NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0326

PMC
9/8

STATE OF LOUISIANA

VERSUS

JAMES H. DONALDSON

Judgment Rendered: SEP 14 2011

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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. 481768

Honorable William J. Crain, Judge Presiding

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Welch J. concurs and assigns reasons.

McCLENDON, J.

The defendant, James H. Donaldson, was charged by bill of information with possession with intent to distribute a Schedule II controlled dangerous substance, cocaine, a violation of LSA-R.S. 40:967(A)(1). The defendant entered a plea of not guilty. After a trial by jury, the defendant was unanimously found guilty as charged and sentenced to twenty (20) years imprisonment at hard labor. After the defendant was adjudicated a third-felony[1] habitual offender, the trial court vacated the previously imposed sentence and resentenced the defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the trial court's "for cause" removal of prospective juror Shawn Liggio on the motion of the State. The defendant further filed a pro se supplemental brief wherein he assigned error to the denial of his constitutional right of confrontation, to the admission of other crimes evidence, and to the sufficiency of the evidence. The pro se supplemental brief further requests a review of the record pursuant to LSA-C.Cr.P. art. 920. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On October 29, 2009, based on information from a confidential informant, surveillance observations, and controlled buys, the Narcotics Division of the St. Tammany Parish Sheriff's Office obtained and executed a search warrant for the defendant's residence. The officers recovered approximately three ounces of cocaine in separate bags. The officers also recovered a digital scale and a box of

[1] The State introduced the following predicate convictions: on June 14, 2000, conspiracy to possess with intent to distribute more than fifty grams of cocaine base (count one) and distribution of cocaine base (counts two through six, amounts varied); on September 24, 1992, possession of between 28 grams and 200 grams of cocaine; on October 9, 1992, second degree battery and simple robbery; and, on October 9, 1992, possession of cocaine. In its reasons for judgment, the trial court stated that the State proved that the defendant was previously convicted as alleged. The defendant has not raised any issues regarding the habitual offender adjudication or sentencing on appeal and the transcript for the habitual offender proceeding is not in the record on appeal.

sandwich bags that also contained a bag of cocaine. The defendant was placed under arrest and transported to the St. Tammany Parish Jail.

COUNSELED ASSIGNMENT OF ERROR

In the sole counseled assignment of error, the defendant argues that prospective juror Shawn Liggio was erroneously removed for cause, and the State was thereby given more than twelve peremptory challenges. Though noting that during voir dire Liggio candidly suggested that his distrust of police officers based on life experience may cause him to more closely scrutinize their testimony, the defendant contends that Liggio rehabilitated himself. Thus, the defendant argues that there was no basis for the State's challenge for cause.

The State or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality, or on the ground that the juror will not accept the law as given to him by the court. LSA-C.Cr.P. art. 797(2) and 797(4). A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion, if after further questioning, the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. See **State v. Lee**, 559 So.2d 1310, 1318 (La. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991). Nonetheless, a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law reasonably may be inferred. **State v. Thompson**, 489 So.2d 1364, 1370 (La. App. 1 Cir.), writ denied, 494 So.2d 324 (La. 1986). A defendant cannot complain of an erroneous grant of a challenge to the State unless the effect of such a ruling is the exercise by the State of more peremptory challenges than it is entitled to by law. LSA-C.Cr.P. art. 800(B). A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. **State**

v. Howard, 98-0064 (La. 4/23/99), 751 So.2d 783, 795, cert. denied, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999).

After the trial court asked the second panel of prospective jurors if they had ever been the victims of a crime, the prospective juror in question, Shawn Liggio, stated that his vehicle was stolen in the past and he was once "involved in a hit-and-run by a drunk State trooper." When the trial court asked if those experiences would affect his ability to be a fair and impartial juror in this case, Liggio responded, "I have slight trust issues." Continuing the examination, the trial court asked Liggio if he could evaluate the testimony of a law enforcement officer the same as any other witness without being influenced by his experience. In response Liggio stated, "I couldn't honestly give my opinion on that. I really couldn't."

The following further colloquy then took place:

THE COURT:
You saying you don't know how –

MR. LIGGIO:
I don't know how.

THE COURT:
-- how it would affect you?

MR. LIGGIO:
Right, I've never been in this position before.

THE COURT:
You think it could make it more difficult for you to be fair and impartial?

MR. LIGGIO:
It could be slightly difficult.

THE COURT:
Thank you, sir.

