

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 2356

STATE OF LOUISIANA

VERSUS

JEROME MILLER

DATE OF JUDGMENT: September 14, 2007

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
(NUMBER 390505 & 424947 DIV. "D"), PARISH OF LAFOURCHE
STATE OF LOUISIANA

HONORABLE ASHLY BRUCE SIMPSON, JUDGE

Rene C. Gautreaux
Assistant District Attorney
Thibodaux, Louisiana

Counsel for Appellee
State of Louisiana

C. Gary Wainwright
New Orleans, Louisiana

Counsel for Defendant/Appellant
Jerome Miller

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

**Disposition: CONVICTION, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCE
AFFIRMED.**

Kuhn, J.

The defendant, Jerome Miller, was charged by a bill of information with distribution of cocaine, a schedule II controlled dangerous substance (count one), a violation of La. R.S. 40:967.¹ The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The State filed a habitual-offender bill of information. The defendant originally denied the allegations in the habitual-offender bill of information. The trial court denied the defendant's motion to quash the habitual-offender bill of information and motion for new trial. Subsequently, the defendant withdrew his former denial and, after being advised of his rights, stipulated to his habitual-offender status (fourth offender under La. R.S. 15:529.1A(1)(c)(i)). The defendant waived delays and was sentenced to thirty years imprisonment at hard labor. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, arguing the trial court erred in admitting other-crimes evidence under the *res gestae* rule and that the evidence presented during the trial was insufficient to support his conviction. For the forthcoming reasons, we affirm the conviction, habitual-offender adjudication, and sentence.

FACTS

On or about June 27, 2002, Penny Pitre, a source of information for the Lafourche Parish Drug Task Force, contacted Sergeant John Champagne of the

¹ The defendant was also charged as a multiple offender under La. R.S. 40:982. The State struck this portion of the bill of information and filed a habitual-offender bill of information under La. R.S. 15:529.1.

Lafourche Parish Sheriff's Office.² According to Sergeant Champagne, Pitre advised she could purchase crack cocaine from Shelley Trosclair and Jerome Miller, the defendant, who was also called "G." Several officers conducted an undercover operation targeting Trosclair and the defendant at Pitre's residence in Lafourche Parish. Agent Richard Hines of the St. Charles Parish Sheriff's Office acted as the undercover purchaser. Agent Hines was equipped with an audio transmitter and serialized funds. Several officers of the Lafourche Parish Sheriff's Office monitored the audio system at a nearby location near Pitre's residence.

After Agent Hines arrived at the residence, Pitre informed him that the two subjects would be arriving with a pre-determined amount of narcotics. Shortly after his arrival, Trosclair arrived, entered the residence, and after looking around, exited, and re-entered with a male subject. The male subject pulled a bag of marijuana out from his crotch area and placed it on a table. A bag of crack cocaine was enclosed. The male subject handed the crack cocaine to Agent Hines, who then handed \$900.00 in serialized funds to the male subject.³ The male subject asked Agent Hines if he also wanted to purchase marijuana, and Agent Hines declined. After the transaction was complete, Agent Hines used a code word, "Winnebago," to alert the surveillance team to make the arrest. Agent Hines also described the seller as a black male with a scar over his eye wearing a welder's cap.

² Sergeant Champagne explained that a person who is considered a source of information must establish his credibility before being classified as a confidential informant.

³ According to the evidence form, approximately eight grams of crack cocaine were collected. The evidence was submitted to the Louisiana State Police Crime Laboratory for testing and determined to contain cocaine.

He also related Pitre's description of the perpetrators' vehicle, a beige Mazda, to the surveillance team.

The officers located and stopped the perpetrators' vehicle within a block or two from Pitre's house. After arresting the defendant and Trosclair, the officers conducted a search of the vehicle, and Detective Mamie Pellegrin located the serialized funds on the floorboard of the vehicle on top of Trosclair's purse. Detective Kevin Johnson also participated in the arrests and search of the vehicle. He located a substance suspected to consist of marijuana (and later determined to be approximately nine grams of marijuana) on the floorboard on the driver's side of the vehicle. The arrests took place at approximately 10:00 p.m.

