NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0285**
VERSUS	*	**COURT OF APPEAL**
DAVID M. LIVAS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-129, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr.)

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CONVICTION AFFIRMED; REMANDED

The defendant, David Livas, appeals his conviction and sentence. For the reasons that follow, we affirm the conviction and remand for a ruling on the motion to reconsider the sentence.

STATEMENT OF THE CASE

David Livas was charged with aggravated burglary, a violation of La. R.S. 14:60, and pled not guilty. He was tried on September 7, 2000, by a twelve-member jury and found guilty of the lesser offense of unauthorized entry of an inhabited dwelling, a violation of La. R.S. 14:62.3. On November 16, 2000, he was sentenced to six years at hard labor. The court filed a motion to reconsider sentence on the defendant's behalf, which the court agreed to review at a future time. Livas filed a motion for appeal, which was granted. **ERRORS PATENT**

Our review of the record reveals no errors patent.

FACTS

Officer Reynelle Celestaine testified that she responded to a

"burglary" or "disturbance" on June 10, 2000, at 12151 I-10 Service Road. She found David Livas and a woman standing on either side of the open front door. The woman was in the house, leaning out of it. In response to the officer's questioning, Livas said that no one had called 911. The woman ran into the house. The officer followed her and found her crying hysterically. The officer also noticed a broken door lock to the left of the front entrance. The door and door frame had been splintered. Livas was arrested, and a knife was recovered from him.

On cross-examination, Officer Celestaine said the couple had not been arguing. Upon entering the home, the officer learned that the woman's friend, Mrs. Dozier, who was present inside the apartment, had called 911.

Patricia Livas testified that she had been married to David Livas for eleven years, and that they had separated in 1997. Following the separation, she had moved to Louisa Street and then to the I-10 Service Road. David Livas did not live in the apartment, nor did he have a key.

On the night of the incident, David had called Patricia on her cell phone as she was driving home from a fast food restaurant with supper for their two children. David asked to speak to the children, but she told him that she would have them call him from home because they had fallen asleep in the back seat of the car. Once at home, the children sat down and began

to eat. Patricia told them to call their father when they finished, and went to take a shower. While in the shower, she heard a noise, and called for one of the children, but got no answer. Then the bathroom door opened, and she saw David standing there with a knife. He brandished the knife and said that he was going to kill her and then kill himself. She calmed him down by talking to him. He then said, “Lord, I don’t know what I’ve done. I don’t know what I’ve done.” He left the bathroom. Patricia got dressed and found David in the living room. He said, “I know I am going to jail. I know you are going to call the police because I have broken your door down.” She then realized the door was broken, but assured him she would not call the police. David said he did not want to talk in front of the children; therefore, the couple went into the back bedroom. While they were in the room, one of the children called out to say that Mrs. Dozier, whom he called, “Auntee Wanda” was on her way over to borrow some maple syrup. David said that he had better leave. Then, Dozier pulled up in her car with her son, and sent her son to the door for the syrup. Patricia Livas went outside to the car to tell Dozier what was going on, and lost her composure at that point. She managed to regain her composure, however, when David walked up behind her. Dozier then went into the house to get the syrup, and David expressed concern that Dozier would call the police. When Officer Celestaine arrived,

David insisted that no one had called for the police. She responded that other officers would arrive if someone did not explain why the police had been called. Patricia ran into the house and became totally hysterical at that point. When the Officer Celestaine followed her into the house, Patricia told the officer that David had a knife.

Patricia Livas explained in court that the divorce decree between her and David was signed June 14, 2000, four days after this incident. When cross- examined, she explained that she had been separated from David once before when she was pregnant with one of the children. After they got back together, she learned that he had a child out of wedlock and also a substance abuse problem, and they separated again. She conceded that David had come to her apartment during the time of the second separation, prior to the divorce, and that he had slept there on occasion. She testified that David was in tears the night of the incident, saying he had lost everything when he lost her and the children. She testified that upon leaving David the second time, she had obtained advice from a battered women's program, and that private counsel had secured an injunction against him.