The trial court later asked Liggio if the fact that he has family members who have been employed in law enforcement would affect his ability to serve as a fair and impartial juror. Liggio simply responded, "No, sir."

During the State's examination of the prospective jurors on the second panel, the prosecutor stated, "Mr. Liggio, I think, yes, sir, you had some problems with a drunken State trooper in New Orleans, right?" Liggio confirmed

that he had such a problem. The trial court noted that police officers would be involved in the case and again examined Liggio as follows, "could you judge the credibility of a police officer the way you would a lay witness ... would you automatically say, no, my experience is so bad that I'm just not going to listen to them?" Liggio responded, "Depends on the evidence."

The following colloquy then took place between the prosecutor and Liggio:

MR. NORIEA:
No, no, no. I understand that. But they are the evidence.

MR. LIGGIO:
Right.

MR. NORIEA:
They are the evidence. They are the evidence. But, your guilty verdict depends on whether or not you give them a fair chance to – you determine their credibility.

MR. LIGGIO:
I'll give them a fair chance.

MR. NORIEA:
And would you tend to judge that police officer more harshly than a lay witness because they are a police officer?

MR. LIGGIO:
No.

MR. NORIEA:
You would give them a fair shot?

MR. LIGGIO:
Yes.

When the defense attorney asked the prospective jurors to rate the St. Tammany Parish Sheriff's Office on a scale of one to ten with ten being the best score, Liggio responded, "I couldn't rate it because I've never had any problem with them."

When asked about an on-the-job injury that he sustained in the past, Liggio stated that he had occasional headaches for the past six years for which he no longer took medication because of a past addiction, and had problems sitting or standing for long periods of time. The trial judge noted that Liggio would be permitted to stand when so desired.

At the close of the jury selection from the pertinent panel, the State moved to remove Liggio for cause. In granting the State's motion, the trial court stated:

> Close call. I'm going to grant the challenge for cause. ... And again, I base that on the fact that he testified I think had had a person [sic] involvement, personal experience with law enforcement, and indicated when I questioned him that he would be more difficult with law enforcement, meaning to me that he would have a predisposition against law enforcement is the way that I interpreted it.

The State exhausted its twelve peremptory challenges. See LSA-C.Cr.P. art. 799.

When determining whether or not a juror should be dismissed for cause, the trial judge should consider the potential juror's answers as a whole and not merely consider "correct" answers in isolation. **Lee**, 559 So.2d at 1318. In disclosing his prior experience with law enforcement officers, Liggio revealed his clear bias against them. During questioning by the trial court and the prosecutor, Liggio repeatedly expressed concerns about his ability to be fair and impartial, suggesting that he may be biased against police testimony. Conversely, he did not hesitate to say in an unqualified manner that he would not be biased in their favor. The trial judge had the benefit of questioning Liggio and examining his demeanor and intonations before making his ruling. After a thorough review of the voir dire, we find Liggio's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred. Based on the record before us, we cannot say that the trial court abused its discretion in granting the State's challenge for cause. The counseled assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In the first pro se assignment of error, the defendant argues that he was denied his constitutional right to confront his accusers and his right to a fair trial because the confidential informant, to whom he allegedly sold drugs on several occasions, did not testify. The defendant contends that absent the confidential informant's testimony, the trial court erred in allowing Detective Bill Johnson of the St. Tammany Parish Sheriff's Office Narcotics Division to present testimony, which he contends included hearsay and lacked corroboration, as to the

confidential informant's statements and actions.[2] The defendant notes that there was no testimony by the confidential informant or "unwitting" male or female as to who sold drugs to them on the 12th, 21st, and 26th of October, 2009. The defendant notes that he was unable to inquire as to any motive, bias, interest, or possible pending charges the confidential informant may have had in making the accusation against the defendant.

Louisiana Code of Evidence article 514(A) provides for an informant's privilege:

> The United States, a state, or subdivision thereof has a privilege to refuse to disclose, and to protect another from required disclosure of, the identity of a person who has furnished information in order to assist in an investigation of a possible violation of a criminal law.

