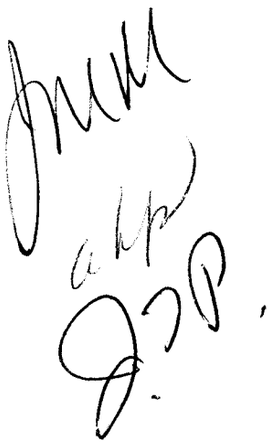
NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT



2017 KA 0027

STATE OF LOUISIANA

VERSUS

SHANE BADEAUX

Judgment Rendered: JUN 02 2017

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APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LAFOURCHE
STATE OF LOUISIANA
DOCKET NUMBER 548739, DIVISION E

HONORABLE F. HUGH LAROSE, JUDGE

* * * * * * *

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BEFORE: PETTIGREW, McDONALD, and PENZATO, JJ.

McDONALD, J.

The defendant, Shane Badeaux, was charged by bill of information with simple criminal damage to property, a violation of LSA-R.S. 14:56 (count one); resisting a police officer with force or violence, a violation of LSA-R.S. 14:108.2 (count two); possession of a schedule II controlled dangerous substance (methamphetamine), a violation of LSA-R.S. 40:967 (count three); aggravated flight from an officer, a violation of LSA-R.S. 14:108.1 (count four); and two counts of possession of a firearm or carrying concealed weapons by a person convicted of certain felonies, violations of LSA-R.S. 14:95.1 (counts five and six).[1] The State subsequently entered a nolle prosequi as to counts one, two, three, and six. Following a jury trial, the jury unanimously found defendant guilty as charged on counts four and five. He filed motions for post-verdict judgment of acquittal and new trial, both of which were denied. On count four, the district court sentenced defendant to five years imprisonment at hard labor. On count five, the district court sentenced defendant to twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The district court ordered the sentences to run consecutively. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, asserting two assignments of error. For the following reasons, we affirm the convictions and sentences.

FACTS

On November 2, 2015, around 12:45 a.m., Lockport Police Department Officer Cullen Orgeron was conducting stationary radar operations inside of his marked police unit on Highway 308. The officer observed a white Impala but could not see the vehicle's license plate. Because driving without a functioning license plate light is against the law under LSA-R.S. 32:304(C), Officer Orgeron attempted to stop the Impala by turning on his overhead lights. When the Impala did not stop, Officer Orgeron turned on his sirens. The Impala continued traveling on Highway 308, made a right turn onto Highway 654, and increased its speed from approximately 55 miles per hour to approximately 80 miles per hour. The Impala crossed the double yellow lines

[1] The defendant's predicate felony was a September 12, 2013 guilty plea to possession of a schedule IV controlled dangerous substance under Seventeenth Judicial District Court, Parish of Lafourche, docket number 516840.

on the highway several times prior to turning left onto Gheens Shortcut Road. It continued to travel at an excessive speed, made a right turn onto Sugar Street, a U-turn, a turn back onto Gheens Shortcut Road, and then back onto Highway 308. Once back on Highway 308, the Impala proceeded to travel in the incorrect lane against the flow of traffic and turned onto a dirt road that led into a golf course. The Impala drove through portions of the golf course and finally came to a stop when it reached a marsh area. During the entire chase, Officer Orgeron's lights were activated. Once the Impala came to a stop, the driver, later identified as the defendant, fled on foot carrying a backpack in his right hand and an unidentified black object in his left hand. The defendant discarded both items while running. He dove into a pond and began swimming. When Officer Orgeron tried to detain him, the defendant pushed him away and continued to flee. Officer Orgeron continued to pursue the defendant in the pond and was able to gain control of the defendant's left hand and place his left wrist into a handcuff. The defendant pulled away from the officer and the two engaged in a tug-of-war, during which Officer Orgeron was able to move the defendant out of the pond and into a kneeling position. Because the defendant refused to lie face down, Officer Orgeron deployed his Taser two times. On his third attempt, the Taser would not deploy because it was wet. The defendant removed the Taser probes from his chest and began to flee on foot. At that point, Lafourche Parish Sheriff's Office Deputy Aaron Buckley arrived on the scene and told the defendant, "Stop, or you will be tased again." The defendant complied, fell to his knees, and was taken into custody.

