

STATE OF LOUISIANA

COURT OF APPEAL

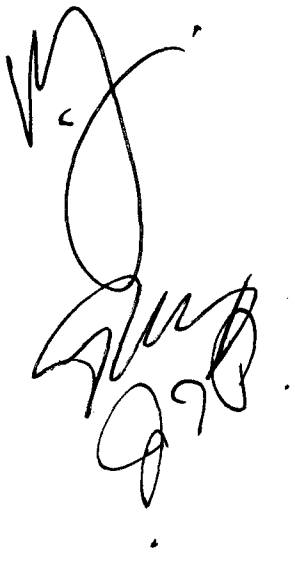
FIRST CIRCUIT

NO. 2017 KA 0716

STATE OF LOUISIANA

VERSUS

JOSEPH BUTLER III



Judgment Rendered: NOV 01 2017

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On Appeal from  
The 16<sup>th</sup> Judicial District Court,  
Parish of St. Mary, State of Louisiana  
Trial Court No. 2012-187826  
The Honorable Paul J. deMahy, Judge Presiding

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In Proper Person

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BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

**CRAIN, J.**

The defendant, Joseph Butler III, was convicted of distribution of a Schedule II controlled dangerous substance (cocaine). He admitted to being a second-felony habitual offender and was sentenced to fifteen years of imprisonment at hard labor. We affirm the conviction, habitual offender adjudication, and sentence.

**FACTS AND PROCEDURAL HISTORY**

During an undercover narcotics investigation, an individual, later identified as the defendant, sold crack cocaine on two occasions to Gabrielle Price Amador, an undercover narcotics officer with the Assumption Parish Sheriff's Office. The defendant was charged with distribution of a Schedule II controlled dangerous substance on June 22, 2011, (count one) and August 3, 2011 (count two). *See* La. R.S. 40:967A. Following a jury trial, the defendant was found not guilty on count one and guilty on count two.

The defendant was sentenced to imprisonment at hard labor for a term of seven years, with the first two years to be served without benefit of probation, parole, or suspension of sentence. The state filed a habitual offender bill of information, and, after a hearing, the trial court adjudicated the defendant a third-felony habitual offender. However, pursuant to an offer by the state, the defendant admitted to being a second-felony habitual offender. The trial court vacated the sentence previously imposed and sentenced the defendant as a second-felony habitual offender to imprisonment at hard labor for a term of fifteen years. *See* La. R.S. 40:967B4(b) and 15:529.1A(1).<sup>1</sup> The defendant appeals, raising two counseled and two *pro se* assignments of error.

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<sup>1</sup> The entirety of the defendant's sentence is deemed to be served without benefit of probation or suspension of sentence, and the first two years of the defendant's sentence are to be served without benefit of parole. *See* La. R.S. 40:967B(4)(b), 15:529.1G, and 15:301.1. All citations to these statutes are to the text in effect prior to the respective revisions by 2017 La. Acts No. 257, 281, and 282.

## DISCUSSION<sup>2</sup>

In his two counseled and first *pro se* assignments of error, the defendant argues the evidence is insufficient to support his conviction and the trial court erred in denying his motion for postverdict judgment of acquittal. Specifically, he complains that the only evidence presented by the state was the testimony of Detective Amador, whose identification of the defendant did not occur until weeks after the August transaction. He further contends that no marked police money was recovered.

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 sufficiency of evidence, an appellate court must determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt based on the entirety of the evidence, both admissible and inadmissible, viewed in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *State v. Oliphant*, 13-2973 (La. 2/21/14), 133 So. 3d 1255, 1258-59; *see also* La. Code Crim. Pro. art. 821B; *State v. Mussall*, 523 So. 2d 1305, 1308-09 (La. 1988). When circumstantial evidence forms the basis for conviction, the evidence, “assuming every fact to be proved that the evidence tends to prove . . . must exclude every reasonable hypothesis of innocence.” La. R.S. 15:438; *Oliphant*, 133 So. 3d at 1258.