Exceptions to this privilege are listed in Article 514(C). For example, disclosure can be ordered when a party clearly demonstrates exceptional circumstances where the informer's testimony is essential to the preparation of the defense or a fair determination on the issue of guilt or innocence. One situation where the informer's testimony may be essential is where the informer played a crucial role in the alleged criminal transaction. See **Roviaro v. United States**, 353 U.S. 53, 60-66, 77 S.Ct. 623, 628-30, 1 L.Ed.2d 639 (1957); **State v. Davis**, 411 So.2d 434, 436-37 (La. 1982). However, the burden rests with the accused to set forth concrete reasons why the identity of the informant is crucial to the defense. **State v. Broadway**, 96-2659 (La. 10/19/99), 753 So.2d 801, 815, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000).

In this case, the defendant was not charged with distribution of contraband, but with possession with intent to distribute cocaine. The confidential informant did not play a crucial role in the transaction that led to the

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[2] The argument in support of this pro se assignment of error does not provide a name for the detective referenced. Based on the argument raised and record references, we have concluded that the defendant is referring to Detective Johnson. While the defendant contends that Detective Johnson's testimony included hearsay, he is not challenging the admissibility of any portion of the detective's testimony on that ground on appeal. Moreover, although the defendant claims otherwise, Detective Johnson's trial testimony regarding the use of a confidential informant was corroborated by Officer Scott Saigeon of the St. Tammany Parish Sheriff's Office Narcotics Division.

defendant's arrest because he played no part in the execution of the search warrant and the subsequent search. See **State v. Diliberto**, 362 So.2d 566, 567-68 (La. 1978). Since the informant did not participate in a transaction for which the defendant was charged, the defendant's right to confrontation was not abridged. We note that even if the affidavit indicated the informant made a controlled buy to corroborate information for the search warrant, disclosure of the informant would not be required. See **State v. Clark**, 2005-61 (La. App. 5 Cir. 6/28/05), 909 So.2d 1007, 1015-16, writ denied, 05-2119 (La. 3/17/06), 925 So.2d 538. We find no merit to the argument raised in pro se assignment of error number one.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In the second pro se assignment of error, the defendant argues that the trial court erred in allowing other crimes evidence to be admitted during the trial. The defendant notes that during opening statements, the prosecutor told the jury that in early October of 2009, narcotic detectives received information that the defendant was selling cocaine out of his residence. Noting the defendant was not on trial for distribution of cocaine and the State's failure to give notice of its intention to offer other crimes evidence, the defense objected and requested a mistrial. The defendant contends that the trial court was in error in ruling that the search warrant provided notice of the State's intention to offer other crimes evidence and noting that the defendant failed to request a hearing on its introduction. The defendant further notes the jury was also told that a confidential informant went to the defendant's home and purchased cocaine. The defendant contends that it is reasonable to conclude that prejudicial and highly inflammatory statements regarding other crimes evidence contributed to the verdict. The defendant contends that the State failed to comply with LSA-C.E. art. 404(B)(1). The defendant also notes that the State was allowed to offer as exhibits for the jury drugs that were bought on three separate occasions, though the defendant was not charged with or on trial for distribution of cocaine. The defendant argues that the evidence of the prior drug sales did not form *res*

gestae and was not so similar as to establish a pattern or system and should not have been admitted.

Louisiana Code of Criminal Procedure article 770(2) provides that a mistrial shall be granted, upon motion of the defendant, when a remark or comment is made within the hearing of the jury by the judge, district attorney, or a court official during trial or in argument and that remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.[3] The jurisprudence has held that an impermissible reference to another crime deliberately elicited of a witness by the prosecutor would be imputable to the State and would mandate a mistrial. **State v. Madison**, 345 So.2d 485, 494 (La. 1977). Mistrial is a drastic remedy that is only authorized where substantial prejudice will otherwise result to the accused. **State v. Pooler**, 96-1794 (La. App. 1 Cir. 5/9/97), 696 So.2d 22, 45, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288. Further, a trial court ruling denying a motion for mistrial will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518 (La. 1/17/01), 776 So.2d 443, 454.

Generally, evidence of crimes other than the offense being tried is inadmissible because of the substantial risk of grave prejudice to the defendant. **State v. Millien**, 02-1006 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 513. To avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. **State v. Lockett**, 99-0917 (La. App. 1 Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 00–1261 (La. 3/9/01), 786 So.2d 115.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

[3] It should be noted that even if a mistrial had been warranted under Article 770, it would not result in an automatic reversal of the defendant's conviction, but would be an error subject to harmless error review. See **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 100-02 (rejecting prior per se rule of reversing convictions based on error in introducing inadmissible other crimes evidence and holding that the introduction of inadmissible other crimes evidence results in a trial error subject to harmless error analysis).

