NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1233**
VERSUS	*	**COURT OF APPEAL**
ROBERT WILLIAMS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-522, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

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CONVICTION AND MULTIPLE BILL ADJUDICATION

AFFIRMED; SENTENCES VACATED; REMANDED FOR RESENTENCING

STATEMENT OF THE CASE

On December 22, 1999, defendant-appellant, Robert Williams, and his sister, Carol Williams, were charged in count one of a two-count bill of information with distribution of cocaine. In count two, only the appellant was charged with possession with intent to distribute cocaine. After hearing on January 20, 2000, the trial court found probable cause to bind the defendants for trial and denied the motion to suppress evidence. The defendants' cases were severed prior to trial. On February 22, 2000, a jury found the appellant guilty on both counts. On February 28, 2000, the state filed a multiple bill. On March 17, 2000, the appellant filed motions to set aside the verdict and for new trial, both of which were denied. He waived delays and was sentenced to thirty years at hard labor. The trial court then heard evidence and argument and adjudicated the appellant to be a triple offender. The previously imposed sentence of thirty years at hard labor was vacated and a sentence of life imprisonment without benefit of probation, parole or suspension of sentence was imposed.

FACTS

At about 7:00 p.m. on November 16, 1999, Detective Adam Henry was working undercover in a buy/bust operation. Prior to going out on the street, Sergeant Patrick Brown gave him pre-photographed currency. The photocopy of the currency was stamped by machine with the date and time. Detective Henry proceeded to a location with high drug complaints in an unmarked car that had audio and video recording capabilities. In addition, the car emitted a signal that could be monitored for the undercover officer's safety.

Detective Henry observed the defendant standing on Thalia Street near its intersection with Simon Bolivar Avenue. He waved to the defendant, and the defendant waved back. He asked the defendant, "Anybody have anything?" To which the defendant replied, "Yeah. Pull back and park." The officer then negotiated for a "dime" bag, which the defendant said he could handle. The defendant then went around the car to the sidewalk and spoke with his sister, Carol Williams. She handed him something. The defendant then went back to the driver's side and opened his hand to reveal three pieces of compressed powder. He let Detective Henry choose one, and Detective Henry gave him one of the pre-recorded ten-dollar bills in exchange. Detective Henry then drove away.

Detective Henry radioed the takedown officers that he had successfully completed a transaction and furnished a description of the subjects. The takedown team also got a description from an undercover officer on the street who maintained visual contact with Detective Henry during the transaction. From these descriptions, Sergeant Brown, Detective Clarence Gillard, and others proceeded to arrest the subjects.

Sergeant Brown was the first to arrive on the scene. He ordered the defendant to place his hands on the police car. At that point, he observed the defendant put currency into his mouth. He ordered the defendant to spit the money onto the hood of the car. The defendant did so. When the defendant spit out the money, Sergeant Brown noticed that a rock of compressed powder was also on the hood of the car. The defendant and his sister were both arrested for possession of cocaine.

In the meantime, one of the officers took photographs of the subjects to Detective Henry at an undisclosed remote location. He positively identified the subjects as the ones who engaged in the transaction with him. The officers returned to the scene and arrested the subjects for distribution of cocaine. A ten-dollar bill seized from the defendant matched the serial number of one of the pre-photographed bills provided to Detective Henry for the buy.

Detective Gillard testified that he observed the defendant place the compressed powder substance on the hood of the police car at the same time that he spit the currency from his mouth. He surmised that the defendant intended to drop the rock on the ground, but that it stuck to his hand and did not fall as expected.

The defense stipulated that the rock obtained by Detective Henry and the rock discarded on the hood of the car both tested positive for cocaine.

The videotape of the transaction was played for the jury while Detective Henry was on the stand. Occasionally, the prosecutor asked Detective Henry to identify individuals or narrate portions for the jury.

ERRORS PATENT

A review of the record for errors patent reveals several sentencing errors. These errors are not indicated by the sentencing minute entry; however, the minute entry is replete with sentencing facts not found in the transcript. Where there is a discrepancy between the minute entry and the transcript, the transcript controls. State v. Short, 94-0233 (La. App. 4 Cir. 5/16/95), 655 So. 2d 790.

The sentencing minute entry indicates that the trial court originally sentenced the appellant "as to each count individually and concurrently" to

thirty years at hard labor. In fact, after denying the motion for new trial and the motion for post verdict judgment of acquittal, the court confirmed from defense counsel that the defendant was ready for sentencing. The court then stated: "I sentence you to 30 years at hard labor in the custody of the Louisiana Department of Corrections with credit for time served." The court never indicated to which count or counts the sentence applied.

The minute entry further indicates that the appellant was charged as a multiple bill on count one only. In fact, the multiple bill indicates that the appellant was charged and found guilty of two counts, one for distribution and one for possession with intent to distribute.

