NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1459

STATE OF LOUISIANA

VERSUS

DARREN EDWARD COUSAN, JR.

Judgment Rendered: March 23, 2012

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 436939

Honorable Allison H. Penzato, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Defendant, Darren Edward Cousan, Jr., was charged by bill of information with one count of distribution of a Schedule II controlled dangerous substance (cocaine), a violation of La. R.S. 40:967(A)(1). He entered a plea of not guilty. After a jury trial, defendant was found guilty as charged. The trial court denied defendant's motions for a new trial and post-verdict judgment of acquittal. The state filed a habitual-offender bill of information, and defendant admitted to the allegations therein. The trial court adjudicated defendant a third-felony habitual offender and imposed a sentence of thirty years at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, arguing as his only assignment of error that there was insufficient evidence to support his conviction for distribution of cocaine. For the following reasons, we affirm defendant's conviction and habitual-offender adjudication. Finding one sentencing error, we vacate defendant's sentence and remand for resentencing.

FACTS

On July 25, 2007, Louisiana State Trooper Heath Miller and Detective Scott Crane of the Washington Parish Sheriff's Office[1] were involved in an undercover operation during which they attempted to purchase illegal narcotics. While driving an unmarked truck through the Lonesome Pines subdivision in St. Tammany Parish, Trooper Miller and Detective Crane made contact with a white female who was later identified as Sally Miley.

Upon his initial contact with Miley, Trooper Miller asked her whether anything was "going on" in the area, but Miley replied negatively. Soon thereafter, Miley flagged down the officers' truck and asked what they wanted. Trooper Miller responded that they were looking for "40 hard," or $40.00 worth of crack

[1] Detective Crane was employed by the Washington Parish Sheriff's Office at the time of the incident, but he now works for the St. Tammany Parish Sheriff's Office.

cocaine. Following Miley's instructions, Trooper Miller began to drive his vehicle around the block, and he and Detective Crane observed Miley walk toward a black, two-door Lincoln. The officers returned, and Miley approached the passenger's side of the truck in order to hand Detective Crane the crack cocaine in exchange for his money. As the officers departed, they observed Miley walk to the passenger's side of the black, two-door Lincoln. Additional surveillance officers who were stationed to watch the entirety of the drug transaction witnessed what they perceived to be hand-to-hand transactions between Miley and the front-seat passenger of the black, two-door Lincoln both while Trooper Miller and Detective Crane circled the block and after they departed from the scene. Based on these observations, St. Tammany Parish Sheriff's officers conducted immediate arrests of Miley and the occupants of the vehicle, including defendant, who was seated in the front passenger's seat. The arresting officers seized crack cocaine from different areas of the vehicle, including from the driver's-side floorboard and from a CD case located on the passenger's-side floorboard.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues that there was insufficient evidence to support his conviction for distribution of cocaine. Specifically, defendant argues that the only physical distribution of cocaine was done by Sally Miley and that there is no evidence to implicate him as a principal to the offense of distribution of cocaine.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). 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, La. R.S. 15:438 provides that, in order to convict, the fact-finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

To support a conviction under La. R.S. 40:967(A)(1), the state must prove that the defendant distributed a controlled dangerous substance classified in Schedule II. Cocaine is a Schedule II controlled dangerous substance. See La. R.S. 40:964, Schedule II (A)(4). The term "distribute" is defined as "to deliver a controlled dangerous substance . . . by physical delivery . . . ." La. R.S. 40:961(14). Delivery is defined as the "transfer of a controlled dangerous substance whether or not there exists an agency relationship." La. R.S. 40:961(10). Transfer of possession or control, i.e., distribution, is not limited to an actual physical transfer between the culpable parties. Rather, distribution may be accomplished by the employment of a third party. **State v. Gentry**, 462 So.2d 624, 627 (La. 1985).

A defendant may be guilty as a principal in the crime of distribution if he aids and abets in the distribution or directly or indirectly counsels or procures another to distribute a controlled dangerous substance. **State v. Parker**, 536 So.2d 459, 463 (La. App. 1st Cir. 1988), writ denied, 584 So.2d 670 (La. 1991). A defendant is guilty of the charged crime if he knowingly or intentionally distributes cocaine. La. R.S. 40:967(A). Only general criminal intent is required. See **State v. Banks**, 307 So.2d 594, 596 (La. 1975). Such intent is established by mere proof of voluntary distribution. **State v. Williams**, 352 So.2d 1295, 1296 (La. 1977).

In the instant case, Sally Miley testified that on the date of the incident, she had been walking down a street in the Lonesome Pines subdivision on the way to a job. At the time, Miley had recently been fronted some drugs by defendant, and

she needed to repay her debt to him. Miley testified that she had initially made contact with the individuals in the truck who, unbeknownst to her, were undercover law enforcement officers and told them that she did not know anybody in the area who had drugs. Soon thereafter, she saw defendant ride by in a black vehicle, and she stopped him to inform him that some people in the area were looking to buy drugs. Miley stated that defendant was in the passenger's seat of this black vehicle. According to Miley, defendant told her to "go ahead with the process," so when she saw Trooper Miller and Detective Crane drive by again, she stopped them to tell them that she could get the drugs, but that she needed money. Miley said that the officers wanted to see the drugs first, so she told them to circle the block, and she approached the black vehicle, where defendant handed her two crack rocks. She approached the officers' truck after it circled the block, and she handed the passenger, Detective Crane, the drugs and received his money. After the officers' truck drove away, the vehicle in which defendant was riding pulled up, and Miley handed defendant the money she had received from the officers. When Miley was arrested, she gave a brief statement to Officer Richard O'Keefe, Jr., of the St. Tammany Parish Sheriff's Office, in which she indicated that defendant had a black CD case inside the vehicle from which he had retrieved the drugs sold to the officers. Officers later found cocaine in a black CD case that was located on the passenger's-side floorboard of the black, two-door Lincoln. During her testimony, Miley stated that she had been convicted of distribution of cocaine and possession of cocaine in connection with this incident, that she had already completed her imprisonment and a drug rehabilitation program in connection with those offenses, that she had no further pending charges, and that she had not agreed to testify on behalf of the state in exchange for a lenient sentence.