> in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. **State v. Tilley**, 99–0569 (La. 7/6/00), 767 So.2d 6, 22, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001).[4] The issue of notice of the State's intent to use other crimes evidence is separate and independent of the question of the admissibility of the evidence. Although a pretrial evidentiary hearing to determine the admissibility of such evidence is preferable, such a hearing is not always required. See **State v. Addison**, 551 So.2d 687, 692 (La. App. 1 Cir. 1989), writ denied, 573 So.2d 1116 (La. 1991).

Under Article 404(B)(1) evidence of other crimes, wrongs or acts may be introduced when it relates to conduct, formerly referred to as *res gestae*, that "constitutes an integral part of the act or transaction that is the subject of the present proceeding." *Res gestae* events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the State could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the

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[4] The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by **State v. Prieur**, 277 So.2d 126 (La. 1973). However, 1994 La. Acts 3d Ex.Sess., No. 51 added LSA-C.E. art. 1104 and amended Article 404(B). The burden of proof in a pretrial hearing held in accordance with **Prieur** shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404. LSA-C.E. art. 1104. The burden of proof required by Federal Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. See **Huddleston v. U.S.**, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of LSA-C.E. art. 1103 and the addition of Article 1104. However, numerous Louisiana appellate courts, including this court, have held that the burden of proof is now less than "clear and convincing." See **State v. Williams**, 99–2576 (La. App. 1 Cir. 9/22/00), 769 So.2d 730, 734 n.4.

other crimes. **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam).

The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. **State v. Kimble**, 407 So.2d 693, 698 (La. 1981). In addition, integral act (*res gestae*) evidence in Louisiana incorporates a rule of narrative completeness without which the State's case would lose its "narrative momentum and cohesiveness, 'with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.'" **Colomb**, 747 So.2d at 1076 (quoting **Old Chief v. United States**, 519 U.S. 172, 187, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997)). The Louisiana Supreme Court has held that evidence of multiple crimes committed in a single course of conduct is admissible as *res gestae* at the trial of the accused for the commission of one or more, but not all, of the crimes committed in his course of conduct. **State v. Washington**, 407 So.2d 1138, 1145 (La. 1981); **State v. Meads**, 98-1388 (La. App. 1 Cir. 4/1/99), 734 So.2d 792, 797, writ denied, 99-1328 (La. 10/15/99), 748 So.2d 465.

The evidence at issue in this assignment of error was first introduced during the motion to suppress hearing on May 12, 2010. The trial began on May 26, 2010. The initial trial reference occurred during the prosecution's opening statement. Specifically, the prosecution referred to information narcotic detectives received in October of 2009, indicating that the defendant was selling cocaine. The defense objected and moved for a mistrial, arguing that they did not receive notice and specifically relying on this court's opinion in **State v. Scott**, 08-2418 (La. App. 1 Cir. 6/19/09), 20 So.3d 1089. The trial court reviewed the opinion in **Scott** and noted that the State provided open file discovery containing the search warrant obtained based on the drug transactions

at issue. The court concluded that the defendant therefore had reasonable notice of the State's intent to rely upon evidence of other crimes in connection with this case, and further noted that the defendant did not request a hearing. In finding that a mistrial was not warranted, the trial court noted the evidence in question was relevant as to the identity of the person in possession of the drugs seized in the instant case at the time of the execution of the search warrant and further noted that the contested evidence would be admissible if it related to conduct that constitutes an integral part of the act or transaction that was the subject of the present proceeding.

At the outset, we note that we agree with the trial court's findings regarding the sufficiency of the notice of the other crimes evidence in this case. The issue of notice of the State's intent to use other crimes evidence is separate and independent of the question of the admissibility of the evidence. Although a pretrial evidentiary hearing to determine the admissibility of such evidence is preferable, such a hearing is not always required. **State v. Addison**, 551 So.2d at 692. Not every violation of **Prieur** notice requires reversal. Before a defendant can complain of such a violation, he must show prejudice. **State v. Sanders**, 93–0001 (La. 11/30/94), 648 So.2d 1272, 1284, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996). Herein, the defendant had actual notice of the State's intent to rely on other crimes evidence considering the basis of the search warrant that lead to the recovery of the evidence in this case and the State's introduction of such other crimes evidence during the motion to suppress hearing on May 12, 2010, two weeks before the trial. The defendant makes no showing of any effect on his trial strategy. Because the defendant does not demonstrate prejudice based on lack of notice, he shows no basis for relief under the notice requirements of **Prieur**. See **State v. Ridgley**, 08-675 (La. App. 5 Cir. 1/13/09), 7 So.3d 689, 698, writ denied, 09-0374 (La. 11/6/09), 21 So.3d 301.