The minute entry further indicates that the trial court sentenced the appellant to life imprisonment on count one only, to run consecutive to any other sentence. According to the transcript, after finding the appellant to be a triple offender, the trial court noted both of the instant convictions prior to imposing a life sentence as a triple offender. The court then vacated the previously imposed thirty-year sentence. The court again failed to specify if the sentence was for one or both counts.

In State v. Sherer, 411 So. 2d 1050 (La. 1982), the court found error in sentencing the defendant as a habitual offender on two counts of negligent homicide where both counts arose from a single accident. The court there

established the principle that, where multiple counts are entered on the same date, they are to be treated as a single conviction, and the sentence of only one count should be enhanced on a multiple bill. This court later clarified the rule to apply only to multiple convictions arising out of the same criminal act or episode and obtained on the same date. State v. Ward, 94-0490 (La. App. 4 Cir. 2/29/96), 670 So. 2d 562.

The two convictions in the instant case arose out of the same act or episode. Accordingly, the sentence for only one count may be enhanced by a multiple bill. Because the trial court failed to assign an original sentence to each count and then failed to designate to which count the multiple bill sentence applied, this case must be remanded for resentencing.

LAW AND DISCUSSION

INSUFFICIENT PROOF AT THE MULTIPLE BILL ADJUDICATION

The appellant, through counsel, argues that the evidence was insufficient to prove that he is a triple offender and thus subject to a mandatory life sentence under the Habitual Offender Statute at La. R.S. 15:529.1A(1)(b)(ii). The appellant specifically argues that the evidence was insufficient relative to the predicate conviction based on a guilty plea to first

degree robbery in 1992. The appellant was charged in the multiple bill with three prior offenses, but the state only proved up two of them. The court found the proof was sufficient and adjudicated the appellant to be a triple offender.

The State cites State v. Cossee, 95-2218 (La. App. 4 Cir. 7/24/96), 678 So.2d 72, for its holding that this issue was not preserved for appellate review because no written objection was filed prior to sentencing. However, this court has held that an oral objection may be sufficient to preserve the issue of sufficiency of the evidence relative to the validity of a conviction for appellate review. State v. Everett, 99-1963 (La. App. 4 Cir. 9/27/00), 770 So.2d 466. Defense counsel objected to the sufficiency of the state's evidence at the multiple bill hearing in this case.

The evidentiary burden relative to a multiple bill adjudication was set forth in State v. Shelton, 621 So.2d 769 (La. 1993). The Louisiana Supreme Court determined that where a general minute entry and a well-executed plea of guilty form are submitted, the State has met its burden of proving a prior guilty plea. The burden of proving that the plea was invalid then shifts to the defendant.

In the instant case, the State introduced the waiver of rights form for the defendant's conviction, as well as the minute entry memorializing the

guilty plea. The defendant placed his initials next to each enumerated right listed on the form. The defendant, his defense attorney, and the trial judge signed the waiver of rights form. The waiver of rights form contains the exact sentence the judge imposed on the defendant. Both the waiver of rights form and the minute entry list all three of the Boykin rights. The minute entry indicates that the defendant was represented by counsel, was advised of his rights, and that the court found the plea to be knowingly, intelligently and voluntarily made.

The appellant testified at the multiple bill hearing and denied that he was advised of his rights prior to his 1992 plea to the reduced charge of first degree robbery. He testified that he initialed and signed the forms, but denied that counsel or the trial court ever explained his rights to him. The court questioned the appellant on the predicate, then stated:

> He's double-talking and I find your testimony to be self-serving, inconsistent and false.

Credibility of witnesses is within the discretion of the trier of fact and should not be disturbed unless clearly contrary to the evidence. State v. Vessell, 450 So.2d 938, 943 (La. 1984). We find that the trial court's determination in this case was not contrary to the evidence. Accordingly, we decline to overturn the trial court's finding that the predicate plea was knowingly and voluntarily made.

EXCESSIVENESS OF SENTENCE

The appellant, through counsel, argues that his original sentence of thirty years at hard labor, the maximum for the offense, is constitutionally excessive. He argues that the transaction involved only a very small amount of cocaine, that he did not sell to a child or near a school, and that no weapon or threat of violence was involved.

Article 1, Section 20 of the Louisiana Constitution of 1974 provides, "No law shall subject any person ... to cruel, excessive or unusual punishment." A sentence within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless imposition of pain and suffering." State v. Caston, 477 So. 2d 868 (La. App. 4 Cir. 1985).

Generally, a reviewing court must determine if the trial judge adequately complied with the guidelines set forth in La. C.Cr.P. art. 894.1 and if the sentence is warranted in light of the particular circumstances of the case. State v. Soco, 441 So.2d 719 (La. 1983); State v. Quebedeaux, 424 So.2d 1009 (La. 1982). If adequate compliance with art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case,

keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense charged. State v. Guajardo, 428 So. 2d 468 (La. 1983).

