NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0490

STATE OF LOUISIANA

VERSUS

DION HOWARD

Judgment Rendered: October 31, 2008.

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On Appeal from the
23rd Judicial District Court,
in and for the Parish of Ascension
State of Louisiana
District Court No. 11,251

The Honorable Ralph Tureau, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

Whipple, J. concurs in the result.

CARTER, C.J.

The defendant, Dion Howard, was charged by bill of information with one count of theft of goods valued at over five hundred dollars, in violation of La. R.S. 14:67. The defendant entered a plea of not guilty and, following a jury trial, was found guilty as charged. The trial court sentenced the defendant to five years at hard labor.

The defendant appeals citing the following as error:

1. The evidence is insufficient to support the conviction.

2. The trial court erred by denying the defendant's objection to hearsay testimony.

3. The trial court erred in imposing an excessive sentence.

4. The trial court erred by failing to comply with the sentencing mandates of La. Code Crim. P. art. 894.1.

For the reasons that follow, we affirm the defendant's conviction and sentence.

FACTS

On September 12, 1998, the defendant and two females (Lacresha Ginn and Ronda Howard)[1] participated in an elaborate theft scheme at a Gonzales Wal-Mart. Darlene Long was working as a loss prevention manager that day. Long initially observed the defendant in the infant department select a diaper bag, remove the stuffing inside of the bag, then place the diaper bag in her shopping cart. Long continued to observe the defendant as she moved to the electronics department where the defendant placed numerous compact discs (CDs) into the shopping cart, along with a

[1] Lacresha Ginn and Ronda Howard were charged with the same offense in the same bill of information; however, defendant was tried alone. In the transcript, Lacresha's name is spelled Lecretia and Ronda's name is spelled Rhonda.

couple of cordless phones that she placed in the area underneath the main storage area of the shopping cart.

The defendant then proceeded to the accessories department where she met another female, later identified as Howard. Howard also had a shopping cart that held an infant and contained a black purse and a small blue diaper bag. The two women tried on a few hats in that section of the store and then separated, with the defendant proceeding to the shoe department and Howard going to the electronics department.

As Long continued to watch the defendant, she witnessed the defendant remove her shoes, select some platform tennis shoes, and place them on her feet. The defendant left her own shoes in the shoe department. Meanwhile, Long observed Howard meet up with a third female, Ginn, in the electronics department. Howard picked up the infant and walked away, leaving the shopping cart with Ginn. Ginn placed additional items into the cart, then left the electronics department with the cart and met the defendant in the shoe department.

Because there were three women exhibiting suspicious behavior, Long contacted Bobby Causey, the Assistant Chief of Police with the Gonzales Police Department, who was working as a part-time loss prevention employee for Wal-Mart. Long informed Causey that she was watching three females behaving in a very suspicious manner inside the store. Long told Causey that the women had separated and requested his assistance in watching them.

The defendant and Ginn left the shoe department with the two carts, then proceeded to the health and beauty aids department. Ginn concealed

the CDs Howard had given her in the black purse. The defendant then handed Ginn the large diaper bag from which the defendant had previously removed the stuffing. Ginn placed the large diaper bag in what was Howard's cart, which still contained the black purse and small diaper bag. The defendant handed Ginn some of the CDs from the defendant's shopping cart, which Ginn placed into the purse and diaper bag. According to Causey, it was very obvious that the women were attempting to conceal their actions. Both the defendant and Ginn then proceeded toward the cashier area at the front of the store. The defendant and Ginn were at the checkout when Howard approached, with a third cart. Howard took the black purse that was in the cart she had left with Ginn and put the black purse in her new cart. Howard placed the small diaper bag on her shoulder.

While in a checkout line, the defendant was involved in a confrontation with one of the cashiers regarding the telephones that were still in the bottom compartment of the defendant's shopping cart. Following this confrontation, the defendant and Howard left the carts and exited the store together. Howard carried the black purse and the small diaper bag. The defendant was still wearing the platform tennis shoes. Ginn also left the store carrying the unpaid for large diaper bag filled with CDs and other items that had not been purchased.

After the women left the store, they were detained by Causey. It was determined that the items in the black purse and both diaper bags were valued at $622.24. Causey admitted that he did not personally see the defendant place any items into the black purse or diaper bag, but he did observe the defendant hand Ginn a diaper bag and some CDs. He then

observed Ginn conceal the CDs in the diaper bag as the defendant handed the CDs to her.

The defendant did not testify.