Officer Orgeron then returned to the area where the vehicles had been left and found the backpack in front of the defendant's Impala. The backpack contained a couple of gold watches and bracelets wrapped inside of a blue bandana. Later that morning, Officer Orgeron found a locked black Sentry safe nearby. He obtained a search warrant for the safe and found two guns inside, a 9 millimeter Ruger pistol and a .25 caliber Lorcin pistol, as well as ammunition for both. Officer Orgeron also searched the defendant's Impala, wherein he found two crack pipes.

SUFFICIENCY OF THE EVIDENCE

In cases where a defendant has raised issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence before discussing the other issues raised on appeal. When the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. *State v. Hearold*, 603 So.2d 731, 734 (La. 1992). Accordingly, we will first address the defendant's second assignment of error, which challenges the sufficiency of the State's evidence in support of his conviction on count five. Specifically, the defendant contends that the State failed to establish that he had actual or constructive possession of a firearm at any time. The defendant does not challenge the sufficiency of the evidence on count four.

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, 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* LSA-C.Cr.P. art. 821(B); *State v. Ordodi*, 06-0207 (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 LSA-C.Cr.P. art. 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, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *See State v. Patorno*, 01-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Under LSA-R.S. 14:95.1(A), in pertinent part, it is unlawful for any person who has been convicted of a violation of the Uniform Controlled Dangerous Substances Law which is a felony to possess a firearm or carry a concealed weapon. To convict a defendant of possession of a firearm by a convicted felon, the State must prove beyond

a reasonable doubt the possession of a firearm, a previous conviction of an enumerated felony, that ten years have not elapsed since completion of the previous sentence, and general intent to commit the offense.[2] LSA-R.S. 14:95.1; *see State v. Husband*, 437 So.2d 269, 271 (La. 1983). The general intent to commit the offense of possession of a firearm by a convicted felon may be proved through the actual possession of the firearm or through the constructive possession of the firearm. Thus, constructive possession satisfies the possessory element of the offense. Constructive possession occurs when the firearm is subject to the offender's dominion and control. Dominion and control over a weapon are sufficient to constitute constructive possession even if the control is only temporary in nature. *See State v. Johnson*, 03-1228 (La. 4/14/04), 870 So.2d 995, 998-99; *see also State v. Plain*, 99-1112 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 340-41.

The defendant does not dispute his prior conviction of possession of a schedule IV controlled dangerous substance nor that it was in the correct timeframe. Thus, the only issue is the sufficiency of the evidence of the defendant's possession of the guns. The defendant argues that the State failed to prove that he had actual possession of the safe that contained two guns. He contends that "[a]ny number of people could have left the locked safe in the area for any number of reasons." He further complains that the State did not present any DNA evidence linking him to the safe, the guns, or the ammunition. The defendant also argues that the State failed to establish that he had either actual or constructive possession of the guns found in the safe. The defendant notes that the safe was locked and no key to the safe was found inside of his backpack or vehicle. The defendant concludes that, because the safe was locked, the State failed to prove that he had knowledge or intent to possess the guns found inside. He argues, "A safe, locked or otherwise, may be tempting for someone down on his luck. In such a situation, an individual might steal a safe without knowing its contents, assuming it contains something valuable or else it wouldn't be locked."

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[2] General criminal intent exists when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. LSA-R.S. 14:10.

Mere presence in an area where a firearm is found, or mere association with an individual found to be in possession of a firearm, does not necessarily establish possession. Whether the proof is sufficient to establish possession under LSA-R.S. 14:95.1 turns on the facts of each case. Guilty knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. *Johnson*, 870 So.2d at 998.

After initially refusing to stop his vehicle and fleeing from Officer Orgeron, the defendant finally stopped the Impala on a golf course, exited, and began to flee on foot. Officer Orgeron testified that, upon leaving the vehicle, the defendant was holding a backpack in one hand and something black in the other, both of which the defendant discarded. After chasing the defendant on foot and placing him under arrest, Officer Orgeron found the backpack. Later that morning, Officer Orgeron found a locked black Sentry safe floating in a pond not far from where the defendant exited his vehicle.

The jury heard the testimony and viewed the physical evidence presented at trial and found the defendant guilty as charged on count five by unanimous verdict. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. *State v. Higgins*, 03-1980 (La. 4/1/05), 898 So.2d 1219, 1226, *cert. denied*, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). The trier of fact is free to accept or reject, in whole or in part, any witness's testimony. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of witness credibility, 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. 1 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. Evidence in the record that conflicts with testimony accepted by the trier of fact does not render the testimony

accepted by the trier of fact insufficient. *State v. Quinn*, 479 So.2d 592, 596 (La. App. 1 Cir. 1985).

