NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1000

STATE OF LOUISIANA

VERSUS

JERRY BICKHAM, JR.

DATE OF JUDGMENT: DEC 2 1 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 494725, DIV. F, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

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

KUHN, J.

Defendant, Jerry Bickham, Jr., was charged by bill of information with possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1. He pled not guilty and, following a jury trial, was found guilty as charged. Defendant filed a motion for a postverdict judgment of acquittal, which was denied. He was sentenced to fourteen years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The State filed a multiple offender bill of information. Following a hearing on the matter, defendant was adjudicated a second-felony habitual offender. The trial court vacated the previously imposed fourteen-year sentence and resentenced defendant to fourteen years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. Defendant now appeals, designating two assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On July 29, 2010, from outside of her house in Slidell, Courtney MacCauley called 911 with her cell phone and informed the operator that she had just returned from the store and, when she walked inside her house, she saw her boyfriend, defendant, and thought he might have tried to overdose on some pills. Courtney asked for a paramedic and an officer. Courtney identified herself and defendant and gave her address. When the operator asked what was wrong with defendant, Courtney responded that he was lying on the couch holding a gun in his hand, and she could not tell if he was alive. She added that she did not know what frame of mind he was in. When the operator asked if she could tell if defendant was breathing, Courtney responded that when she realized he had a gun she did not

want to look anymore because, if he had tried to kill himself, she did not want her children to see any blood. Instead, she wanted to get them out of the house. Moments later, defendant walked outside and Courtney told him that she thought he was dying and asked why he would do something like that.

The 911 call was dispatched to the police as an attempted suicide by gun. Shortly thereafter, several police officers with the St. Tammany Parish Sheriff's Office arrived at Courtney's house. After speaking with Courtney, who was next door, Deputy Mark Oster approached Courtney's house and saw defendant walking from Courtney's backyard. Defendant was apprehended and handcuffed. Deputies Oster and Vargo searched the backyard for a weapon, but found none. The deputies then looked over the privacy fence adjacent to Courtney's backyard. Using a flashlight, they found a handgun in Courtney's neighbor's backyard. The gun, a Taurus 9mm semiautomatic, belonged to Courtney. The magazine in the gun contained four 9mm rounds.

Deputy Oster testified at trial that he ***Mirandized*** defendant. Deputy Oster further stated defendant told him that his girlfriend bought the gun and that he needed a second chance because he knew he had done the wrong thing. Defendant told the deputy that he threw the gun over the fence because he knew he would get in trouble for possessing the gun.

Defendant testified at trial that he took two sleeping pills to help him sleep. He stated he had never threatened to commit suicide. He further stated that Deputy Oster's testimony was not accurate. Specifically, defendant testified that he never told Deputy Oster that he threw a gun over the fence. Defendant also stated he had two convictions for possession of cocaine.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant asserts that he was denied due process when he was not allowed to confront his accuser. Specifically, he contends he was denied his Sixth Amendment right to confront his accuser, Courtney MacCauley, since she was unavailable to testify at trial and had alleged on the 911 call that he was in possession of a weapon.

Shortly prior to opening statements, counsel took up the issue of the admissibility of the 911 tape. Per the trial court's earlier instructions, the State had redacted the recording of Courtney's call to 911. The prosecutor informed the trial court that he reviewed the redacted version of the 911 call with defense counsel and pointed out that defense counsel, nevertheless, still maintained her objection to the recording being played at all. Defense counsel stated, "That's correct, Your Honor." It was not clear from this exchange what the substance of defense counsel's objection was. However, it is clear defense counsel had concerns with the 911 tape constituting a hearsay violation[1] based on the trial court's well-reasoned ruling on the admissibility of the tape:

> The tape will be played. The Court has heard the tape. The Court is certainly familiar with ***Davis v. Washington***, applying the standards on a 911 call, to determine whether or not a portion of this fits the hearsay exceptions, it appears this was an ongoing emergency in which the discussion was made on the tape. They were speaking about events actually happening at the time. The Court in reading the case law feels that the statements allowed are non-testimonial and do

[1] See ***Crawford v. Washington***, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004).

> in fact comply with the exceptions for hearsay objections. The excited utterance to be allowed in as hearsay exception. Counsel for the State has in fact redacted possibly more than necessary because this was an ongoing event the environment as spoken in ***Davis*** was certainly not one or certainly not a safe environment, not tranquil, it fit the setting in which an excited utterance could be met. Therefor[e] I will allow the tape as edited can be played and note the defense objection.

Later during trial, after examination of the first witness, counsel entered into a stipulation that the State and defense issued a subpoena to Courtney McCauley for the trial and she failed to appear. At no time did defense counsel object to Courtney's failure to appear in court to testify or raise any issue regarding denial of defendant's due process rights because he was unable to confront his accuser. In order to preserve the right to appellate review of an alleged trial court error, a party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the objection. See La. C.Cr.P. art. 841. A new basis for an objection may not be raised for the first time on appeal. The purpose behind the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity so that he may cure the problem. It is also intended to prevent the defendant from gambling for a favorable verdict and then resorting to appeal on errors that might easily have been corrected by an objection. ***State v. McClain***, 2004-98 (La. App. 5th Cir. 6/29/04), 877 So.2d 1135, 1144, writ denied, 2004-1929 (La. 12/10/04), 888 So.2d 835.