Regarding the admissibility of the other crimes evidence, we note that the circumstances in **Scott** are very similar to the instant case. In that case, the

defendant was in pertinent part charged with possession with intent to distribute cocaine. Probable cause for a search warrant executed in that case was based on three drug sales prior to the execution of the search warrant, wherein the defendant allegedly sold crack cocaine to undercover officers. In that case we found the other crimes evidence of the three drug sales was inadmissible. Under the facts of that case, we specifically found that the other criminal acts did not form part of the *res gestae*. This court noted that the prosecutor therein failed to show the "other crimes" were related and intertwined with the charged offenses to such an extent the State could not have accurately presented its case without reference to them. This court further found that the other crimes evidence in that case had no independent relevancy besides simply showing a criminal disposition.

However, after the trial in the instant case, the Louisiana Supreme Court reversed this court's opinion in **Scott**, specifically holding the prior transactions were relevant to the question of whether the defendant, assuming further that he had actual or constructive possession of the contraband in the residence, intended to distribute the cocaine, an essential element of the offense charged. **State v. Scott**, 09-1658 (La. 10/22/10), 48 So.3d 1080, 1085 (per curiam). The denial of the motion for mistrial in the instant case must be reviewed in light of the Louisiana Supreme Court's reversal of this court's opinion in **Scott** and the factual and circumstantial similarities of that case and the instant case.

In order to convict the defendant in this case, the State was required to prove beyond a reasonable doubt not only that he possessed the cocaine found on his premises, but also that he did so with the specific, subjective intention of possessing it in order to distribute it. See **State v. Knighten**, 07–1061 (La. 11/16/07), 968 So.2d 720, 721 (per curiam) (evidence of prior sales to informant admissible to prove an essential element of the crime charged, possession of marijuana with intent to distribute); **State v. Grey**, 408 So.2d 1239, 1241-42 (La. 1982). Moreover, evidence of the prior sales was also relevant because the defendant denied being in actual or constructive possession of the drugs found in

the residence, arguing that others possibly lived in the residence and possessed the drugs.

Additionally, and in compliance with **Prieur**, the jury instructions provided that the other crimes evidence was received for the limited purpose of proving an issue for which other crimes evidence may be admitted, such as intent, and that the defendant cannot be convicted of any charge other than the one named in the bill of information or one that is responsive to that charge. Even if we were to assume that the prior drug transactions forming the basis for the search warrant executed in this case did not form integral components of the charged offense, we find that the evidence was relevant to the extent that the probative value of the extraneous crimes evidence outweighed its prejudicial effect. Therefore, we find no abuse of discretion in trial court's denial of the defendant's motion for mistrial. The second pro se assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In pro se assignment of error number three, the defendant argues that the evidence presented by the State failed to exclude all reasonable hypotheses of innocence, contending that he was only one of three tenants who occupied the residence where the drugs were found. The defendant specifically argues that it was possible that another tenant owned the drugs, noting that he was outside when the police arrived to execute the search warrant and further contending that the drugs were found in a drawer used to store a female's items in a bathroom closet. The defendant also contends that the confidential informant was not familiar with the seller and provided an indistinct description of the seller.

In reviewing claims challenging the sufficiency of the evidence, this court must consider "whether, after 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 LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988); **State v.**

Wright, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732. The elements must be proven such that every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. Louisiana Revised Statutes 15:438 is not a separate test from **Jackson v. Virginia**, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. All evidence, direct and circumstantial, must meet the **Jackson v. Virginia** reasonable doubt standard. **State v. Wright**, 445 So.2d 1198, 1201 (La. 1984). When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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.

Louisiana Revised Statutes 40:967(A) provides, in pertinent part, that it shall be unlawful for any person knowingly or intentionally: (1) to produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance or controlled substance analogue classified in Schedule II. Cocaine and its derivatives are listed in Schedule II. LSA-R.S. 40:964, Schedule II(A)(4). A defendant is guilty of distribution of cocaine when he transfers possession or

control of cocaine to his intended recipients. See LSA-R.S. 40:961(14); **State v. Cummings**, 95-1377 (La. 2/28/96), 668 So.2d 1132, 1135.