Mrs. Dozier testified that she had called the Livas's son on the night in question, had gone to the house to get syrup, and had sent her son to the door when Patricia came running out of the house, obviously upset. Before

David came outside, Patricia told Dozier to call the police, and Dozier did. Dozier said she had known Patricia for sixteen years and knew that David was not supposed to be at the apartment, and that there was a "peace warrant" out on him. She said he did not have a key, and that she noticed immediately that the lock had been broken.

ASSIGNMENT OF ERROR ONE

The defendant argues the evidence was insufficient to convict him.

Recently, this court reiterated the standard of review applicable to a claim that the evidence produced was constitutionally insufficient to support a conviction:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La.1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La.App. 4 Cir.1989). When circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d

> 372 (La.1982). The elements must be proved such that every reasonable hypothesis of innocence is excluded. La.R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

State v. Cojoe, 2000-1856, pp. 6-7 (La. App. 4 Cir. 3/21/01), 785 So.2d 898, 902, quoting *State v. Ash*, 97-2061, pp. 4-5 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, 667-68.

In the instant case, the defendant was convicted of unauthorized entry of an inhabited dwelling, which is defined by La.R.S. 14:62.3 as "the intentional entry by a person without authorization into any inhabited dwelling or other structure belonging to another and used in whole or in part as a home or place of abode by a person." *See State v. Segue*, 92-2426 (La. App. 4 Cir. 5/17/94), 637 So.2d 1173.

The defendant argues that State failed to show that he was an "unauthorized intruder," or, a person without permission to enter Patricia Livas's residence, because he was still married to Patricia and had been in the apartment with her permission on previous occasions. However, in similar cases, this court has repeatedly rejected the argument that the defendant's prior acceptance into the victim's house showed that his entry

was not authorized. *See, e.g.:* S*tate v. Cojoe*, *supra*, *State v. Spain*, 99-1956 (La. App. 4 Cir. 3/15/00), 757 So. 2d 879; S*tate v. Monley*, 557 So. 2d 319 (La. App. 4th Cir. 1990). In *State v. Spain*, *supra*, this court stated: "The relevant question is not whether defendant could generally enter the victim's residence, but whether this particular entry was unauthorized." *Id.* at p.8, 757 So. 2d at 884.

In the instant case, the jury heard evidence that the defendant was separated from the Patricia Livas, and that their divorce was imminent. Patricia testified that David Livas had no authority to enter the house. Her friend confirmed this. The jury also heard evidence that Patricia had sought help from a battered women's program, and had obtained some type of an injunction against David. Nevertheless, the defendant kicked in the door of her residence and appeared with a knife as she stood in the shower. We find these facts sufficient to support the jury's conclusion that the defendant was guilty of unauthorized entry of an inhabited dwelling.

ASSIGNMENT OF ERROR TWO

The defendant argues that his six-year sentence is excessive.

The first issue to be resolved is whether the merits of this assignment of error are reviewable, in light of the trial court's having filed on the defendant's behalf, but not ruled on, a motion for reconsideration of

sentence. No provision of law authorizes a trial court to defer ruling on a motion to reconsider sentence. *State v. Davis*, 2000-0275, p.11 (La. App 4 Cir. 2/14/ 01), 781 So.2d 633, 640. Moreover, it is not procedurally correct for an appellate court to review a defendant's sentence for excessiveness when the trial court has not yet ruled on the defendant's motion for reconsideration. Therefore, in *State v. Davis*, *supra*, this court held that because there had not been a final ruling on the motion to reconsider, the issue of excessiveness was not properly before it. *Id*. Accordingly, we conclude that the issue of excessiveness of defendant's sentence is not before us, and remand the matter to the trial court for a ruling on the motion to reconsider sentence within a reasonable amount of time.

CONCLUSION

Accordingly, we affirm the defendant's conviction and remand the case to the trial court for a ruling on the motion to reconsider defendant's sentence within a reasonable amount of time.

CONVICTION AFFIRMED;

REMANDED