NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0026

STATE OF LOUISIANA

VERSUS

KIM ROBERT HOGAN

Judgment Rendered: June 8, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 387357

The Honorable Elaine W. Dimiceli, Judge Presiding

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

Defendant, Kim Hogan, was charged by bill of information with possession of cocaine with intent to distribute, (Count 1), and four counts of distribution of cocaine, violations of La. R.S. 40:967(A)(1), (Counts 2-5).[1] Defendant pled not guilty and was tried before a jury. A jury found defendant guilty as charged on all counts. The trial court sentenced defendant on each count to fifteen years at hard labor, with two years of the sentence to be served without benefit of parole. Each sentence was ordered to be served concurrently.

The State then instituted habitual-offender proceedings. Defendant was adjudicated as a second-felony habitual offender. The trial court vacated defendant's previous sentence on Count 2 (distribution of cocaine) and sentenced defendant to thirty years at hard labor, with two years of the sentence to be served without benefit of probation, parole, or suspension of sentence.

We affirm defendant's convictions, habitual-offender adjudication, and sentences.

FACTS

On May 2, 2004, Detective Darren Blackmon of the St. Tammany Parish Sheriff's Office came into contact with Mark Cardella, who said that he could buy narcotics from defendant. In an unrelated incident, Cardella was arrested for possession of crack cocaine. Cardella had previously been documented as a cooperating individual or confidential informant (CI) by the police. Because of his status as a CI, the charge against Cardella was

[1] Lillian Gillian, who lived with defendant, was charged as a co-defendant in Count 1. Gillian was not tried in this proceeding and the disposition of her charge is not an issue in this appeal.

reduced to possession of drug paraphernalia and he was sentenced to misdemeanor probation.

Cardella met the police and was searched for drugs and weapons. Detective Blackmon then gave Cardella marked currency from the sheriff's office in order to execute a controlled purchase of narcotics. The police also gave Cardella a transmitter (a "Kel") so that the police could monitor what was going on during the transaction, and a digital-audio recorder (a "Bilby") so a recording could be made of the transaction.

Cardella proceeded to defendant's residence. When Cardella made contact with defendant, defendant told him to come back to his residence in ten minutes. Cardella gave defendant $140 of the $160 in currency that the police had given him for the transaction. Cardella left, went down the street, and reported this to the police. The police searched Cardella and his vehicle again to check for the presence of illegal drugs. After a few minutes, Cardella returned to defendant's residence and asked for an "eight-ball" (a street term for 1/8 of an ounce of cocaine). Defendant asked Cardella if he wanted "soft" (the pure, powder form of cocaine) or "hard" (crack cocaine). Cardella obtained $140 worth of soft cocaine (2.53 grams) and returned to where the police were waiting. Once Cardella met with the police, he and his vehicle were searched again, and he returned the cocaine and monitoring equipment. According to Detective Blackmon, the cocaine was fieldtested and gave a positive indication for cocaine.

On May 5, 2004, Cardella made arrangements with the police to make another purchase from defendant. The police gave Cardella $160, but Cardella thought it was only $80. Using the same procedure as the previous transaction, Cardella was searched and given monitoring devices prior to going to defendant's residence. On this date, Cardella gave defendant the

money and returned with .83 grams of crack cocaine. When the police noticed the amount, they questioned the purchase. At that point, Cardella told them he thought he was only given $80. The confusion was caused by Cardella's failure to count the money given to him by the police, which was in denominations of one $100 bill, and three $20 bills. Cardella thought he was only given four $20 bills.

Cardella called defendant and explained he had a misunderstanding and asked defendant to check the amount of money he had been given. Defendant checked the money and told Cardella to come back. Upon his return, defendant asked Cardella if he wanted the money or the equivalent in drugs, and Cardella obtained the equivalent in crack cocaine, which was .8 grams.

On July 29, 2004, the police arranged another controlled buy between Cardella and defendant. On this date, Cardella called defendant from a convenience store and defendant told him to come by in about fifteen minutes because he was working on his boat. On this date, Cardella was given $100 and obtained .86 grams of crack cocaine from defendant.

Cardella testified that he approached the police with the idea to investigate defendant. Cardella admitted to having a destructive drug habit and reasoned that if he eliminated his contacts, he would not seek to use drugs anymore. Cardella was paid a total of $620 by the police for his role in the controlled transactions.

