NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017KA0655

STATE OF LOUISIANA

VERSUS

JASON SPIKES

Judgment Rendered: DEC 21 2017

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Case No. #16 CR6 129868
The Honorable, Richard Swartz, Jr., Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

THERIOT, J.

The defendant, Jason Jarrell Spikes, was charged by bill of information with public intimidation, in violation of Louisiana Revised Statutes 14:122, and two counts of possession or introduction of contraband in a state correctional institution, violations of Louisiana Revised Statutes 14:402. The defendant filed a motion to quash and/or sever the bill of information, which the district court granted. The parties then proceeded to trial on the two counts of contraband possession, which were thereafter referred to as counts one and two.[1] The defendant entered a plea of not guilty and, following a jury trial, was found guilty as charged on count one and not guilty on count two.

The defendant filed motions for postverdict judgment of acquittal and new trial, both of which were denied. He was then sentenced to five years at hard labor. The defendant filed a motion to reconsider sentence, which was denied. The State filed a habitual offender bill of information and, after a hearing, the defendant was adjudicated a fourth-felony habitual offender.[2] The district court vacated the original sentence and sentenced the defendant to twenty-year imprisonment at hard labor without the benefit of probation or suspension of sentence. Defense counsel objected to the sentence.

The defendant now appeals, challenging (1) the sufficiency of the evidence presented by the State, (2) the habitual offender adjudication, and (3) the sentence imposed by the district court. For the following reasons, we

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[1] The date of offense for count one was February 27, 2016. The date of offense for count two was March 3, 2016.

[2] The defendant's predicate offenses were the following: (1) an April 16, 2008 conviction for possession of cocaine under Twenty-Second Judicial District Court ("22nd JDC") docket number 05-CR6-092266, and (2) an April 14, 2009 conviction for two counts of distribution of cocaine under 22nd JDC docket number 08-CR1-99746. Although the State's habitual offender bill of information lists the conviction date as April 13, 2009, for docket number 08-CR1-99746, the minute entry and commitment order in connection with that docket number list the conviction date as April 14, 2009.

affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On February 27, 2016, officers with the Washington Parish Sheriff's Office noticed a few inmates, including the defendant, behaving in an unusual manner. The defendant was "staggering around" toward his bunk and appeared to be impaired. The defendant was later found passed out on his bunk. In response to the unusual behavior, the officers cleared the inmates from their cell block and searched the cells. During the search, the officers pulled back the blankets on the defendant's bunk, flipped back the mat, and found a homemade knife. When the defendant was told that the officers found his knife, he responded, "That's okay. I'll just make another one."

Five days later, on March 3, 2016, the officers smelled something suspicious and noticed that the defendant appeared to be under the influence. The defendant was subsequently escorted out of his cell and searched. During the search, the officers located a pack of suspected synthetic marijuana in the defendant's prison jumpsuit. The substance found in the defendant's jumpsuit was tested and determined to be MDMB-CHMZCA, which is known to be a synthetic cannabinoid.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant contends that the district court erred in accepting the jury's verdict. According to the defendant, the State failed to adequately establish that the homemade knife was among the defendant's belongings and not that of the other inmates housed in the same section of the prison.

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 constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia,** 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Wright,** 98-0601 (La. App. 1 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. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984); **State v. Taylor**, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

Pursuant to Louisiana Revised Statutes 14:402(A), "No person shall introduce contraband into or upon the grounds of any state correctional institution." "Contraband" means "[a] dangerous weapon, or other instrumentality customarily used or intended for probable use as a dangerous weapon or to aid in an escape[.]" La. R.S. 14:402(D)(2). The defendant does not dispute that a homemade knife was found, but rather, contends that it was not in his possession. According to the defendant, inmates routinely move their belongings to different areas of the cell block, and he did not

have any belongings in the area where the homemade knife was found.

Washington Parish Sheriff's Officer Joshua McMorris testified that the defendant was found "staggering" toward the bunk bed where the homemade knife was found. According to Officer McMorris, he knew that the homemade knife belonged to the defendant because (1) it was found in the bunk where the defendant was passed out, (2) the bunk was listed as belonging to the defendant in the prison's record, and (3) a piece of mail addressed to the defendant was in the bunk.

The defendant testified that on the date the knife was found, he was sleeping on the floor on a mattress. He stated that he was on the bunk where the knife was found because he could not see the television from the mattress where he sleeps. He denied being assigned to a bunk and denied knowledge of the knife. The defendant also denied having any mail on or underneath the bunk.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where 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. Richardson,** 459 So.2d 31, 38 (La. App. 1st Cir. 1984). 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. **Taylor**, 721 So.2d at 932. Absent a showing that the defendant was not granted the fundamental due process of law, it is not appropriate for this court to impinge on the fact finder's discretion and reject that credibility determination. See **State v. Johnson,** 2003-1228 (La. 4/14/04), 870 So.2d 995, 1000.

The guilty verdict in this case indicates the jury rejected the defendant's claim that the homemade knife did not belong to him. Testimony established that the defendant was on the bunk at the time the knife was found and there was a piece of mail addressed to the defendant on the bunk. Moreover, when told that the knife was found, the defendant responded that he would "just make another one." Considering the evidence presented during the trial, the jury could have reasonably concluded that the knife belonged to the defendant. Thus, in reviewing the evidence, 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.