The due process standard does not require the reviewing court to determine whether it believes the witnesses or whether it believes the evidence establishes guilt beyond a reasonable doubt. *State v. Mire*, 14-2295 (La. 1/27/16), \_\_\_ So.3d

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<sup>2</sup> In his *pro se* brief, the defendant claims the state failed to properly invoke the jurisdiction of this court. The defendant, not the state, must invoke the jurisdiction of this court for his appeal. Jurisdiction is vested by Louisiana Constitution Article 5, Section 10(A)(3).

\_\_\_, \_\_\_ (2016WL314814). Rather, appellate review is limited to determining whether facts established by direct evidence and inferred from the circumstances established by that evidence are sufficient for *any* rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *State v. Alexander*, 14-1619 (La. App. 1 Cir. 9/18/15), 182 So. 3d 126, 129-30, *writ denied*, 15-1912 (La. 1/25/16), 185 So. 3d 748. The weight given evidence is not subject to appellate review; therefore, evidence will not be reweighed by an appellate court to overturn a fact finder's determination of guilt. *State v. Wilson*, 15-1794 (La. App. 1 Cir. 4/26/17), 220 So. 3d 35, 41.

It is unlawful for any person knowingly or intentionally to possess with the intent to distribute a controlled dangerous substance in Schedule II, which includes cocaine. *See* La. R.S. 40:967A(1) and 40:964A(4). The term "distribute" is defined as "to deliver a controlled dangerous substance . . . by physical delivery." La. R.S. 40:961(14).

When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the state is required to negate any reasonable probability of misidentification. *State v. Hughes*, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051; *State v. Neal*, 00-0674 (La. 6/29/01), 796 So. 2d 649, 658. Positive identification by only one witness is sufficient to support a conviction. *Id.*

Detective Amador testified that on June 22, 2011, she drove into the parking lot of the Family Food Mart in Morgan City in her undercover vehicle and asked about buying narcotics. A person who she identified as the defendant waved for her to come in his direction. She approached his vehicle, which she described as red and "boxy," and asked for "\$40.00 hard," referring to crack cocaine. The person placed the crack cocaine into Detective Amador's hand, and she gave him \$40.00 in marked police cash. The detective obtained the person's telephone

number and left the parking lot. The purchased substance was tested and identified as cocaine.

On August 3, 2011, Detective Amador met the defendant at a gas station at a prearranged meeting. The detective arrived first, and the defendant pulled in and parked his vehicle behind her. The defendant exited his vehicle but remained near it while using an air pump at the station. Detective Amador approached the defendant, gave him \$40.00 in marked police cash, and he handed her a substance that was later tested and confirmed to be cocaine. The marked money was not recovered.

On August 16, 2011, Detective Amador viewed a photographic lineup and identified the defendant as the person who sold crack cocaine to her on June 22, 2011, and on August 3, 2011. When asked about the identification, Detective Amador testified, "I am positive that I did not make a mistake on the identity."

After a thorough review of the record, we find that any 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 distribution of cocaine, and the defendant's identity as the perpetrator of that offense on August 3, 2011. The verdict indicates the jury credited the testimony of Detective Amador and her identification of the defendant for the August 3, 2011 transaction. We agree with the trial court's observation that the jury could have reasonably concluded that Detective Amador's identification from the first incident was so distant that she may have made a mistake. However, contrary to the defendant's assertion, that does not preclude the jury from concluding that on August 16, 2011, Detective Amador correctly identified the defendant as the person who distributed crack cocaine to her on August 3, 2011.

The trier of fact may accept or reject, in whole or in part, the testimony of any witness. 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. 1 Cir. 3/27/97), 691 So. 2d 1365, 1368, *writ denied*, 97-1124 (La. 10/17/97), 701 So. 2d 1331. The credibility of witnesses will not be reweighed on appeal. *State v. James*, 02-2079 (La. App. 1 Cir. 5/9/03), 849 So. 2d 574, 581.

The jury rejected the defendant's theory that Detective Amador misidentified him as the person who distributed crack cocaine to her on August 3, 2011. 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. *See State v. Moten*, 510 So. 2d 55, 61 (La. App. 1 Cir.), *writ denied*, 514 So. 2d 126 (La. 1987). No such hypothesis exists in this case. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. *See State v. Ordodi*, 06-0207 (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 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*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*). The assignments of error asserting insufficiency of the evidence are without merit.