Based on the information obtained by Cardella's participation in these controlled transactions, the police obtained a search warrant, signed at 1:00 a.m. on July 30, 2004. Soon thereafter, narcotics officers executed the warrant at defendant's residence.

At the time the search warrant was executed, defendant and his girlfriend, Gillian, were in the residence, along with Gillian's minor children. Upon searching defendant's residence, the police seized numerous plastic bags and plastic "corner bags," which were the corners of plastic bags commonly used in narcotics trafficking, a seal-a-meal machine, a digital scale, and a two-inch by two-inch tray with some type of residue. A canine unit, handled by Detective James McIntosh, was used to search the residence. The canine unit alerted to a pair of underwear on the bed in which defendant had been located, and a shoe in the closet of the master bedroom. The canine unit also alerted to a stack of cash in the bathroom. When counted, this cash amounted to $7,170, and included the $100 bill the police had given Cardella to use in a controlled transaction a few hours earlier.[2]

Once the search of the interior of the residence was completed, the canine unit was used in the yard. During this search, the canine unit alerted to the rear section of defendant's boat. On closer examination, police officers discovered a crack cocaine "cookie," unwrapped, sitting on the jack plate of the boat The police also seized three Radio Shack 2.4 gigahertz wireless cameras mounted outside the defendant's residence. According to Detective Blackmon, these types of cameras are commonly found during narcotics seizures.

The police found no cigarette lighters, butane tanks, pipes, straight shooters, or other items associated with the use of crack cocaine during this search. Moreover, the police found several plastic bags in the abandoned yard across the street from defendant's residence. When these bags were

[2] The police were subsequently able to verify from the Louisiana Department of Labor that from the third quarter of 2003 until his arrest, defendant had only earned $4,200.

brought to the canine unit, there was a positive alert to the presence of narcotics. Once the search was completed, defendant was arrested and transported to the police department where he was processed and advised of his rights. Defendant waived his rights and spoke with the police. Defendant admitted the digital scale was his, but claimed he did not sell cocaine, he only "hustled."

Deputy Tasha Karnes, a forensic chemist for the St. Tammany Parish Sheriff's Office, who was accepted as an expert in narcotics analysis, had analyzed the evidence in this case. According to Deputy Karnes, all of the baggies, the digital scale, and the tray tested positive for the presence of cocaine. Deputy Karnes also testified that the total weight of the cocaine involved in the controlled transactions and the cookie seized from the motor of defendant's boat was 8.34 grams.

Captain Barney Tyrney, of the St. Tammany Parish Sheriff's Office, testified that he spoke with defendant sometime in August 2004, following defendant's arrest. Defendant had gone to the Covington enforcement complex to speak with the police regarding the four-wheelers seized from his residence during the execution of the search warrant. During this conversation, defendant expressed a willingness to work as an informant with the police in their efforts to identify and apprehend high-level narcotics distributors. However, after a few months, none of defendant's efforts materialized into any useful leads.

Defendant testified on his own behalf. Defendant admitted having a 1992 federal conviction for conspiracy to distribute drugs for which he served ten years in federal prison. Defendant claimed to have met Cardella through a relative. Defendant testified that he never intended to start dealing drugs again following his release from prison. Defendant acknowledged his

own drug use for over twenty years that he resumed once he was released from prison.

Defendant described his relationship with Cardella as a "drug relationship." Defendant denied he sold drugs to anyone other than Cardella and that if Cardella had not come to him and asked him for drugs, he would not have given drugs to him. Defendant denied placing the cookie of crack cocaine on the jack plate of his boat and explained that he installed surveillance cameras around his residence because of threats stemming from his relationship with a girlfriend. During his testimony, defendant acknowledged that Cardella gave him money for the drugs, but denied he was soliciting customers. Defendant testified that he often used powder cocaine, so when Cardella asked him for crack cocaine, that was not out of his personal stash.

ENTRAPMENT

In defendant's first counseled assignment of error, he contends that the evidence is insufficient to overcome the allegation of entrapment and establish guilt beyond a reasonable doubt. Defendant argues that he never would have sold or given drugs to Cardella, had Cardella not prevailed upon him as a friend.