Further, in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder, a court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law. See **State v. Mire,** 2014-2295 (La. 1/27/16), __So.3d__, __ (per curiam). An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway,** 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). After a thorough review of the record, viewing the evidence presented in this case in the light most favorable to the State, we are convinced that a rational trier of fact could find that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of the offense. Accordingly, this assignment of error is without merit.

HABITUAL OFFENDER ADJUDICATION

In his second assignment of error the defendant argues that the evidence presented by the State at the habitual offender hearing was insufficient to establish his identity as the person convicted of the predicate convictions. Specifically, the defendant contends that the probation officer who testified did not personally supervise him and that the fingerprints on the bills of information in connection with the predicate offenses did not match his fingerprints.

To obtain a multiple-offender adjudication, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Payton**, 2000-2899 (La. 3/15/02), 810 So.2d 1127, 1130. The Habitual Offender Act does not require the State to use a specific type of evidence in order to carry its burden at the hearing, and the prior convictions may be proved by any competent evidence. **Payton**, 810 So.2d at 1132.

Herein, the habitual offender bill of information alleged the following prior convictions: (1) an April 16, 2008 conviction for possession of cocaine under 22nd JDC docket number 05-CR6-092266; and (2) an April 14, 2009 conviction for two counts of distribution of cocaine under 22nd JDC docket number 08-CR1-99746.

At the habitual offender hearing, the State introduced into evidence certified copies of the defendant's testimony from the trial of the instant offense, wherein the defendant admitted that he was convicted of possession

of cocaine and two counts of distribution of cocaine. The State also offered into evidence and asked the district court to take judicial notice of the records from the defendant's predicate offenses. The district court accepted them into evidence and noted that duplication was unnecessary because it had the original records. The State noted that the records contained rights forms and/or advice of rights forms for the guilty pleas entered by the defendant. The bills of information for the defendant's instant and predicate offenses bear the same name, date of birth, address, and last four social security number digits. Additionally, the bills of information in connection with docket number 08-CR1-99746 and the instant offense bear the same state identification number.

The State also presented the testimony of Aaron Moran, an employee with the Louisiana Division of Probation and Parole. Moran testified that he supervised the defendant's case under "administrative parameters," explaining that the case was transferred to him after the defendant's parole officer retired. The defendant was incarcerated at the time Moran received his case. Moran identified the defendant and stated that he recognized him. Moran further testified that he supervised the defendant and served the defendant with a notice of parole violation on a charge that he incurred while incarcerated. Moran also testified that the defendant was the same person that his department had under supervision.

The defendant also testified at the hearing and argued that the prior felony convictions that he admitted to during the trial of the instant offense were entered when he was a juvenile.

At the conclusion of the testimony, the district court noted that during the trial on January 11, 2017, the defendant indicated that he had been convicted of simple possession of cocaine and two counts of distribution.

The district court pointed out that there was no testimony as to whether those convictions were entered when the defendant was a juvenile and that on cross-examination, the defendant again stated that he had been convicted of simple possession of cocaine and two counts of distribution without reference to being a juvenile at the time of those convictions. The district court further noted that during the defendant's testimony, he stated that on the date of the instant offense, he was "backing up parole time on the two counts of distribution and the simple possession that [he was] convicted of in 2009." As noted by the district court, that testimony corresponds with the records of the predicate offenses. The district court also stated that the date of birth listed for the defendant was the same in the predicate records and the instant offense and the same address was utilized. Further, the district court pointed out that Moran identified the defendant in court.

Moreover, contrary to the defendant's assertion that the fingerprints on the bills of information in connection with the predicate convictions did not match those on the bill of information in connection with the instant offense, the district court specifically stated that the issue was not that the fingerprints did not match but that the fingerprints on the bills of information in connection with the predicate offenses were not of sufficient quality to provide for a comparison. Accordingly, the State presented sufficient evidence to establish that the defendant was the same person who pled guilty to the three prior felony offenses. Therefore, this assignment of error is without merit.

EXCESSIVE SENTENCE

In his last assignment of error, the defendant argues that the sentence imposed by the district court is excessive. Specifically, the defendant

contends that because his predicate convictions were "non-violent and not sex related[,]" the sentence imposed by the district court was excessive.

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 imposition of pain and suffering. See **State v. Hurst**, 99-2868 (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 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. 1990), 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).

The defendant was sentenced to twenty years at hard labor without the benefit of probation or suspension of sentence, which is the minimum mandatory sentence pursuant to Louisiana Revised Statutes 15:529.1(A)(4)(a). 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 to the severity of the crime." **State v. Dorthey**, 623 So.2d 1276, 1280 (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. 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 State argued that the defendant had "chosen the criminal life" and suggested that more than a minimum sentence would be warranted. However, the district court disagreed with the State's position and imposed the twenty-year sentence without benefit of probation or suspension of sentence. After the imposition of sentence, the defendant challenged his habitual offender adjudication, but did not present any arguments in favor of a sentence below the mandatory minimum.

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 minimum penalty provided for in Louisiana Revised Statutes 15:529.1(A)(4)(a). The defendant failed to present any arguments that clearly and convincingly showed 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 minimum term of twenty years. We also note that a 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. 1 Cir. 9/5/07), 970 So.2d 592, 602, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173. Accordingly, this assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.