In his second *pro se* assignment of error, the defendant argues that his right to due process was violated because the state delayed his habitual offender

proceedings. According to the defendant, the “state was allowed to continue habitual proceeding for an amazing 2 years and 3 months.”

The defendant was convicted on April 15, 2014. He was originally sentenced on August 27, 2014. The state filed the habitual offender bill of information on August 26, 2014, and an arraignment on the bill was set for September 29, 2014. The record does not include a minute entry for the September 29, 2014 arraignment date. The next minute entry is dated July 10, 2015, and reflects the defendant was informed that if he was unable to retain counsel, a public defender would be appointed to represent him. The trial court then continued the arraignment until September 4, 2015. The defendant appeared on September 4, 2015, and informed the court that he was no longer represented by counsel. The court appointed the public defender’s office as defendant’s counsel and continued the arraignment until November 13, 2015. The November 13, 2015 hearing, at the state’s request, was continued without date.

On January 6, 2016, defense counsel waived the reading of the habitual offender bill of information and entered a denial to its allegations. A hearing for the habitual offender adjudication was scheduled for March 29, 2016. Defense counsel was unable to appear on March 29, 2016, and, on defense motion, the hearing was continued until April 12, 2016. On the ensuing hearing date, defense counsel informed the trial court that the defendant wished to have the hearing continued to allow him more time to speak with counsel. The trial court continued the hearing until June 16, 2016. After another request for continuance by the defendant, the hearing was rescheduled for July 5, 2016. On that date, the district court adjudicated the defendant a habitual offender, vacated the original sentence, and resentenced the defendant.

Louisiana Code of Criminal Procedure article 874 provides that a sentence shall be imposed without unreasonable delay. For a defendant convicted of a felony, a habitual offender bill of information may be filed “at any time, either after conviction or sentence.” *See* La. R.S. 15:529.1D(1)(a). While Louisiana Revised Statute 15:529.1 does not establish a time limit for habitual offender proceedings, the jurisprudence holds that a habitual offender bill must be filed within a reasonable time after the state learns of the defendant’s prior felony convictions. *State v. Muhammad*, 03-2991 (La. 5/25/04), 875 So. 2d 45, 54. The same considerations that underlie the constitutional right to a speedy trial compel a conclusion that upon conviction a defendant is entitled to know the full consequences of the verdict within a reasonable time. *State v. Broussard*, 416 So. 2d 109, 110-11 (La. 1982). Since the enhancement of penalty provision is incidental to the latest conviction, the proceeding to sentence under that provision should not be unduly delayed. *Broussard*, 416 So. 2d at 111.

The determination of whether the hearing is held within a reasonable time hinges on the facts and circumstances of the specific case. *Muhammad*, 875 So. 2d at 55. Relevant speedy trial considerations may be used to assist the court in determining whether any delays are unexplained or extraordinarily long in a habitual offender adjudication. *Id.* As a general matter, the United States Supreme Court has set forth four factors for courts to consider in determining whether a defendant’s right to a speedy trial has been violated. Those factors are the length of the delay, the reasons for the delay, the accused’s assertion of his right to a speedy trial, and the prejudice to the accused resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93, 33 L.Ed. 2d 101 (1972). While these factors are neither definitive nor dispositive in the context of



a habitual offender proceeding, they are instructive. *See Muhammad*, 875 So. 2d at 55; *see also State v. Reaves*, 376 So. 2d 136, 138 (La. 1979).

There was no delay in this case between the defendant's sentencing on the underlying offense and the filing of the habitual offender bill of information. While there was a delay of almost two years before the adjudication hearing, a significant portion of that delay was directly attributable to the defendant. All but one of the continuances were granted at the defendant's request or were necessitated by his counsel's inability to appear. The record does not reflect, nor do we find, any prejudice resulting from the delay. Finally, there is nothing in the record before us that indicates any abusive or vindictive behavior by the state. Thus, the defendant's due process rights were not violated. *Cf. State v. Neathery*, 12-0162, 2012WL6681803, (La. App. 1 Cir. 12/21/12), *writ denied*, 13-0218 (La. 9/13/13), 120 So. 3d 278 (three-year delay in filing habitual offender bill was not unreasonable). This assignment of error is without merit.

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