NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0930

STATE OF LOUISIANA

VERSUS

SHAWNATHON LAMON FABRE

Judgment Rendered: DEC 21 2017

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 548281

Honorable August J. Hand, Judge Presiding

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Warren L. Montgomery
District Attorney
Mary Watson Smith
Assistant District Attorney
Covington, Louisiana

Counsel for Appellee
State of Louisiana

Bertha M. Hillman
Louisiana Appellate Project
Covington, Louisiana

Counsel for Defendant/Appellant
Shawnation Lamon Fabre

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Theriot J. Agrees and Dissents in Part.
I would have Applied Price.

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McCLENDON, J.

The defendant, Shawnathon L. Fabre, was charged by amended bill of information with domestic abuse aggravated assault on count one, a violation of LSA-R.S. 14:37.7, possession of marijuana, second offense, on count two, a violation of LSA-R.S. 40:966(C)(2)(a), possession of a firearm by a convicted felon, on count three, a violation of LSA-R.S. 14:95.1, and aggravated assault with a firearm on count four, a violation of LSA-R.S. 14:37.4.[1] He entered a plea of not guilty on all counts. Count one was severed, and the matter proceeded to trial on counts two, three, and four.[2] After a trial by jury, the defendant was found guilty as charged on counts two and three, and guilty of the responsive offense[3] of attempted aggravated assault with a firearm on count four, in violation of LSA-R.S. 14:37.4 and 14:27. He was sentenced to five years imprisonment at hard labor on counts two and four, and to fifteen years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count three, to be served concurrently.

The State filed a habitual offender bill of information seeking to enhance the sentence on count four.[4] The defendant withdrew his former not guilty plea on count one, pled guilty as charged, and was sentenced to five years imprisonment at hard labor. He stipulated to his status as a second-felony habitual offender, the original sentence on count four was vacated, and the defendant was resentenced on count four to an agreed upon sentence of ten years imprisonment at hard labor, to be served consecutive to the sentences imposed on counts one, two, and three.[5] He now

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[1] Count two is based on a predicate conviction of possession of marijuana or synthetic cannabinoids on December 16, 2008. Count three is based on a predicate conviction of distribution of cocaine on September 29, 2008. The statutory citation provided herein on count two is in accordance with the version of the statute in effect at the time of the offense (prior to amendment by 2017 La. Acts No. 281, §2 and 2015 La. Acts No. 295, §1).

[2] The trial court declared a mistrial as to the initial trial by jury prior to the amendment of the bill of information to add count four. The case thereafter proceeded to retrial.

[3] Attempted aggravated assault with a firearm is a responsive verdict when, as in the instant case, the State relies on "the intentional placing of another in reasonable apprehension of receiving a battery" definition of assault. See **State v. Barnett**, 12-816 (La.App. 5 Cir. 5/16/13), 118 So.3d 1156, 1162-63.

[4] The habitual offender bill of information alleges the distribution of cocaine predicate.

[5] We note that in the same proceeding the defendant pled guilty to additional unrelated offenses from other cases. Though stated otherwise in the minutes, the trial court did not restrict parole in imposing the enhanced sentence on count four. When there is a discrepancy between the minutes and transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

appeals, assigning error to the sufficiency of the evidence on counts three and four. For the following reasons, we affirm the convictions and sentences on counts two and four. We also affirm the conviction on count three, but amend the sentence on count three and affirm as amended.

STATEMENT OF FACTS

On April 16, 2014, at 9:28 a.m., officers of the Covington Police Department (CPD) were dispatched to 303 West 29th Avenue, based on the complaint that the defendant brandished a gun. In addition to providing the defendant's name, the caller further described the defendant as wearing a gray sweater and blue jeans at the time. That morning Kandi Laurent asked her mother, Kathy Montana, to accompany her as she dropped off clothing that belonged to the defendant, her boyfriend, with whom she had an argument the night before.[6] They left baskets of clothing in the defendant's mother's yard and then drove to Carla Montana's house, Kandi's sister, who lived a block away from the defendant's mother's residence. While they were in Kandi's vehicle in Carla's driveway, the defendant drove up behind them and began "fussing" at Kandi and "calling her names." Kathy stepped out of the vehicle to confront the defendant as he exited his vehicle and approached Kandi's vehicle. At that point, Kathy saw a gun in the defendant's hand.[7] The defendant brandished the gun, raising it upward, and Kathy told Kandi to call the police. The defendant then drove off toward his mother's residence. CPD officers began arriving at the scene minutes later.