Defense counsel never objected on the record to the admissibility of the 911 tape on the basis of Courtney's unavailability at trial. At no time before or during trial did defense counsel ask the trial court to declare Courtney unavailable or suggest to the trial court that she (defense counsel) would not be able to cross-

examine her. Accordingly, the confrontation issue is not properly before us. See ***McClain***, 877 So.2d at 1144.

The failure to preserve the confrontation issue notwithstanding, we find that the recording of Courtney's 911 call was nontestimonial and, therefore, did not implicate the Sixth Amendment's Confrontation Clause and that under Louisiana hearsay rules, the 911 call was admissible both as nonhearsay and as an exception to the hearsay rule.

The Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." ***Crawford v. Washington***, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004). In ***Davis v. Washington***, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006), the Supreme Court found that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Thus, the 911 call at issue in ***Davis*** was determined to be nontestimonial because the victim was speaking about events as they were actually happening, rather than describing past events. Also, the nature of what was asked and answered during the 911 call, the ***Davis*** Court opined, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. ***Davis***, 547 U.S. at 827, 126 S.Ct. at 2276.

Similarly, Courtney's 911 call was nontestimonial. It is clear the primary purpose of her call and the questioning by the 911 operator was to address and resolve an ongoing emergency. When Courtney made the 911 call, defendant was in her house with a gun in his hand. Further, the 911 operator's queries were necessary to evaluate the situation and to dispatch the appropriate emergency personnel. Accordingly, the admission of the 911 recording did not implicate the Confrontation Clause, which rendered unnecessary Courtney's availability as a witness for cross-examination.

The admissibility of the 911 call was not proscribed by Louisiana's hearsay rules, either. As *res gestae* (or things said or done), Courtney's 911 statement is, by definition not hearsay. See La. C.E. art. 801(D)(4).[2] See ***State v. Hester***, 99-426 (La. App. 5th Cir. 9/28/99), 746 So.2d 95, 106, writ denied, 99-3217 (La. 4/20/00), 760 So.2d 342; ***State v. Martin***, 562 So.2d 468, 471-72 (La. App. 5th Cir.), writ denied, 566 So.2d 987 (La. 1990). Her 911 call also falls under the hearsay exceptions of present sense impression and excited utterance, in both of which the availability of the declarant is immaterial. See La. C.E. arts. 803(1) & 803(2).

Louisiana Code of Evidence article 803 provides in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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[2] La. Code Evid. art. 801(D)(4) provides:

> **Statements which are not hearsay.** A statement is not hearsay if:
>
> **Things said or done.** 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.

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Under the present sense impression hearsay exception, the critical factor is whether the statement was made while the individual was perceiving the event or immediately thereafter. See ***State v. Johnson***, 2000-0680 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 679, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066; La. C.E. art. 803(1). Courtney's statements to the 911 operator which indicated defendant had a gun in his hand were clearly made immediately after perceiving the event. See ***State v. Price***, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 120-21 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

Under the excited utterance exception, there must be an occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative. Additionally, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. Of the many factors that enter into determining whether in fact the second requirement has been fulfilled and whether a declarant was at the time of an offered statement under the influence of an exciting event, probably the most important of these is the time factor. In this regard, the trial court must determine whether the interval between the event and the statement was long enough to permit a subsidence of emotional upset and a restoration of a reflective thought

process. See ***State v. Hilton***, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1034-35, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113.

Courtney's observation of defendant with a gun in his hand and her uncertainty of whether he had harmed himself with the gun was an event sufficiently startling and upsetting to have deprived Courtney of her reflective thought process. Courtney was on the phone with the 911 operator only moments after observing this event, and our review of the 911 recording clearly indicates Courtney was still upset while describing what she had observed. See ***State v. Krolowitz***, 407 So.2d 1175, 1179-80 (La. 1981); ***State v. Henderson***, 362 So.2d 1358, 1361-62 (La. 1978); ***State v. King***, 604 So.2d 661, 666-67 (La. App. 1st Cir. 1992).

Moreover, even if the 911 recording had been admitted in error, it would have been harmless error because it merely supported Deputy Oster's testimony about defendant being in possession of a gun. Thus, the 911 recording was merely cumulative or corroborative of other testimony adduced at trial. See ***State v. Taylor***, 2001-1638 (La. 1/14/03), 838 So.2d 729, 748, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004); ***State v. Johnson***, 389 So.2d 1302, 1305-06 (La. 1980).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant maintains that the evidence was insufficient to support the conviction. Specifically, he contends that the State failed to prove he was in actual possession of the gun.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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 La. C.Cr.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, 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 the factfinder 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.