Sergeant Emile Lubrano, of the St. Tammany Parish Sheriff's Office, testified that on the date of the incident, he was acting as a surveillance officer in connection with the Lonesome Pines narcotics investigation. During his

surveillance of the area where the undercover officers' interaction with Miley took place, Sergeant Lubrano listened to an audio transmission from the "Kell wire" microphone device attached to Trooper Miller's body. While conducting his surveillance of the transaction, Sergeant Lubrano observed Miley twice approach the black vehicle occupied by defendant. According to Sergeant Lubrano, he first observed Miley approach the black vehicle immediately after she told the undercover officers to circle the block. Sergeant Lubrano then observed Miley approach the black vehicle after Trooper Miller's unmarked truck left the scene. According to Sergeant Lubrano, Miley conducted a quick hand-to-hand transaction with the person in the passenger's seat of the black vehicle during both of her approaches to the vehicle.

When considered in the light most favorable to the state, the evidence presented at trial overwhelmingly proved beyond a reasonable doubt all of the elements of the offense of distribution of cocaine. The state and defense stipulated to the fact that the substances recovered from the undercover buy and from the car in which defendant was located were cocaine. The testimonies of Trooper Miller and Detective Crane both describe Miley approaching a black, two-door Lincoln immediately prior to and immediately after their undercover purchase. The testimony of Sergeant Lubrano details two apparent hand-to-hand transactions between Miley and the passenger of the black vehicle – later revealed to be defendant – both immediately before and immediately following the transaction with undercover officers. Officer O'Keefe's testimony highlights the corroboration of Miley's statement that cocaine could be found in a black CD case in defendant's vehicle. Finally, Miley's own testimony describes in great detail how defendant used her as an agent for the distribution of cocaine to the undercover officers.

Defendant did not testify at trial, but his attorney, through his closing argument, attacked the credibility of Miley, highlighted the fact that Miley referred

to defendant as "Chris" during her interaction with Trooper Miller and Detective Crane, and questioned whether any hand-to-hand transaction actually took place. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. 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. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. Here, the jury apparently accepted Miley's testimony as credible. Further, although the jury heard a copy of the audio recording from Trooper Miller's "Kell wire" in which Miley referred to defendant as "Chris," they clearly believed the testimony given by Trooper Miller that it is not uncommon for a person involved in the drug trade to use a false name. Finally, the jury rejected the defense's argument that no hand-to-hand transactions took place between Miley and defendant. 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. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury rejected all of defendant's hypotheses of innocence, and we find such rejection reasonable. A reviewing 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, we are convinced that, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence that defendant was guilty of the offense of distribution of cocaine.

This assignment of error is without merit.

REVIEW FOR ERROR

Pursuant to La. Code Crim. P. art. 920(2), this court routinely reviews all criminal appeals for errors "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

After a careful review of the record in these proceedings, we have found a sentencing error. The term of the habitual-offender sentence imposed on defendant was within the range provided by the habitual offender law, but the trial court improperly restricted the possibility of parole for the entirety of defendant's sentence. Whoever commits the crime of distribution of cocaine shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars. See La. R.S. 40:967(B)(4)(b). Defendant admitted the allegations in his habitual-offender bill of information, and he was adjudicated a third-felony habitual offender under La. R.S. 15:529.1(A)(1)(b) (prior to 2010 amendments). In the instant case, defendant's instant felony conviction was punishable for a term less than his natural life, so he was eligible to be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for a first conviction and not more than twice the longest possible sentence for a first conviction. See La. R.S. 15:529.1(A)(1)(b)(i)(prior to 2010 amendment). Because defendant's two prior

felonies[2] are not crimes of violence, sex offenses, violations of the Uniform Controlled Dangerous Substances Law punishable by imprisonment of ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, defendant's third-offense habitual offender sentence should not have restricted the benefit of parole, outside of the conditions imposed by the reference statute. See **State v. Bruins**, 407 So.2d 685, 687 (La. 1981); see also La. R.S. 15:529.1(G). So, the proper sentencing range for defendant's third-felony habitual offender adjudication is twenty to sixty years, with the first two years of the sentence to run without benefit of parole.

If the trial court had been aware of the inability to restrict parole, except as provided for in the referenced statute, it may have imposed a different term in this matter. When the amendment of a defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, does not sanction *sua sponte* correction by the court of appeal on defendant's appeal of his conviction and sentence. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Thus, we must vacate the sentence and remand for resentencing.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

[2] Defendant's habitual offender bill of information alleges that he was previously convicted of simple criminal damage to property over $500.00 in 22nd Judicial District Court docket number 362664, and of second offense possession of marijuana in 22nd Judicial District Court docket number 391084.