Lieutenant Steven Culotta approached the scene and began speaking to Kathy and Kandi. They pointed out the defendant, who was down the street at 203 West 29th Avenue, and informed the officer that the defendant was armed with a gun. Lieutenant Culotta immediately pursued the defendant, a black male wearing a gray sweater and jeans, fitting the description provided in the dispatch. The defendant was observed on foot walking between two houses located at 203 and 209 West 29th Avenue. Lieutenant Culotta apprehended the defendant, escorted him to the nearest

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[6] Kandi and Kathy's names are inconsistently spelled in the record. The spelling used herein is consistent with Kathy Montana's handwritten signed statement given to the police.

[7] By the time of the trial, Kathy indicated that she was not certain as to whether the object brandished by the defendant was a gun, though she unequivocally identified it as such at the time of the offense.

police car, and conducted a pat-down search. Detective James Blackwell motioned to Lieutenant Culotta to check the defendant's bulging right front pocket, where a plastic bag tied in a knot containing suspected marijuana was discovered. At that point, the defendant was handcuffed and advised that he was being placed under arrest. Other officers secured and remained posted at the scene. Subsequently, Officer Joel Crawford discovered a gun in an outdoor fire pit located between the two houses, where Lieutenant Culotta observed the defendant on foot before he was escorted to the police unit.[8]

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues that the evidence is insufficient to support the convictions of possession of a firearm by a convicted felon and attempted aggravated assault with a firearm. The defendant is not contesting the other convictions. The defendant specifically contends that the State failed to prove that he possessed a gun. He notes that a gun was not found in his possession, and contends that there was no fingerprint evidence or scientific certainty that the DNA sample from the gun found in the fire pit near the scene included the defendant as a donor. The defendant further notes that Kathy testified that she did not believe that the defendant had a gun and admitted that she was in shock at the time of her police statement. Thus, the defendant concludes that the eyewitnesses did not establish that he possessed a gun. Finally, the defendant argues that the evidence did not exclude a reasonable hypothesis of innocence that the gun in the fire pit was thrown there by someone else. In further support of this position, defendant notes that three of his male relatives—two brothers and a cousin—live in the house near the area where the gun was found. The defendant also notes that all male relatives along his paternal lineage cannot be excluded as DNA donors of the sample from the firearm.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The constitutional

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[8] After obtaining written consent to search from the homeowner at 203 West 29th Avenue, Katherine Fabre, the police confiscated the weapon, which was loaded at the time. The record is unclear as to whether Katherine Fabre is the defendant's mother or grandmother.

standard for testing the sufficiency of the evidence, enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 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 charged and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. **State v. Jones**, 596 So.2d 1360, 1369 (La.App. 1 Cir.), writ denied, 598 So.2d 373 (La. 1992); see also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660. 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, LSA-R.S. 15:438 provides that the fact finder must be satisfied that 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. 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 which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statutes 14:95.1(A) makes it unlawful for any person who has been convicted of certain felonies to possess a firearm. To prove a violation of LSA-R.S. 14:95.1, the State must prove: (1) the defendant's status as a convicted felon; and (2) that the defendant was in possession of a firearm. **State v. Loper**, 10-0582 (La.App. 1 Cir. 10/29/10), 48 So.3d 1263, 1266. The State must also prove that ten years have not elapsed since the date of completion of the punishment for the prior felony conviction. See LSA-R.S. 14:95.1(C). Thus, a violation of LSA-R.S. 14:95.1 by the defendant required no more than establishing that he had a prior felony conviction and was in possession of a firearm due to the fact that his conviction of his predicate offense occurred in 2008. In this case, the defendant does not contest his predicate conviction.

Louisiana Revised Statutes 14:95.1 does not make "actual" possession a necessary element of the offense or specifically require that the defendant have the

firearm on his person to be in violation. "Constructive" possession satisfies the possessory element of the offense. **State v. Day**, 410 So.2d 741, 743 (La. 1982). Constructive possession occurs when the firearm is subject to the defendant's dominion and control. **State v. Plain**, 99-1112 (La.App. 1 Cir. 2/18/00), 752 So.2d 337, 340-41 (constructive possession found where the defendant admitted to having the weapon underneath the mattress in his bedroom, the defendant then led officers to his bed and pointed out the location of the weapon, and the police recovered a weapon from the area the defendant had pointed out); **State v. Mose**, 412 So.2d 584, 585 (La. 1982) (gun located in the defendant's bedroom sufficient for constructive possession); **State v. Frank**, 549 So.2d 401, 405 (La.App. 3 Cir. 1989) (constructive possession found where the gun was in plain view on the front seat of a car the defendant was driving but did not own); **State v. Lewis**, 535 So.2d 943, 950 (La.App. 2 Cir. 1988), writ denied, 538 So.2d 608 (La. 1989), cert. denied, 493 U.S. 963, 110 S.Ct. 403, 107 L.Ed.2d 370 (1989) (presence of firearms in the defendant's home, statement by the defendant that one gun belonged to his wife, and discovery of shoulder holster in the master bedroom indicated the defendant's awareness, dominion, and control over the firearms). Louisiana cases hold that a defendant's dominion and control over a weapon constitutes constructive possession even if it is only temporary and even if the control is shared. **Plain**, 752 So.2d at 340; **State v. Melbert**, 546 So.2d 948, 950 (La.App. 3 Cir. 1989); **State v. Bailey**, 511 So.2d 1248, 1250 (La.App. 2 Cir. 1987), writ denied, 519 So.2d 132 (La. 1988).

