NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1224

STATE OF LOUISIANA

VERSUS

MANUAL SAM WEBER

DATE OF JUDGMENT: DEC 2 3 2009

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 418,234-2, DIV. G, PARISH OF ST. TAMMANY

HONORABLE WILLIAM J. CRAIN, JUDGE

* * * * * *

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Appellant
In proper person

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BEFORE: PARRO, KUHN, AND MCDONALD, JJ.

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

KUHN, J.

Defendant, Manuel S. Weber, was charged by bill of information with, and pled not guilty to, theft of property with an aggregate value of $500 or more ("theft over $500"), a violation of La. R.S. 14:67.[1] After a trial on the merits, a jury found him guilty as charged, and the trial court sentenced him to five years at hard labor. Defendant was subsequently adjudicated a third-felony habitual offender, after which the trial court vacated the five-year sentence and re-sentenced defendant to 20 years at hard labor to be served without benefit of probation or suspension of sentence under the Multiple Offender Bill, La. R.S. 15:529.1.[2] Defendant appeals, designating two counseled assignments of error and two *pro se* assignments of error for review. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On August 11, 2006, Officer Rod West with the Slidell Police Department was off-duty working a supplemental job as a security guard for Dillard's in the Northshore Mall. One of West's primary duties at Dillard's is theft deterrence. While fulfilling his duties, West noticed defendant in the men's denim department with a woman, later identified as Shantrell Boutrin, and noted what he described as unusual behavior from the two. Suspicious of their activities, West watched defendant and Boutrin, making eye contact with each of them. Defendant had been carrying a large stack of jeans but, after making eye contact with West, put

[1] Defendant separately appeals from his conviction under bill of information #436502. See ***State v. Weber***, 2009-1227 (La. App. 1st Cir. 12/16/09).

[2] The predicate offenses supporting defendant's adjudication as a third-felony habitual offender include a 1989 conviction for involuntary manslaughter and 1991 convictions for purse snatching and credit card/financial transaction fraud, all of which occurred in Georgia.

them back on the rack, made a loop around the store, and walked out to the parking lot with Boutrin in tow.

West continued to watch defendant and Boutrin as they walked toward a pickup truck and met up with another woman. All three then headed toward J.C. Penney, where they split up and entered through different doors. A few minutes later, West saw defendant walk out of J.C. Penney carrying a box on his shoulder. He placed the box in the bed of the truck and then went back into J.C. Penney. Five to ten minutes later, defendant again walked out of J.C. Penney with a box that appeared to be identical to the first box. He placed the second box in the truck and then changed from a brown t-shirt into a white one and went, yet again, into J.C. Penney. He then left the store without any merchandise that West could see, got into his truck, and drove away.

West contacted dispatch while he watched defendant coming and going from J.C. Penney and notified them of a possible theft in progress. Officer Bradford Hoopes responded to the call and stopped defendant as he was driving away from the mall. Hoopes explained to defendant that he had been detained on suspicion of theft and advised him of his ***Miranda***[3] rights. After insuring that defendant understood his rights, Hoopes asked where he got the merchandise in the bed of the truck. Defendant first answered that he did not know where the merchandise came from. Hoopes riposted that an officer saw him carrying the merchandise from J.C. Penney to his truck, at which point defendant admitted to stealing the items, and Hoopes placed him under arrest.

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[3] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

An inventory of the merchandise revealed a gift card for $130.43 that defendant explained he got by returning stolen merchandise, four comforters valued between $250 and $325 each, and three George Foreman-type grills valued between $119 and $140. The total value of the stolen merchandise was $1,499.97

SUFFICIENCY OF THE EVIDENCE

In his first counseled and *pro se* assignments of error, defendant challenges the sufficiency of the evidence to support his conviction for theft over $500. See La. R.S. 14:67. He contends that the evidence is sufficient to establish theft of property valued over $300 only.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That ***Jackson*** standard of review, incorporated in Article 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. La. C.Cr.P. art. 821(B); ***State v. Ordodi***, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; ***State v. Mussall***, 523 So.2d 1305, 1308-09 (La. 1988). The ***Jackson*** standard 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. See ***State v. Patorno***, 2001-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. 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. ***State v. Richardson***, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). 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, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

La. R.S. 14:67 provides, in pertinent part:

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

Defendant does not contest the finding that he committed theft from J.C. Penney. Rather, he complains that the proof is sufficient to establish theft of merchandise with an aggregate value of $300 or more only.

The evidence revealed that West observed defendant carry two George Foreman-type grills out of J.C. Penney and place them in the back of his truck. Furthermore, defendant admitted that he stole the merchandise found in the back of his truck and that he acquired the gift card by returning stolen merchandise.[4] Additional evidence revealed that the gift card was validated for defendant on the same day that he was seen removing the grills from J.C. Penney and that the comforters found in defendant's possession were the same type as sold at J.C. Penney.

Defendant maintains in his counseled assignment of error that he did not identify the merchandise that he admitted stealing and that he never stated that he stole all of it. He urges a discrepancy between West's and Hoopes's testimony renders the evidence insufficient. He suggests that, because West testified that the merchandise was in the cab of the truck while Hoopes testified it was in the bed of the truck, a rational jury could not have rendered a guilty verdict.

This court's review of the record revealed that West testified that defendant placed the merchandise in the bed or in the back of his truck. He later testified that he went out to the vehicle at one point to get the license plate number and "saw these comforters that were in the bed of the pickup truck inside the cab of the pickup truck, all still appearing brand new in the original packages." He reiterated during cross-examination that he initially saw the comforters in the cab of the truck.