It was established at trial that defendant had been convicted of possession of cocaine on April 13, 2009. It is unlawful for any person "who has been convicted of . . . any violation of the Uniform Controlled Dangerous Substances Law which is a felony . . . to possess a firearm or carry a concealed weapon." (footnote omitted). La. R.S. 14:95.1(A). Possession of cocaine is a violation of the Uniform Controlled Dangerous Substances Law which is a felony. La. R.S. 14:2(A)(4); La. 40:967(C)(2). Whether the proof is sufficient to establish possession under La. R.S. 14:95.1 turns on the facts of each case. See ***State v. Johnson***, 2003-1228 (La. 4/14/04), 870 So.2d 995, 998.

The testimony and other evidence introduced at trial established that Courtney called 911 and reported to the operator that her boyfriend had a gun in his hand and that she could not tell if he had harmed himself with the gun. Shortly thereafter, the police arrived and Deputy Oster apprehended defendant as he came out of the backyard. In the yard adjacent to Courtney's backyard, deputies found Courtney's handgun. Deputy Oster testified at trial that defendant told him he threw the gun over the fence because he knew he was in trouble for having it in his possession. Thus, Deputy Oster's testimony corroborated Courtney's 911 call to the extent it established defendant was in possession of a firearm.

Defendant testified at trial that he never threatened to commit suicide and that Deputy Oster's testimony about what defendant told him was not accurate. Defendant testified he never told Deputy Oster that he threw a gun over the fence. He further testified that he never had a gun in his hand.

The jury heard all of the testimony and viewed the evidence presented to it at trial and found defendant guilty as charged. When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. ***State v. Captville***, 448 So.2d 676, 680 (La. 1984). Defendant admitted to Deputy Oster to possessing the gun, yet attempted to retract his own admission of guilt at trial by testifying that he never had the gun in his possession and that Deputy Oster lied, or at least was inaccurate, while testifying under oath.

It is clear from the finding of guilt that the jury concluded the testimony of Deputy Oster, which was corroborated by Courtney's 911 call, was more credible

than the testimony of defendant. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. ***State v. Higgins***, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). 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 factfinder'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. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. ***State v. Quinn***, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). Thus, in finding defendant guilty, the jury reasonably rejected defendant's theory of innocence. See ***Johnson***, 870 So.2d at 998-00.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that, viewing the evidence in the light most favorable to the State, 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 a convicted felon in possession of a firearm. See ***State v. Calloway***, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

SENTENCING ERRORS

Under La. C.Cr.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. See ***Price***, 952 So.2d at 123. After a careful review of the record, we have found sentencing errors.

For his possession of a firearm by a convicted felon conviction, defendant was sentenced to fourteen years at hard labor without benefit of probation, parole, or suspension of sentence. He was adjudicated a second-felony habitual offender and resentenced to fourteen years at hard labor without benefit of probation, parole, or suspension of sentence. Whoever is found guilty of violating the possession of a firearm by a convicted felon provision shall be imprisoned at hard labor for not less than ten nor more than fifteen years without benefits and be fined not less than one thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1(B) (prior to its amendment by 2010 La. Acts No. 815, § 1). The trial court failed to impose the mandatory fine at either the sentencing or resentencing.[3] Accordingly, defendant's sentence, which did not include the mandatory fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See ***Price***, 952 So.2d at 124-25.

[3] The minutes also reflect that no fine was imposed.

We also note that at sentencing, immediately following the imposition of defendant's sentence, defense counsel informed the trial court that, at that time, she was filing a motion for new trial and a motion for "judgment of acquittal." The trial court denied both of the motions.

Under La. C.Cr.P. art. 821(A), a motion for postverdict judgment of acquittal must be made and disposed of before sentence. Under La. C.Cr.P. art. 853, a motion for a new trial must be filed and disposed of before sentence. Also, sentence shall not be imposed until at least twenty-four hours after the motion for a new trial (or postverdict judgment of acquittal) is overruled. See La. C.Cr.P. art. 873. Defendant did not object to the trial court's rulings on the two motions and did not enter a contemporaneous objection to the trial court's failure to rule on the motions prior to sentencing. Thus, defendant's failure to enter a contemporaneous objection precludes him from complaining of this error on appeal. See La. C.Cr.P. art. 841(A). We note, as well, that remand or resentencing is not required because defendant has neither raised the issue of the twenty-four-hour delay nor challenged his sentence on appeal. See ***State v. Augustine***, 555 So.2d 1331, 1333-34 (La. 1990). Finally, we have found no indication that defendant was prejudiced as a result of the trial court's ruling on the motions immediately following sentencing. Thus, any error that may have occurred is not reversible. See ***Price***, 952 So.2d at 123-25. See also ***State v. Lindsey***, 583 So.2d 1200, 1205-06 (La. App. 1st Cir. 1991), writ denied, 590 So.2d 588 (La. 1992).

DECREE

Accordingly, for these reasons, we affirm the conviction, habitual offender adjudication, and sentence imposed against defendant-appellant, Jerry Bickham, Jr.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.