Constructive possession contains an element of awareness or knowledge that the firearm is present, and the general intent to possess it. General intent exists when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed consequences as reasonably certain to result from his act or failure to act. LSA-R.S. 14:10(2). Although the existence of intent is a question of fact, it may be inferred from the circumstances of the transaction. See **State v. Johnson**, 03-1228 (La. 4/14/04), 870 So.2d 995, 998-99. Whether the proof is sufficient to establish possession turns on the facts of each case. See **State v. Harris**, 94-0970 (La. 12/8/94), 647 So.2d 337, 338-39 (per curiam).

Further, guilty knowledge may be inferred from the circumstances of the transaction and proved by direct or circumstantial evidence. See **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983).

Aggravated assault is an assault committed with a firearm. LSA-R.S. 14:37.4(A). Assault is, in pertinent part, "the intentional placing of another in reasonable apprehension of receiving a battery." LSA-R.S. 14:36. A battery includes "the intentional use of force of violence upon the person of another." LSA-R.S. 14:33. The elements of assault are (1) the intent-to-scare mental element (general intent), (2) conduct by the defendant of the sort to arouse a reasonable apprehension of bodily harm, and (3) the resulting apprehension on the part of the victim. **State v. Gardner**, 16-0192 (La.App. 1 Cir. 9/19/16), 204 So.3d 265, 268; **State in Interest of K.M.**, 14-0306 (La.App. 4 Cir. 7/23/14), 146 So.3d 865, 872; **State in Interest of Tatom**, 463 So.2d 35, 37 (La.App. 5 Cir. 1985). Circumstantial evidence of a victim's state of mind can be used to prove the element of reasonable apprehension. **Gardner**, 204 So.3d at 268. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. LSA-R.S. 14:27(A). Specific intent is that state of mind which exists when the circumstances indicate the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La.App. 1 Cir. 1984). Unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the fact finder, is sufficient to support a factual conclusion. See **State v. Marshall**, 04-3139 (La. 11/29/06), 943 So.2d 362, 369, cert. denied, 552 U.S. 905, 128 S.Ct. 239, 169 L.Ed.2d 179 (2007). It is the fact finder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. **State v. Hughes**, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

In this case, Kathy Montana's written police statement indicates that the incident occurred at approximately 9:25 a.m., the police were called at 9:27 a.m., the officers were dispatched at 9:28 a.m., and the officers began arriving at the scene at 9:30 a.m., within minutes of the dispatch. In her written statement, Kathy indicated that her daughter, Kandi, had put the defendant out of her house the night before, and that she asked Kathy to go with her to drop off the defendant's clothes because she was afraid to go alone. After they dropped the clothes off and arrived at Carla's residence down the street, the defendant pulled up behind them, blocking Kandi's car. Kathy's statement, without any uncertainty, further indicates that when she stepped out of Kandi's vehicle, she saw a "big gun" in the defendant's right hand dangling about halfway to his knee. Kathy stated that she became "so scared" when the defendant pointed the gun at her. She specifically added, "I have never been so scared in my life the look in his eyes told me that if I uttered another word he [would] surely shoot. The police were right on time, he got in his car and pulled to his [mother's] house."

At trial, Kathy again stated that the defendant had a gun, but conceded that it could have been a taser. Thus, at the time of the trial, she was not sure that it was a gun and noted that tasers look like guns. When asked if the defendant pointed the gun at her, she testified that it was probably pointed in her direction, stating that he pointed it sideways "like they do in the movies." She confirmed that the defendant went down the street, between his mother's house and the house next door. Kathy testified that she did not see any other males in the area at the time.

Officer Culotta noted that the scene was secured at the time of the defendant's arrest such that no one was allowed to enter or exit the area. Officer Culotta did not see any other males in the area. Deputy Doug Arrowood remained on the scene and supervised the officers who began canvassing the area. Officer Crawford saw the gun at the top of the small fire pit behind one of the houses, and alerted Deputy Arrowood to its presence.

Tara Johnson, an expert forensic DNA analyst for the St. Tammany Parish Coroner's Office, performed the DNA analysis in this case. According to the results of her analysis, the defendant and all male relatives along his paternal lineage cannot be

excluded as DNA donors of the sample from the firearm. Moreover, based on the DNA profile, approximately 1.48 percent of the African American population, 4.74 percent of the Caucasian population, and 1.64 percent of the Hispanic population cannot be excluded as donors of the sample.