Defendant contends that this testimony is inconsistent and "makes it unreasonable for the jury to conclude that [he admitted] to stealing all of the

[4] Defendant also told Hoopes that stealing is his profession.

merchandise in his truck . . . ." We disagree. The record is unclear as to whether defendant moved the comforters to the bed of the truck before driving away. West did not testify that he saw defendant move the comforters, nor did he testify that he did not. He was not asked whether defendant moved the comforters before driving away and, therefore, his testimony is silent on this issue. Hoopes, however, testified that all of the merchandise was in the bed of the truck when he made contact with defendant. Thus, because all of the merchandise was in one area of the truck when defendant gave his statement, without qualification, that he stole the merchandise, the jury was free to believe that his admission encompassed it all.

In his *pro se* assignment of error, defendant urges that, by telling him that they believed he had stolen all the merchandise in the truck, the police led him to believe he could protect his sister from prosecution. Thus, he asserts, when considered in light of his conversation with the officers, his confession to stealing the merchandise is insufficient to support the conviction. He relies on the following colloquy to support this contention:

> Q: Officer Hoopes, when he said he did not know where these came from, did you tell him anything?
>
> A: Yes, I did.
>
> Q: What did you tell him?
>
> A: I told him that we had an officer observing him as he was taking the merchandise to his truck.
>
> Q: What did he tell you?
>
> A: He then changed his statement and said that he did, in fact, steal the items in the back of his truck.

A reviewing court is not called upon to decide whether the conviction is contrary to the weight of the evidence. ***State v. Smith***, 600 So.2d 1319, 1324 (La. 1992). 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, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the trier of fact's verdict does not render the evidence accepted by the trier of fact insufficient. See ***State v. Azema***, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460; ***State v. Quinn***, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). The jury obviously rejected defendant's hypothesis of innocence based on the contention that the evidence established only the lesser offense of theft over $300. We find such rejection reasonable.

After a thorough review of the record, we are convinced that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was guilty of theft over $500.

These assignments of error are without merit.

EXCESSIVE SENTENCE

In his second counseled and *pro se* assignments of error, defendant complains that his sentence is excessive. In his counseled assignment of error, he specifically complains that, because the evidence is sufficient to support a conviction for the lesser offense of theft over $300 only, the sentence imposed is outside the legal parameters for that crime. He alternatively asserts that the sentence is excessive even if the evidence is sufficient to sustain his conviction for

theft over $500 because there is insufficient justification for imposing the maximum sentence of 20 years in this case. In his *pro se* assignment of error, defendant maintains that he received a sentence reduction in one of his prior offenses that should have been taken into account by the court in sentencing him in this case.

A thorough review of the record indicates that counsel did not make a written or oral motion to reconsider defendant's sentence. The procedural requirements for objecting to a sentence are provided in La. C.Cr.P. art. 881.1, which provides, in pertinent part, as follows:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> * * *
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> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
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> * * *
>
> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, **shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.** (Emphasis added).

The failure to make or file a motion to reconsider sentence **shall preclude** the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Defendant, therefore, is procedurally barred from seeking review of this assignment of error. See ***State v. Duncan***, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam); see also ***State v.***

LeBouef, 97-0902, pp. 2-3 (La. App. 1st Cir. 2/20/98), 708 So.2d 808, 808-09, writ denied, 98-0767 (La. 7/2/98), 724 So.2d 206.

These assignments of error are without merit.

Additionally, in his second *pro se* assignment of error, defendant further contends that the evidence to support the finding that he is a habitual offender is insufficient because of discrepancies in the dates on the fingerprint cards and dates of conviction for the prior offenses. He urges that the evidence is "clearly faulty" because the fingerprint card that correlates to his August 10, 1989 involuntary manslaughter conviction in case number 88-CR-08113-3 is dated 7-2-91.[5] However, the certified documents show that the sentence imposed in 1988 was thereafter probated, which probation was revoked on May 7, 1991.

The parties stipulated that Deputy Michael Futch of the St. Tammany Parish Sheriff's Office is an expert in the field of fingerprint examination. Futch testified that he took defendant's fingerprints to compare to those provided in relation to the prior convictions. Proof that defendant was the same individual convicted in those case numbers was provided in the form of certified documents bearing a raised seal and an original signature from Offender/Inmate Information Services at the Georgia Department of Corrections. See La. R.S. 15:529.1F. Futch explained that defendant provided him with his name and date of birth, which he found to match that listed on the fingerprint cards. Additionally, the fingerprint cards contain defendant's signature, sex, race, height, weight, "OCA number," and social security number. Furthermore, the charges and sentences imposed listed on

[5] The fingerprint card that correlates to defendant's March 25, 1991, convictions in Georgia for robbery by sudden snatching and fraud in case number 90-B-01855-1 is dated March 25, 1991.

the fingerprint cards match those on the corresponding bills of indictment and final disposition forms.

Futch compared the prints he took from defendant to those taken in relation to defendant's prior offenses. He concluded that the fingerprints on the cards linked to the convictions in case numbers 88-CR-08113-3 and 90-B-01855-1 did belong to defendant. We find that the State adequately proved defendant had been convicted of the prior offenses. See ***State v. Westbrook***, 392 So.2d 1043, 1045 (La. 1980) (on rehearing) (in addition to defendant's name, his driver's license number, sex, race, and date of birth were sufficient evidence for the State to carry its burden of proving that this defendant was the same person previously convicted of another crime).

This argument is without merit.

DECREE

Having found no merit in defendant's assignments of error, the conviction, habitual offender adjudication, and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.