In her closing argument, defense counsel argued that when Officer Orgeron first returned to the area where the vehicles were, he found the backpack but did not find the safe. According to the defense's theory, had the defendant dropped the safe in the ankle-deep water near the vehicles as Officer Orgeron testified, it would not have been found floating later that morning because it was heavy and contained items making it heavier.

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 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). A reasonable alternative hypothesis is not one "which could explain the events in an exculpatory fashion," but one that is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. Thus, in all cases, the *Jackson* standard does not provide a reviewing court with a vehicle for substituting its appreciation of what the evidence has or has not proved for that of the factfinder. A reviewing court may impinge on the factfinder's discretion only to the extent necessary to guarantee the fundamental due process of law. *State v. Mack*, 13-1311 (La. 5/7/14), 144 So.3d 983, 989 (per curiam).

In finding the defendant guilty, the jury in this case clearly rejected the defense's theory of innocence that the black item defendant discarded when he left the Impala was something other than the safe Officer Orgeron found near the vehicles later on the morning of the incident. *See Moten*, 510 So.2d at 61. The jury had an evidentiary basis for rationally rejecting the defense's hypothesis of innocence and had sufficient evidence to conclude that the safe and its contents were under the defendant's dominion and control at the time his vehicle was stopped. Such dominion and control is sufficient to constitute constructive possession. *State v. Villarreal*, 99-827 (La. App. 5 Cir. 2/16/00), 759 So.2d 126, 131, *writ denied*, 00-1175 (La. 3/16/01), 786 So.2d 745 (finding defendant constructively possessed a gun found in a locked safe in his locked

bedroom). Although the defendant complains that a key to the safe was not found at the scene, Officer Orgeron testified that he did not contact the defendant about obtaining a key to the safe. Additionally, Officer Orgeron testified that when he found the backpack, some items fell out. While he testified that he replaced the items, if the key were inside of the backpack and fell into the ankle-deep water near the vehicles when the defendant discarded it, it is unlikely that Officer Orgeron would have found it. Moreover, the jury could have reasonably concluded that defendant had guilty knowledge of the safe's contents from the facts that the defendant attempted to flee from Officer Orgeron, discarded the safe upon exiting his vehicle, and continued to flee on foot.

After a thorough review of the record, we find the evidence supports the jury's unanimous verdict on count five. 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 in possession of firearms as a convicted felon and that he had the general intent to possess them. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). The jury did not unreasonably reject the defendant's hypothesis or innocence, and nor do we accept it, for to do so would impermissibly impinge on the jury's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law. *See State v. Mire*, 14-2295 (La. 1/27/16), ___ So.3d ___, 2016 WL 314814 *4 (per curiam).

CHALLENGE FOR CAUSE

In his first assignment of error, the defendant argues that the district court erred in failing to grant his challenge for cause of potential juror Cynthia Acosta. The defendant contends that during voir dire, Ms. Acosta stated that she believed the defendant was guilty of the crime. The defendant further contends that Ms. Acosta was not successfully rehabilitated after making this statement.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, §17(A); LSA-C.Cr.P. art. 786. The purpose of voir dire examination is to determine

prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. *State v. Burton*, 464 So.2d 421, 425 (La. App. 1 Cir.), *writ denied*, 468 So.2d 570 (La. 1985). A district court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. A district court should grant a challenge for cause, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. *State v. Martin*, 558 So.2d 654, 658 (La. App. 1 Cir.), *writ denied*, 564 So.2d 318 (La. 1990). *See* LSA-C.Cr.P. art. 797.

A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. LSA-C.Cr.P. art. 800(A). Prejudice is presumed when the district court erroneously denies a challenge for cause and the defendant has exhausted his peremptory challenges. To prove there has been error warranting reversal of the conviction, the defendant need only show: (1) the erroneous denial of a challenge for cause, and (2) the use of all his peremptory challenges. *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1281.

Defense counsel raised a cause challenge for Ms. Acosta, which the district court denied. Defense counsel then peremptorily struck Ms. Acosta and, thus, she did not serve on the jury of the defendant's trial. Defense counsel exhausted all of the defendant's peremptory challenges before the twelfth juror was selected. Therefore, we need only determine the issue of whether the district court erred in denying the defendant's cause challenge of Ms. Acosta.