A person not in physical possession of a drug is considered to be in constructive possession when the drug is under that person's dominion and control. See **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983). Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute constructive possession include: (1) his knowledge that illegal drugs were in the area; (2) his relationship with the person, if any, found to be in actual possession; (3) his access to the area where the drugs were found; (4) evidence of recent drug use by the defendant; and (5) his physical proximity to the drugs. It is well settled that the mere presence in an area where drugs are located or the mere association with one possessing drugs does not constitute constructive possession. See **State v. Toups**, 01-1875 (La. 10/15/02), 833 So.2d 910, 913. A person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. Determination of whether a defendant had constructive possession depends on the circumstances of each case. **State v. Gordon**, 93-1922 (La. App. 1 Cir. 11/10/94), 646 So.2d 995, 1002.

In cases where the intent to distribute a controlled dangerous substance is an issue, a court may look to various facts: (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of the drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. **State v. House**, 325 So.2d 222, 225 (La. 1975).

Officer Saigeon initiated the investigation that led to the October 12, 21, 26, and 27 controlled purchases of cocaine at the defendant's residence. Officer Saigeon provided the confidential informant with funds from the St. Tammany

Parish narcotics dispense fund and took custody of the purchased narcotics after the controlled purchases. According to Officer Saigeon, an undercover detective travelled with the confidential informant during the third purchase (on October 26) to allow his introduction to the third-party source, the defendant. On the date of the fourth controlled purchase, October 27, the undercover detective called the defendant, whom she had met the prior day during the third purchase, and requested to purchase cocaine. Officer Saigeon also participated in the execution of the search warrant obtained after the controlled purchases. Officer Saigeon confirmed that some of the articles of clothing located in the master bedroom appeared to belong to a female.

Detective Johnson participated in the October 29, 2009 search warrant execution at the defendant's residence. The defendant was present during the search, and a female who left the residence just prior to the search, later identified as Kimberly Burnett, was detained and brought back to the residence. One baggie of cocaine was found in the master bathroom vanity drawer. The digital scale, a sandwich bag box containing another baggie of cocaine, and empty sandwich baggies were found in the bottom drawer of the vanity. A rolled-up towel located in the master bathroom closet contained three individual baggies of cocaine. Documentation addressed to the defendant was also located in the bathroom. Detective Johnson also participated in police surveillance at the defendant's residence during controlled buys. On those occasions, officers observed brief transactions including hand-to-hand exchanges between the confidential informant, others, and a "heavyset black male" with a "dreadlock type hairdo," a physical appearance consistent with the defendant. During cross-examination, Detective Johnson confirmed that items such as hair clips, a hair trimmer, and a hairbrush were located in the bathroom vanity drawer that contained cocaine, but was uncertain as to which hair items may have been used by the defendant.

Officer Steven Gaudet, a supervisor in the St. Tammany Parish Sheriff's Office Narcotics Division, also participated in the execution of the search warrant.

Officer Gaudet testified that the defendant was at his mailbox when the police approached his residence. After the defendant was handcuffed and read his rights, he was escorted back into his residence. The defendant ultimately guided officers to the master bedroom and bathroom where the drugs were located, specifically instructing Officer Saigeon to look inside the sandwich bag box. Officer Gaudet also testified that the approximate street value of the narcotics was between twenty-five hundred to three thousand dollars. The officers recovered two hundred dollars in U.S. currency from a pair of men's jeans located on the bedroom floor. According to the serial numbers, some of the currency (specifically one hundred sixty dollars worth) was provided to the confidential informant from the St. Tammany Parish narcotics dispense fund to conduct the controlled purchases. Two different forms of cocaine were recovered, hydrochloride and base form, commonly referred to as "crack." According to the St. Tammany Parish Sheriff's Office crime lab, the total weight of the separately packaged seized cocaine was 72.06 grams.

Officer Saigeon testified that he did not have any indication that anyone else resided in the home with the defendant. Burnett provided documentation to show that she resided elsewhere. Charges were filed against Nicholas Darby, who allegedly distributed cocaine (that he retrieved from the defendant's residence) to an undercover police officer during one of the controlled purchases.