On appeal, the defendant asserts the following two assignments of error:

1. The trial court erred when it allowed other crimes evidence to be introduced against defendant during trial under the *res gestae* rule.
2. The trial court erred when it allowed defendant to be convicted as charged on the basis of evidence that was insufficient to prove beyond a reasonable doubt the essential elements of the crime charged.

SUFFICIENCY OF THE EVIDENCE (Assignment of Error Number Two)

In this assignment of error, the defendant contends the State presented insufficient evidence to support the conviction. The defendant contends that he was with the person who made the sale but he did not enter the residence where the transaction took place. The defendant notes that Trosclair's testimony supports his claim. The defendant further notes that Pitre could not recall whether the defendant was in her residence at the time of the transaction. The defendant further notes that none of the officers observed him enter the residence. The

defendant also notes that the serialized funds were located in Trosclair's purse. Finally, the defendant notes the audio recording of the transaction was barely audible.

The constitutional standard of review for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard, initially enunciated in *Jackson*, and now legislatively embodied within La. Code Crim. P. art. 821, is applicable in cases involving both direct and circumstantial evidence. *State v. Smith*, 441 So.2d 739, 741 (La. 1983). When analyzing circumstantial evidence, La. R.S. 15:438 provides the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Nevers*, 621 So.2d 1108, 1116 (La. App. 1st Cir.), *writ denied*, 617 So.2d 906 (La. 1993). The reviewing court will not assess credibility nor reweigh the evidence. *State v. Rosiere*, 488 So.2d 965, 968 (La. 1986). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. *State v. Gordon*, 2001-0236, p. 3 (La. App. 1st Cir. 2/15/02), 809 So.2d 549, 552, *writ denied*, 2004-2438 (La. 6/24/05), 904 So.2d 733. Moreover, where 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. *Gordon*, 2001-0236 at p. 4, 809 So.2d at 552. In the absence of internal contradiction or irreconcilable conflict with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient support for

the requisite factual conclusion. *State v. Brown*, 2003-1076, p. 10 (La. App. 1st Cir. 12/31/03), 868 So.2d 775, 782, *writ denied*, 2004-0269 (La. 6/4/04), 876 So.2d 76.

La. R.S. 40:967A(1) provides that "it shall be unlawful for any person knowingly or intentionally ... [t]o ... distribute, or dispense ... a controlled dangerous substance ... classified in Schedule II[.]" Cocaine and its derivatives are listed in Schedule II. La. 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 La. R.S. 40:961(14); *State v. Cummings*, 95-1377, p. 4 (La. 2/28/96), 668 So.2d 1132, 1135.

Agent Hines testified that Trosclair entered Pitre's residence first. She returned with the male subject who conducted the sale of the crack cocaine. Agent Hines identified the defendant in court as the person who conducted the sale. At the police station after the defendant's arrest, he identified the defendant as the perpetrator. On rebuttal, Agent Hines stated he had not confused Trosclair with the defendant. Although Trosclair and Pitre were both in the residence at the time of the transaction, Agent Hines stated he was certain that the defendant, not Trosclair, conducted the sale.

Pitre, who reluctantly confirmed her status as a source of information for the Task Force, testified she could not remember whether the defendant was present during the transaction at issue. She also could not recall if she had ever seen the defendant before his trial. When asked whether she provided information regarding the potential purchase, she stated, "I can't say yes, I can't say no. Possibly, that's what I can answer you, sir." Pitre stated she has "mental

problems." She stated she remembers Trosclair but would not have given information using the defendant's name, as she did not know the defendant. When asked whether she was a crack cocaine user at the time of the trial, she responded, "Sometimes."