As discussed in the errors patent review, this claim is moot because the appellant must be resentenced on both counts. Nevertheless, considering that the record indicates that the appellant has prior convictions for first degree robbery, simple kidnapping, and two prior convictions for possession of cocaine, a maximum sentence for the appellant's continued criminal activity would not be an abuse of the trial court's discretion.

ENTRAPMENT

The appellant pro se argues that the evidence should have been suppressed because he was a victim of entrapment. This issue is determined under a sufficiency of the evidence standard. When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Jacobs, 504 So. 2d 817 (La. 1987).

Under the generally accepted view, an entrapment is perpetrated when a law enforcement official or a person acting in cooperation with such an official, for the purpose of obtaining evidence of the commission of an offense, solicits, encourages, or otherwise induces another person to engage in conduct constituting such offense when he is not then otherwise disposed to do so. State v. Batiste, 363 So. 2d 639, 641 (La. 1978). Entrapment is an affirmative defense which must be proved by the defendant by a preponderance of the evidence. State v. Brand, 520 So. 2d 114 (La. 1988). The entrapment defense will not be recognized when the law enforcement official merely furnishes the accused with an opportunity to commit a crime to which he is predisposed. State v. Moody, 393 So. 2d 1212 (La. 1981). In entrapment cases, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819 (1958). Thus, the focus in determining an entrapment defense is on the conduct and predisposition of the defendant, as well as the conduct of the government agent. The question of whether the government agent implanted the criminal idea in the mind of an innocent person to induce the commission of a crime that would not otherwise be committed is one for the jury. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210 (1932).

In the instant case, there is no dispute that the appellant committed the crime at the inducement of the police. The only remaining issue is whether or not the appellant was predisposed to commit the crime. Under the facts of the case, the undercover officer got the attention of the appellant, who was standing on the corner. The officer asked if anybody had anything, and the appellant responded by instructing the officer to pull over and park. The appellant then sent his sister to check the corner for police. He then obtained three rocks of crack cocaine and let the officer choose one. A reasonable trier of fact could conclude, beyond a reasonable doubt, that the appellant was predisposed to commit the offense.

This assignment of error is without merit.

PERJURED TESTIMONY

The appellant pro se argues that the prosecutor erred by procuring perjured testimony, which led to his conviction in count two, possession of cocaine with intent to distribute. The appellant avers that the discrepancy in the testimony of Sergeant Brown and Detective Gillard as to how the second rock of crack came to rest on the hood of the police car, and the different number of pieces of cocaine which he is alleged to have had indicates that at least one of the officers was perjuring himself.

Perjury is the intentional making of a false statement, under oath, and relating to a matter which is material to the issue in controversy. An essential element of perjury is that the accused knows that the statement is false. La. R.S. 14:123.

In State v. Broadway, 96-2659, (La. 10/19/99), 753 So.2d 801, cert. denied, Broadway v. Louisiana, 529 U.S. 1056, 120 S.Ct. 1562 (2000), the defendant contended that a particular witness, a co-perpetrator who cut a deal with the state, should not have been allowed to testify because the state and the court knew that he was going to perjure himself, as evidenced by the fact that the witness's former attorney withdrew from representation. The court noted:

> This contention implicates the decision in Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). To prove a Napue claim, the accused must show that the prosecutor acted in collusion with the witness to facilitate false testimony. When a prosecutor allows a state witness to give false testimony without correction, a conviction gained as a result of that perjured testimony must be reversed, if the witness's testimony reasonably could have affected the jury's verdict, even though the testimony may be relevant only to the credibility of the witness. Id. at 269, 79 S.Ct. 1173. Furthermore, fundamental fairness to an accused, i.e., due process, is offended "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. When false testimony has been given under such circumstances, the defendant is entitled to a new trial unless there is no reasonable likelihood that the alleged false testimony could have affected the outcome of the trial. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Broadway, 96-2659, p. 17 (La. 10/19/99), 753 So.2d 801, 814.

There is nothing in the instant case to indicate that either officer perjured himself. Sergeant Brown testified, "When he spat the money onto the hood of the car, I noticed there was a ten-dollar bill. Also, when I moved the money from the hood of the car, I found a piece of crack cocaine on the hood of the car." He never testified that he saw the appellant spit out the cocaine, though he might have surmised it. Detective Gillard, on the other hand, testified that he observed the appellant place the rock on the hood.

The appellant further queries how Detective Henry testified that he was offered three pieces of crack from which to choose, yet only two pieces ended up in evidence. From the testimony of Detective Gillard, one would reasonably assume that the appellant successfully discarded one piece in the street, the other piece ended up on the hood of the police car, and that the third was sold to Detective Henry.

There is no intentional misrepresentation evident in any of the testimony. Accordingly, this assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the conviction and the multiple bill adjudication. We vacate the sentences imposed and remand for

resentencing in accordance with this Court's opinion.

CONVICTION AND MULTIPLE BILL ADJUDICATION AFFIRMED; SENTENCES VACATED; REMANDED FOR RESENTENCING