Defendant does not contend that the evidence was insufficient to establish one count of possession with intent to distribute cocaine (Count 1) and four counts of distribution of cocaine (Counts 2-5). Rather, defendant asserts the affirmative defense of entrapment.

An entrapment is perpetrated when a law-enforcement official or a person acting in cooperation with such an official, for the purpose of obtaining evidence of the commission of an offense, solicits, engages, or otherwise induces another person to engage in conduct constituting the

offense when the person is not otherwise disposed to do so. *State v. Chatman*, 599 So.2d 335, 347 (La. App. 1st Cir. 1992). Entrapment is a factual defense on the merits. *Id.* The defendant bears the burden of production of evidence in support of his defense of entrapment, and having done so, he has the burden of persuading the trier of fact of the existence of facts constituting the defense by a preponderance of the evidence. *Id.* The focal point of inquiry is on the predisposition of the defendant to commit the crime at issue, as well as the conduct of the police. *Id.* An entrapment defense will not be recognized when the law-enforcement official merely furnishes the accused with an opportunity to commit a crime to which he is predisposed. *Id.*

The evidence in the record reveals the following:

Approximately one year before defendant was arrested on these charges, the police had received a tip regarding narcotics hidden at defendant's residence. Defendant lived in a known drug-trafficking and high-crime area and Detective McIntosh was aware that defendant had recently spent ten years in a federal penitentiary for drug trafficking. Following the tip, Detective McIntosh executed a "knock and talk" whereby an officer would go to a suspect's home and speak with the resident and possibly seek consent to search the residence. During this "knock and talk," defendant gave Detective McIntosh permission to search his living room and kitchen, but did not allow the detective to search any bedrooms or bathrooms of the residence. Defendant also refused to allow the canine unit's entry into his residence. The tip and his interaction with defendant raised Detective McIntosh's suspicions, but there was not enough information at the time to establish probable cause to obtain a search warrant.

Because of the suspicions that were raised, the police conducted surveillance of defendant through routine criminal patrols in his neighborhood. Detective Blackmon confirmed that the police were suspicious that defendant was involved in drug trafficking, but denied that the police were actively looking for someone to infiltrate defendant's activities. According to Detective Blackmon, Cardella approached the police with information about defendant because he was a drug user and wanted to earn extra money. Cardella admitted to being a cocaine addict. Although he worked as a lawn-maintenance man in 2004, Cardella testified he spent all his money on cocaine.[3] In lieu of seeking treatment for his addiction, Cardella reasoned that if he eliminated his drug contacts, he would stop seeking drugs.

Motivated by the desire to earn more money and remove his drug contacts, Cardella approached the police with the idea of investigating defendant. Cardella had become acquainted with defendant after defendant had offered to provide him with cocaine during their encounter at a convenience store.

During the controlled transactions in which Cardella participated, the contact was always initiated by Cardella. However, the recordings of the transactions do not reflect Cardella had to persuade or convince defendant to sell him cocaine. These recordings reflect that defendant was well versed in trafficking narcotics, and even in light of a competing buyer, defendant never attempted to dissuade Cardella from dealing with him. Rather, during each transaction, defendant would ask Cardella what he needed, then direct him to return to his residence in a short time.

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[3] Because of his cocaine addiction, Cardella was unemployed, lived in a tent, and used a bicycle for transportation.

Defendant asserted that in 2003, after he returned to Louisiana upon his release from prison, five to six police units arrived at his residence and approximately ten police officers approached him. Defendant said he granted unrestricted access for the officers to search his home and they found nothing. Defendant claimed the police wanted him to work as an informant, but he knew nothing because he was no longer in drug trafficking.

Defendant also admitted he used cocaine, but denied selling drugs. Defendant denied he sold drugs to anyone other than Cardella and claimed that had Cardella not approached him and asked for the drugs, he would never have sought him out to sell or give him drugs.