During the trial, Trosclair testified she and the defendant were good friends.⁴ According to Trosclair's testimony, on the date of the offense she asked the defendant to bring her to Pitre's residence. She further stated that she told the defendant that she would be acquiring clothing for her children from Pitre. According to Trosclair, the defendant was completely unaware of her previously discussed plans with Pitre to conduct a drug transaction. She stated that when they arrived at Pitre's residence, the defendant waited in the car while Trosclair conducted the sale alone. After the sale was complete, the defendant knocked on the door and told Trosclair to leave with him. According to Trosclair, the defendant never entered the residence. Trosclair stated that two other people were present during the transaction, Agent Hines and Pitre. A notarized statement by Trosclair consistent with her testimony was submitted by the defense. According to her testimony, Trosclair had prior distribution convictions. In particular, she received an eight-year sentence for her conviction resulting from this incident. The defendant did not testify at the trial.

Although the audiotape of the transaction is not entirely clear, two distinct male voices can be heard amongst female voices. Agent Hines identified the other

⁴ Trosclair was identified in the trial record as "Shelley Trosclair Gaspard."

male voice as that of the defendant. Trosclair stated that she did not know to whom the other male voice belonged.

Where the key issue raised by the defense is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. *State v. Johnson*, 99-2114, p. 4 (La. App. 1st Cir. 12/18/00), 800 So.2d 886, 888, *writ denied*, 2001-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness is sufficient to support a conviction. *State v. Davis*, 2001-3033, p. 3 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163. 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 that 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 defendant does not deny, but rather admits, being at the scene while the drug transaction took place. Further, the defendant does not deny that the transaction took place. Rather, the defendant urges he was not present inside Pitre's residence when Trosclair made the sale. In essence, his claim is that Agent Hines' testimony is untruthful, as it is not likely that Agent Hines could have mistaken Trosclair for the defendant. However, the conviction herein shows that the jury accepted Agent Hines's testimony. This court will not second-guess the jury's credibility determination. Based on our review of the testimony, we find that the jury reasonably rejected the defendant's hypothesis of innocence. We find that sufficient evidence was introduced at trial to establish all elements of the

offense and sufficiently negate any reasonable probability of misidentification. This assignment of error is without merit.

OTHER CRIMES EVIDENCE
(Assignment of Error Number One)

In assignment of error number one, the defendant contends that the trial court erred in admitting other-crimes evidence under the *res gestae* doctrine. The defendant notes that reference to the marijuana was not essential and could have been easily excluded. The defendant also notes that the State redacted the Crime Lab report to exclude any reference to the marijuana and admonished Deputy Kimberly Pitre (the evidence custodian of the Lafourche Parish Sheriff's Office) not to discuss the fact that it was redacted.

Generally, courts may not admit evidence of other crimes to show a defendant is a man of bad character who has acted in conformity with his bad character. However, under La. Code Evid. art. 404B(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 other crimes evidence to insure that the purpose served by admission of other crimes evidence is not to depict defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. *State v. Colomb*, 98-2813, p. 3 (La. 10/1/99), 747 So.2d 1074,

1076. 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 before, 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). Integral act (*res gestae*) evidence in Louisiana also incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. See *Colomb*, 98-2813 at p. 4, 747 So.2d at 1076. 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, p. 7 (La. App. 1st Cir. 4/1/99), 734 So.2d 792, 797, *writ denied*, 99-1328 (La. 10/15/99), 748 So.2d 465.

Herein, Agent Hines testified that the evidence forming the basis for the instant offense, crack cocaine, was wrapped inside of the bag that contained the marijuana. The defendant removed the marijuana from his crotch area and separated it from the crack cocaine before passing the crack cocaine to Agent Hines to complete the transaction. The marijuana was recovered during the search of the vehicle, after the defendant and Trosclair were removed from the vehicle. We conclude that the conduct at issue, the possession of the marijuana, constitutes an integral part of the cocaine transaction. See La. Code Evid. art. 404B(1). Thus, we find no merit to this assignment of error.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such error, whether or not a defendant makes such a request. Under La. Code Crim. P. art. 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*, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25.

DECREE

For these reasons, we affirm the defendant's conviction, habitual-offender adjudication, and sentence.

CONVICTION, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.