So.2d at 799.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession with intent to distribute a Schedule I controlled dangerous substance (marijuana and/or synthetic cannabinoids) and possession of 400 grams or more of cocaine. The evidence presented at trial contradicts the defendant's argument that

he was not aware that contraband was inside of the spare tire. The defendant was the only occupant of the Traverse during the period of surveillance. Although he consented to a search of the vehicle, when Trooper Dunn began to search near the spare tire, the defendant's breathing became labored. Bundles of contraband were subsequently found inside of that spare tire, and the defendant's fingerprints were on one of those bundles. After being placed under arrest, the defendant stated that "he had no one to blame but [himself]."

The jury rejected the defendant's theory that the person who rented the vehicle planted the contraband inside of the spare tire. 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. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987); see also **State v. Mack**, 2013-1311 (La. 5/7/14), 144 So.3d 983, 989-90 (per curiam). No such hypothesis exists in the instant case.

This court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The trier of fact 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 the 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. Further, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. 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 factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of

innocence presented to, and rationally rejected by, the factfinder. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Where jurors have an evidentiary basis for rationally rejecting the hypotheses of innocence advanced by the defense, those hypotheses fail, and the pertinent question for this Court is whether the various alternative hypotheses advanced by the defendant do not simply offer a possible exculpatory explanation, but are so reasonable that rational jurors would necessarily have looked past any extraordinary coincidence and found a reasonable doubt of the defendant's guilt. See **Mack**, 144 So.3d at 990.

These assignments of error are without merit.

EXCESSIVE SENTENCE

In his second counseled and pro se assignments of error, the defendant contends that the sentence imposed on count two is excessive.[3] He argues that he "will die in prison for a non-violent drug offense." He notes that he presented evidence of his unique situation at his sentencing hearing and contends that the sentence imposed is nothing more than the purposeless and needless imposition of pain and suffering.

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 (La. App. 1st 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

[3] The defendant does not challenge the sentence imposed on count one.

harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A district 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 manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the district court before imposing sentence. See La. Code Crim. P. art. 894.1. The district court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the district court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. See **State v. Harper**, 2007-0299 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 602, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173.

On count two, the defendant was sentenced to the mandatory term of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. See La. R.S. 15:529.1A(4)(b).[4] Even though a sentence is the mandatory minimum sentence, it may still be 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

[4] Count two and the predicate felony under 22nd JDC docket number 00-CR8-80733 for distribution of cocaine are violations of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more. See La. R.S. 40:967B(4)(b) & 40:967F(1)(c). The defendant's predicate felony under 22nd JDC docket number 04-CR8-91527 for felony battery of a police officer requiring hospitalization is defined as a crime of violence under Louisiana Revised Statutes 14:2B(41).

to the severity of the crime." **State v. Dorthey**, 623 So.2d 1276, 1280-81 (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 (La. 3/4/98), 709 So.2d 672, 676 quoting from **State v. Young**, 94-1636 (La. App. 4th Cir. 10/26/95), 663 So.2d 525, 528, writ denied, 95-3010 (La. 3/22/96), 669 So.2d 1223. Departures downward from the minimum sentence should only occur in rare situations. See **Johnson**, 709 So.2d at 677.

Prior to the imposition of sentence, the defendant testified that he completed the eleventh grade before dropping out of high school. He testified that he lost both of his parents by age sixteen and began using drugs. The defendant stated that he did not receive the proper drug treatment while incarcerated for his prior drug-related offenses, and opined that he could recover from his addiction if he received appropriate treatment. Prior to denying the defendant's request for a downward departure from the mandatory minimum sentence, the district court noted that the instant offense was not a "street deal," but rather, involved a "huge amount" of contraband and appeared to be a business. See La. Code Crim. P. art. 894.1A(15).

A presentence investigation report was admitted into evidence. According to the report, the defendant has an extensive criminal history and was on parole at the time the instant offense was committed. The report also indicates that after being incarcerated for the instant charges, the defendant continued to manage his drug distribution endeavors via telephone. Specifically, the defendant directed his girlfriend to receive payments from others who owed him for previous drug transactions, deposit the money, and make payments to others, including his attorney. According to the report, during one of these conversations, the defendant

stated, "it could have been way more, what I got caught with was nothing." The report concludes that the defendant's criminal history "indicates a propensity to engage in the criminal trafficking of controlled dangerous substances" and his supervision history "indicates an unwillingness to comply with mandated supervision conditions."

Based on our review of the record, we find that the district court did not err or abuse its discretion in imposing the defendant's sentence in accordance with the mandatory penalty provided for in Louisiana Revised Statutes 15:529.1A(4)(b). The testimony presented by the defendant at his sentencing hearing did not clearly and convincingly show that he is exceptional and a victim of the legislature's failure to assign a sentence that was meaningfully tailored to his culpability, to the gravity of the offense, and to the circumstances of the case. Thus, the district court had no reason to deviate downward from the mandatory sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Accordingly, these assignments of error are without merit.

PATENT ERROR

In the conclusion of the defendant's pro se brief, he requests patent error review in accordance with Louisiana Code of Criminal Procedure article 920(2). This court routinely reviews criminal appeals for patent error. The items that the defendant requests we review for patent error include items that would require review of the evidence. Under Article 920(2), we are limited in our patent error review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible patent errors.

PRO SE ARGUMENTS

Although not set out as assignments of error, in his conclusion in the pro se brief, the defendant also contends there were several issues with his habitual

offender adjudication. First, he contends that one of the fingerprint cards introduced at the habitual offender adjudication hearing failed to include a docket number. Contrary to the defendant's assertion, at the habitual offender adjudication hearing, copies of the bills of information bearing docket numbers as well as the defendant's fingerprints for each predicate offense were introduced into evidence and compared to the defendant's fingerprints taken on the morning of the hearing. Therefore, based on our review of the record, this argument is without merit.

The defendant next argues that there was an issue with his first predicate offense (October 11, 2005, conviction under 22nd JDC docket number 02-CR8-84705) because on the appeal of that predicate, this court remanded "for resentencing." He claims that he was resentenced on that predicate offense on the same date that he entered guilty pleas in his second and third predicate offenses (June 20, 2007, convictions under 22nd JDC docket numbers 00-CR8-80733 and 04-CR8-91527). He further complains, citing **State v. LeBlanc**, 2014-0163 (La. 1/9/15), 156 So.3d 1168 (per curiam), that his convictions under docket numbers 00-CR8-80733 and 02-CR8-84705 were obtained on the same day. However, in the appeal of that predicate offense, this court affirmed the defendant's conviction, amended his sentence to delete the restriction of parole eligibility, and affirmed as amended. The matter was remanded to the district court only to correct the minute entry. See **State v. Forrest**, 2006-1334 (La. App. 1st Cir. 3/23/07), 2007 WL 866222 (unpublished). Moreover, the convictions under docket numbers 00-CR8-80733 and 02-CR8-84705 were not entered the same day, and neither conviction was obtained prior to October 19, 2004. See La. R.S. 15:529.1B ("Multiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction for the purpose of this Section."). Thus, the defendant's arguments have no merit.

Finally, the defendant contends that his "rap sheet" indicates that he is actually a second-felony habitual offender. Despite defendant's argument, the State

presented sufficient evidence to establish that he is a fourth-felony habitual offender, and the district court adjudicated him as such. Thus, his claim that he is actually a second-felony habitual offender because of an alleged statement on his "rap sheet" is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.