We find that the evidence was sufficient to prove that the defendant had dominion and control, even if shared, of the drugs located in the residence. The defendant pointed out the location of some of the drugs, thus he was well aware of their presence. The drugs were located in the defendant's residence, and the defendant was on the property at the time of his arrest; thus, he was within close physical proximity to the drugs and had full access to the area where the drugs were found. Not only was a significant amount of cocaine recovered in this case, but the cocaine was in a form usually associated with possession for distribution to others. Additionally, there was paraphernalia, including baggies and a digital scale consistent with use to measure an ounce of a substance,

further evidencing the intent to distribute. Based on a thorough review of the evidence, in the light most favorable to the prosecution, we are convinced that any rational trier of fact could have concluded beyond a reasonable doubt that the evidence was sufficient to exclude every reasonable hypothesis of innocence and to support a conviction for possession of cocaine with intent to distribute. Thus, the third pro se assignment of error lacks merit.

REVIEW FOR ERROR

In his pro se brief, the defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 05-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07–0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED

STATE OF LOUISIANA **NUMBER 2011 KA 0326**

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

JAMES A. DONALDSON **STATE OF LOUISIANA**

WELCH, J., concurring.

While I agree with the majority's ultimate decision to affirm the defendant's sentence and conviction, I believe that the trial court erred in granting the State's challenge "for cause" of prospective juror Shawn Liggio. However, since the trial court's error in this regard was harmless, the defendant's conviction and sentence must be affirmed.

According to the record, the trial court granted the State's challenge to Mr. Liggio for cause because Mr. Liggio had "personal experience with law enforcement" which suggested he would have a "predisposition against law enforcement." During the voir dire examination of Mr. Liggio, he openly stated that as a result of his previous involvement as the victim of a hit-and-run by an intoxicated state trooper, that he had "slight trust issues" with law enforcement. However, after further questioning, he unequivocally stated that he could fairly evaluate the credibility of law enforcement witnesses, that he would not judge the credibility of a witness more harshly simply because that witness was in law enforcement, and that he had never had any problems with the St. Tammany Parish Sheriff's office.

A trial court has broad discretion in ruling on a challenge for cause, and the determination will not be disturbed unless a review of the entire voir dire indicates an abuse of discretion. **State v. Lindsey**, 2006-0255 (La. 1/17/07), 948 So.2d 105, 108. A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, if after further questioning the

potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. **State v. Lindsey**, 2006-0255 (La. 1/17/07), 948 So.2d 105, 108.

Considering Mr. Liggio's answers on voir dire, the trial court clearly abused its discretion in granting the State's challenge for cause. Although Mr. Liggio's response concerning "trust issues" with law enforcement may have slightly appeared prejudicial, it was not grounds for a challenge for cause, because after further questioning, Mr. Liggio clearly demonstrated a willingness and ability to fairly judge the credibility of witnesses and to decide the case impartially and according to the law and evidence. Mr. Liggio responses, when reviewed as a whole, did not exhibit any bias against law enforcement; thus, the trial court abused its discretion in granting the State's challenge for cause of Mr. Liggio.

Nevertheless, even though the trial court's ruling on this challenge was erroneous, I do not believe that the error was reversible. The erroneous allowance to the State of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the State of more peremptory challenges than it is entitled to by law. La. C.Cr. P. art. 800(B); **State v. Thomas**, 589 So.2d 555, 566 (La. App. 1st Cir. 1991); **State v. Thompson**, 489 So.2d 1364, 1369 (La. App. 1st Cir.), writ denied, 494 So.2d 324 (La. 1986); **State v. Fredericks**, 2009-0005, p. 5 (La. App. 1st Cir. 9/11/09) (*unpublished*). While the record does establish that the State exhausted its twelve peremptory challenges, and thus, the effect of the trial court's erroneous ruling resulted in allowing the State to have an excessive number of peremptory

challenges, the error should be reviewed under a harmless-error analysis.[1]

After reviewing the entire record, I find that the trial court's error was harmless, and therefore, the defendant's conviction and sentence should be affirmed.

Thus, I respectfully concur.

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[1] Although dicta in **State v. Cormier**, 272 So.2d 686, 689 (La. 1973) suggests that such an error may be "reversible" error, based on the subsequent United Stated Supreme Court decision in **Arizona v. Fulminante**, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991) and the Louisiana Supreme Court decision in **State v. Langley**, 2006-1041 (La. 5/22/07), 958 So.2d 1160, it appears that such an error would not be a "structural defect" or error in the criminal trial, which would require automatic reversal because it infects the entire trial process, but rather, would be subject to a harmless-error analysis.