SUFFICIENCY OF THE EVIDENCE

In her first assignment of error, the defendant argues the evidence is insufficient to support her conviction. In support of this argument, the defendant contends the only item allegedly taken by her was a pair of tennis shoes, which would not exceed $500.00 in value. The defendant further contends the value of the items removed by Howard and Ginn cannot be imputed to her.

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 defendant guilty beyond a reasonable doubt. La. Code Crim. P. art. 821B; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 provides that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. However, La. R.S. 15:438 does not establish a stricter standard of review on appeal than the rational trier of fact/reasonable doubt standard. The statute serves as a guide for the trier of fact when considering circumstantial evidence. The **Jackson** standard of review is an objective standard for testing all the evidence, both direct and circumstantial, for reasonable doubt. See **State v. Marcantel**, 2000-1629, p. 8 (La. 4/3/02), 815 So.2d 50, 55-56.

The reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. It is not the function of an appellate court to assess credibility or reweigh the evidence. **Marcantel**, 2000-1629 at p. 9, 815 So.2d at 56.

Louisiana Revised Statutes 14:67 provides in pertinent part:

> A. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.
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> B. (1) Whoever commits the crime of theft when the misappropriation or taking amounts to a value of five hundred dollars or more shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both.
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> * * * * *
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> C. When there has been a misappropriation or taking by a number of distinct acts of the offender, the aggregate of the amount of the misappropriations or taking shall determine the grade of the offense.

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals to that crime. An individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state. The mental state of one defendant may not be imputed to another defendant. Thus, mere presence at the scene of a crime does not make one a principal to the crime. **State v. Bean**, 2004-1527, pp. 6-7 (La. App. 1 Cir. 3/24/05), 899 So.2d 702, 707, writ granted on other grounds, 2005-1106 (La.

3/8/06), 925 So.2d 489 (post-conviction bail), writ denied, 2005-1106 (La. 11/3/06), 940 So.2d 652.

Theft is a specific intent crime. Specific intent is that state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be inferred from the circumstances of a transaction and from the actions of the accused. Further, specific intent is a legal conclusion to be resolved by the fact finder. **Bean**, 2004-1527 at p. 7, 899 So.2d at 707.

In the present case, viewing the evidence in the light most favorable to the prosecution, we find there is sufficient evidence to support the defendant's conviction of theft of items having a value over $500.00. First, the defendant was the person who took the large diaper bag and removed the stuffing so that the bag could later be used to conceal unpaid for items. Second, the defendant was seen removing her own shoes in favor of a pair of shoes that she had not paid for and wearing those shoes out of the store. Third, both Long and Causey observed the defendant consulting with the other two women and assisting in trying to conceal items in the diaper bag. Causey testified that the defendant and Howard were clearly trying to hide their activity of placing unpaid for items in the diaper bag. Finally, the defendant deliberately placed two cordless telephones on the bottom rack of the shopping cart and attempted to leave the store without paying for them until this act was brought to light by a Wal-Mart cashier.

Based on our standard of review, we find that there was sufficient evidence for a jury to reasonably have concluded that the defendant was

acting in concert with Howard and Ginn to steal items from Wal-Mart. The facts that the only stolen items found on the defendant's person were the tennis shoes and that the defendant did not actually place stolen items in the purse or diaper bag do not undermine the jury's determination of guilt. Defendant's actions of aiding the women who actually placed those items in the bags are sufficient to uphold her conviction.

This assignment of error is without merit.

HEARSAY TESTIMONY

In her second assignment of error, the defendant argues the trial court erred by overruling her hearsay objection. Specifically, the defendant complains that during the State's direct examination of Causey, wherein he explained how he became involved in the present case, he stated:

> [Causey]
> I was in the store and Darlene Long who is in loss prevention also, she called me and told me that she was watching three black females who were committing some thefts inside the store. She told me they had separated and she wanted me to meet her in the Jewelry Department to help and to assist her in watching these three people.
> I met Darlene in the Jewelry Department and when I arrived there she pointed out two of the three black females to me. [The defendant] was one of the girls later identified and Lecretia was the second person. Darlene did inform me that –

At this point, defense counsel lodged a hearsay objection which was overruled by the trial court.

Causey's testimony continued:

> Darlene did inform me at this time that [the defendant] had some type of shoes on her that she was wearing that did come from Wal-Mart. She saw her put them on her feet in the Shoe Department. She also informed me that she had a diaper bag that was taken off the rack in the store and she observed the black female taking the stuffing out of the diaper bag.

The defendant argues the trial court improperly allowed Causey, through the admission of hearsay testimony, to levy accusations against her that formed the basis for the case against her. The defendant argues there is no exception to the hearsay rule that allows one witness to testify regarding the hearsay statements of another simply because that witness is available.