The fact that the record contains evidence which conflicts with the testimony accepted by the fact finder does not render that evidence insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La.App. 1 Cir. 1985). 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 (La.App. 1 Cir. 9/25/98), 721 So.2d 929, 932. Herein, the police, who arrived within minutes of the incident, were informed that the defendant was armed with a gun. The victim pointed out the defendant, who was down the street within close proximity of the recovered weapon. Based on our review of the evidence, including the eyewitness testimony and the DNA results, the jury reasonably rejected the hypotheses of innocence that the defendant had a taser and/or that the gun was placed in the pit by someone else. The victim specifically indicated in her written police statement that the defendant jumped out of his car, was yelling profanities, and pointed a "big gun" at her. Her statement and testimony further described the fear caused by the defendant's actions. Considering the circumstances, the victim's testimony, and written police statement, the evidence supports a finding that the defendant intentionally placed the victim in the "reasonable apprehension of receiving a battery." Thus, the evidence supports a finding that the defendant committed the completed offense of aggravated assault with a firearm, as opposed to merely attempting the offense. Attempted aggravated assault, however, is a responsive verdict to the charged offense. A jury has the prerogative to compromise and render a lesser verdict whenever it could have convicted as charged.[9] See **State ex rel. Elaire v.**

[9] At trial, the jury instructions included a charge regarding the responsive verdict of attempted aggravated assault with a firearm. No objection was made by defense counsel to this jury instruction. Absent a contemporaneous objection, the reviewing court may affirm the conviction, whether or not the evidence supports the responsive verdict returned by the jury, if the evidence would have supported a conviction of the greater offense. See **State ex rel. Elaire v. Blackburn**, 424 So.2d at 252.

Blackburn, 424 So.2d 246, 251 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983). The evidence in this case was sufficient to convict as charged.

Thus, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 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**, 07-2306 (La. 1/21/09), 1 So.3d 417, 421 (per curiam). 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 in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder. See **State v. Mire**, 14-2295 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814 (per curiam). 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 State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of the offenses and the defendant's identity as the perpetrator. Accordingly, the sole assignment of error lacks merit.

PATENT ERROR REVIEW

This court routinely reviews the record for patent errors pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2). We note that in sentencing the defendant on the conviction on count three of possession of a firearm or carrying a concealed weapon by a convicted felon, the trial judge did not impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars. See LSA-R.S. 14:95.1(B). Accordingly, the defendant's sentence on count three is illegally lenient.

An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. LSA-C.Cr.P. art. 882(A). A defendant in a

criminal case does not have a constitutional or statutory right to an illegal sentence. See **State v. Williams**, 00-1725 (La. 11/28/01), 800 So.2d 790, 797. Even though the State apparently acquiesced in this illegally lenient sentence and does not complain of this error, the Louisiana Supreme Court has stated that it will not ignore patent errors favorable to a defendant even when the state does not complain about them. See **State v. Campbell**, 03-3035 (La. 7/6/04), 877 So.2d 112, 116.

Therefore, we amend defendant's sentence on count three to include the minimum possible, but mandatory, fine of one thousand dollars ($1000.00). We recognize that **State v. Haynes**, 04-1893 (La. 12/10/04), 889 So.2d 224 (per curiam), generally requires a remand for resentencing if amendment of a defendant's sentence involves discretion. However, we find that **Haynes** is distinguishable from the instant case because we do not amend the defendant's sentence to include the maximum possible fine for his conviction on count three, as the appellate court did in that case. Instead, our imposition of the minimum, but mandatory, fine does not involve more than a ministerial correction of an illegally lenient sentence. Our amendment of defendant's sentence on count three to include this nondiscretionary fine does not constitute a due process violation because neither actual retaliation nor vindictiveness exists in this correction. See **Williams**, 800 So.2d at 798; accord **State v. Carter**, 16-1078 (La.App. 1 Cir. 12/22/16), 210 So.3d 306, 309 and **State v. Gregoire**, 13-0751 (La.App. 1 Cir. 3/21/14), 143 So.3d 503, 510, writ denied, 14-0686 (La. 10/31/14), 152 So.3d 151.

CONCLUSION

For the foregoing reasons, the defendant's convictions are affirmed. We also affirm the sentences imposed on counts two and four. We amend the sentence on count three and hereby impose the minimum fine of one thousand dollars ($1,000.00). In all other respects, the defendant's sentence on count three remains the same.

CONVICTIONS AFFIRMED. SENTENCES ON COUNTS TWO AND FOUR AFFIRMED; SENTENCE ON COUNT THREE AMENDED AND AFFIRMED AS AMENDED.