> Louisiana Code of Criminal Procedure article 797 states, in pertinent part:
>
> The state or the defendant may challenge a juror for cause on the ground that:
>
> ....
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;

....

(4) The juror will not accept the law as given to him by the court [.]

During voir dire examinations, the State asked the prospective jurors on the third panel if they thought the burden of proof should be beyond all doubt. Ms. Acosta responded, "No." The following colloquy then took place:

> [State]: So you're okay with the standard that we have to meet, beyond a reasonable doubt?
>
> [Ms. Acosta]: Yes.
>
> [State]: You don't feel like I should have to prove it a little bit further?
>
> [Ms. Acosta]: In this case, I think he's guilty. Since he's a felon and acquired a gun – Is that what you're saying initially? And he was being chased down by an officer?
>
> [State]: Well, that is going to come – We have to present that –
>
> [Ms. Acosta]: Okay.
>
> [State]: – to you. So –
>
> [Ms. Acosta]: But if he was a felon and he acquired a gun and I understand when you're a felon you're not suppose [sic] to be in any possession of any firearms, if I'm incorrect, correct me.
>
> [State]: Okay. The judge will instruct the jury on the law.
>
> [Ms. Acosta]: Okay.
>
> [State]: So. If I'm correct –
>
> [Ms. Acosta]: There are laws to protect us and this is the law that I understand is correct, then he shouldn't [have] been in possession of a firearm.

The defendant later challenged Ms. Acosta for cause. Before ruling on the defendant's challenge, the district court questioned Ms. Acosta:

> [Court]: I mean, obviously, you have some strong opinions, but the issue before the Court is whether or not you could sit back and listen to the evidence and then rule solely on the evidence presented in the courtroom.
>
> [Ms. Acosta]: You putting it that way, yes, sir.
>
> [Court]: Okay. And you would do that?
>
> [Ms. Acosta]: Yes.
>
> [Court]: I mean you can give your assurances to both sides that –
>
> [Ms. Acosta]: I realized what I did – I didn't – I don't have all the evidence at hand.

[Court]: You don't have any evidence.

[Ms. Acosta]: Correct.

After questioning Ms. Acosta, the district court overruled the defendant's challenge for cause. Defense counsel objected to the ruling, arguing that Ms. Acosta, "specifically said in this case I think he is guilty. He should not have been in possession of a gun." Defense counsel then used his ninth peremptory challenge to remove Ms. Acosta from the jury.

We find no reason to disturb the district court's ruling. While Ms. Acosta appeared to have strong opinions, her voir dire testimony overall established that she could have sat as an impartial juror and applied the law as instructed. Once the district court questioned her, Ms. Acosta clarified that she was able to listen to the evidence presented and form an opinion solely on that evidence. Further, she specifically acknowledged that when she made her prior comment, she did not have any evidence.

A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a district court's refusal to excuse her on the grounds of impartiality is not an abuse of discretion if, after further questioning, the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. *See State v. Lee*, 559 So.2d 1310, 1318 (La. 1990), *cert. denied*, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991); *see also State v. Kang*, 02-2812 (La. 10/21/03), 859 So.2d 649, 654-55.

The district court must determine the challenge on the basis of the entire voir dire, and on the court's personal observations of the potential jurors during the questioning. Moreover, the reviewing court should accord great deference to the district court's determination and should not attempt to reconstruct the voir dire by a microscopic dissection of the transcript in search of magic words or phrases that automatically signify the juror's qualification or disqualification. *See State v. Miller*, 99-0192 (La. 9/6/00), 776 So.2d 396, 405-06, *cert. denied*, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). Upon reviewing the voir dire in its entirety, we cannot say the

district court abused its discretion in denying defense counsel's challenge for cause of potential juror Ms. Acosta. This assignment of error is without merit.

SENTENCING ERROR

This court routinely reviews the record for errors that are discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence. LSA-C.Cr.P. art. 920(2). Accordingly, we note that while the applicable sentencing provision mandates a fine of not less than $1,000 nor more than $5,000, the district court failed to impose a fine. *See* LSA-R.S. 14:95.1(B). Although the failure to impose the mandatory fine is error under LSA-C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the district court's failure to impose the minimum required fine was not raised by the State in either the district court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. *See State v. Price*, 05-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES AFFIRMED.