The jury, as trier of fact, is accorded great discretion in deciding the truthfulness of testimony and the weight and credibility of each portion of the evidence presented to it. *State v. Williams*, 2001-2009, p. 6 (La. App. 1st Cir. 6/21/02), 822 So.2d 780, 784-85, writ denied, 2002-2024 (La. 9/19/03), 853 So.2d 621. In the present case, the jury had the benefit of audio recordings of all the controlled transactions. At all times, defendant appeared to be a willing participant in the transactions. Each time Cardella contacted defendant to obtain cocaine, defendant always accommodated him. The jury clearly did not find defendant's claim, that he never would have engaged in these transactions with Cardella had Cardella not initiated them, to be credible. Based on the record, we cannot say the defendant proved by a preponderance of the evidence that he was coerced into doing something that he was not predisposed to do voluntarily, freely, and of his own accord.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant failed to prove the

affirmative defense of entrapment by a preponderance of the evidence. See *Chatman*, 599 So.2d at 348.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second counseled assignment of error, defendant argues that the sentence is excessive considering the circumstances of the case. Specifically, defendant states the issue as "whether, in this particular instance, the imposition of a term of imprisonment for thirty years, tantamount to a life sentence, should yield to the constitutional prohibition of excessive punishment found in Article 1, Section 20 of the Louisiana Constitution." We note defendant raises no argument addressing whether his sentences for Counts 1, 3, 4, and 5 are excessive, thus there is no issue presented regarding those sentences.

The record reflects that the trial court sentenced defendant as a second-felony habitual offender on Count 2 (distribution of cocaine) to a term of thirty years imprisonment at hard labor with the first two years to be served without benefit of probation, parole, or suspension of sentence.

On Count 2 of the bill of information, defendant was convicted of distribution of cocaine. The penalty for distribution of cocaine is imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence to be served without benefit of parole, probation, or suspension of sentence; and a possible fine of not more than fifty thousand dollars. La. R.S. 40:967(B)(4)(b).

As a second-felony habitual offender, the enhanced penalty for defendant's conviction of distribution of cocaine (Count 2), would be imprisonment for a term of not less than fifteen years nor more than sixty

years. See La. R.S. 15:529.1(A)(1)(a). Thus defendant's thirty-year sentence on Count 2 is well within statutory limits.

Defendant now complains that the thirty-year sentence he received is excessive. We disagree.

Although a sentence falls within statutory limits, it may be excessive. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). Article 1, 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. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion to sentence within the statutory limits. *State v. Spradley*, 97-2801, p. 17 (La. App. 1st Cir. 11/6/98), 722 So.2d 63, 72-73, writ denied, 99-0125 (La. 6/25/99), 745 So.2d 625.

The record reflects that soon after being released from serving a ten-year federal prison term for drug trafficking, defendant resumed his involvement with cocaine, by both using and selling it. Clearly, defendant's prior incarceration failed to serve as a deterrent from any continued involvement with illegal drugs. Under these circumstances and considering defendant was eligible to be sentenced to as many as sixty years in prison, we cannot say the sentence of thirty years is excessive. Therefore, trial court did not abuse its discretion in sentencing defendant to this term.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR

Defendant filed a pro-se brief arguing that his multiple-offender adjudication was obtained in violation of constitutional and statutory law. Defendant claims that the trial court failed to advise him of the specific allegations contained in the multiple bill of information when accepting his plea of guilty.[4]

Following defendant's conviction of the underlying offenses, the State instituted habitual-offender proceedings against defendant, seeking to have him adjudicated as a second-felony habitual offender. According to the State's bill of information, defendant was previously convicted under docket number 92-294 in United States District Court, Eastern District of Louisiana of four counts of distribution of cocaine base, a violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to distribute cocaine base, a violation of 21 U.S.C. 846.

After sentencing defendant on the offenses raised in this appeal, the trial court informed the defendant that the State had instituted habitual-offender proceedings. Defense counsel acknowledged to the trial court that he had been furnished with a copy of the multiple bill. Defense counsel indicated to the trial court that he had gone over the bill with his client, then he **specifically waived the reading of the bill**.

Considering defense counsel specifically waived the reading of the habitual-offender bill, defendant cannot now complain that the trial court's failure to do so is reversible error. Moreover, we note that defendant was well aware of his prior federal drug convictions since he admitted to them

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[4] Although defendant initially denied the allegation in the habitual-offender bill of information, at a later hearing, defense counsel stipulated to the allegation. Based on this stipulation, the trial court adjudicated defendant a second-felony habitual offender.

during his trial testimony and testified extensively regarding the various locations he was housed while serving his federal prison term.

This assignment of error is without merit.

CONVICTIONS, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.