Hearsay evidence is defined as testimony in court, or written evidence, of a statement made out of court, when the statement is being offered as an assertion to show the truth of matters asserted therein. See La. Code Evid. art. 801C. Louisiana Code of Evidence article 801D(4) provides that a statement is not hearsay if:

> The statements are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events, and which are necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction.

It is possible that a police officer, in explaining his own actions, may refer to statements made to him by other persons, not to prove the truth of the out-of-court statements, but to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the investigating officer. **State v. Broadway**, 96-2659, p. 7 (La. 10/19/99), 753 So.2d 801, 808, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000). The supreme court discussed the limitations on the admission of such "explaining" testimony:

> Information about the course of a police investigation is not relevant to any essential elements of the charged crime, but such information may be useful to the prosecutor in "drawing the full picture" for the jury. However, the fact that an officer acted on information obtained during the investigation may not be used as an indirect method of bringing before the jury the

> substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule.

Broadway, 96-2659 at p. 8, 753 So.2d at 809.

In the instant case, Causey's testimony regarding what Long told him about the defendant appears to be an explanation of his actions and the sequence of events that lead to the arrest of the defendant. Causey's testimony was presented to explain to the jury why he became involved in observing the defendant in the store, not to prove the truth of what Long had told him.

Moreover, the erroneous admission of such hearsay evidence does not require a reversal of the defendant's conviction because the error was harmless beyond a reasonable doubt. Reversal is only mandated when there is a reasonable possibility that the evidence might have contributed to the verdict. **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992).

The correct inquiry is whether the reviewing court is convinced that the error was harmless beyond a reasonable doubt. Facts to be considered include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. See **Wille**, 559 So.2d at 1332.

In the present case, Causey's testimony that Long told him the defendant had removed her own shoes and was wearing a pair of shoes from Wal-Mart, and that the defendant had removed the stuffing from a Wal-Mart diaper bag, was cumulative of Long's eyewitness account of the defendant's

activities. Moreover, Causey made it clear during his testimony that these were not his own personal observations but information that Long had relayed to him to explain why she was requesting his assistance in observing these three suspicious females. On cross-examination, defense counsel was able to question Causey on exactly what actions he had personally observed the defendant commit.

As a reviewing court, we find the verdict to be surely unattributable to any possible error in admitting Causey's testimony regarding what Long had told him. See La. Code Crim. P. art. 921; **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

This assignment of error is without merit.

EXCESSIVE SENTENCE

In her third and fourth assignments of error, the defendant contends that her sentence is excessive, and the trial court offered inadequate justification for its harshness. In support of these assignments of error, the defendant argues the recommendation contained in the Presentence Investigation Report (PSI) was for the defendant to receive a suspended sentence of five years. The defendant further argues that the trial court failed to give adequate weight to the mitigating factors presented, although the defendant's brief does not specify which mitigating factors the trial court failed to consider.

Article I, section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and

suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **State v. McAlister**, 95-1683, pp. 3-4 (La. App. 1 Cir. 9/27/96), 681 So.2d 1280, 1281. A sentence may be excessive either by reason of its length or because the circumstances warrant a less onerous sentencing alternative. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion to sentence within statutory limits. **McAlister**, 95-1683 at p. 4, 681 So.2d at 1281.

Louisiana Code of Criminal Procedure article 894.1 sets forth factors that should be considered by the trial court before imposing sentence. A trial court is not bound by the recommendation of the PSI. See **McAlister**, 95-1683 at pp. 4-5, 681 So.2d at 1282. Although the trial court need not recite the entire checklist set forth in Article 894.1, the record must reflect that the court adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness must consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

In the present case, the applicable penalty provision provided for a sentence with or without hard labor for not more than ten years. La. R.S. 14:67B(1). The trial court sentenced the defendant to a term of five years at hard labor.

In written reasons for the sentence, the trial court stated that it had considered the PSI, the facts of the case, and the defendant's background. The trial court noted the defendant had failed to appear for sentencing on two previous occasions, and a bench warrant was issued to ensure her appearance. The trial court acknowledged the sentencing recommendation contained in the PSI; however, it also noted that the defendant was previously placed on probation for a theft conviction from East Baton Rouge Parish, which was terminated unsatisfactorily.

Considering the circumstances of the offense and the defendant's failure to appear for the sentencing hearing following her conviction, we do not find the trial court abused its discretion in sentencing the defendant. The defendant's actions during the commission of the offense and following her conviction indicate a disregard for the law and legal process. Accordingly, we do not think the defendant's sentence of five years, which was half of the maximum term she was eligible to receive, is excessive.

These assignments of error are without merit.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.