NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1644

STATE OF LOUISIANA

VERSUS

PATRICK J. DUCRE

Judgment Rendered: December 23, 2008

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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. 429638

Honorable Peter J. Garcia, Judge Presiding

* * * * * *

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

Defendant, Patrick J. Ducre, was charged by bill of information on count one with possession with intent to distribute marijuana (a Schedule I controlled dangerous substance in accordance with LSA-R.S. 40:964), a violation of LSA-R.S. 40:966A(1), and on count two with possession of marijuana, second offense, a violation of LSA-R.S. 40:966C.[1] Defendant entered a plea of not guilty. The trial court denied defendant's motion to suppress evidence. As to count one, defendant was found guilty by a jury of attempted possession with intent to distribute marijuana, and as to count two, defendant was found guilty as charged. The trial court imposed fifteen years imprisonment at hard labor on count one and five years imprisonment at hard labor on count two (to be served consecutively). The trial court later adjudicated defendant a third-felony habitual offender. The trial court vacated the previously imposed sentences and sentenced defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one and to life imprisonment at hard labor on count two. Defendant now appeals, raising the following assignments of error:

1. The trial court erred in denying defendant's motion to suppress evidence seized on April 17, 2007.

2. The trial court erred in denying defendant's motion to suppress evidence seized on April 19, 2007.

3. The trial court erred in failing to admonish the jury when the prosecutor made an improper comment during opening statement.

4. There was insufficient evidence to support the conviction of attempted possession of marijuana with intent to distribute.

5. The trial court erred in overruling defendant's objection to the excessive sentence.

For the following reasons, we affirm the convictions, habitual offender adjudications, and the sentence imposed on count one. However, we vacate the enhanced sentence imposed on count two and remand for resentencing.

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[1] A third charge, injuring or killing a police animal (a violation of LSA-R.S. 14:102.8), was severed from the instant trial and not at issue in this appeal.

STATEMENT OF FACTS

On or about April 17, 2007, Deputy Brian Stienert and Detective Ben Godwin of the St. Tammany Parish Sheriff's Office were on patrol in Slidell, Louisiana. Detective Godwin's vehicle was positioned on the shoulder of Ben Thomas Road, a high crime area, facing eastbound. Deputy Stienert was travelling eastbound on Ben Thomas Road. At approximately 11:30 p.m., they conducted a traffic stop of the vehicle being driven by defendant when defendant failed to stop at a stop sign at the intersection of Javery Street and Ben Thomas Road. Deputy Stienert's unit was directly behind defendant's vehicle at the time of the stop while Detective Godwin's unit was positioned behind Deputy Stienert's unit as back-up.

Defendant exited his vehicle and walked toward Deputy Stienert with his hands in the air, inquiring as to the reason for the stop. Defendant surrendered his Louisiana identification card. The two passengers, Stephanie Webb (defendant's girlfriend and the front seat passenger) and Roger Brock (the back seat passenger on the passenger side) and a pit bull remained in defendant's vehicle. Detective Godwin approached the driver's side of the vehicle and made contact with the two passengers through the open driver's side window. Detective Godwin squatted and leaned his head into the window to observe the passengers. After Detective Godwin did not observe any weapons in the passengers' hands, he used his flashlight to illuminate the floorboard. Detective Godwin observed a portion of a plastic storage bag containing six smaller plastic bags of suspected marijuana protruding from underneath the driver's seat. Detective Godwin pulled the bag from underneath the seat and instructed Deputy Stienert to restrain defendant on the ground.[2] As Detective Godwin seized the evidence, defendant ignored Deputy Stienert's command and took flight into a wooded area. Deputy Stienert gave chase, but defendant escaped. The two passengers in the vehicle were placed under arrest, and an affidavit for

[2] According to his testimony, Detective Godwin did not remove the marijuana from the vehicle or reveal its presence to Deputy Stienert at this particular moment.

a warrant for defendant's arrest was prepared. According to the passengers, the pit bull belonged to defendant. The pit bull was taken to an animal control shelter where the police presented defendant's picture identification card and gave instructions to be contacted if defendant came to retrieve the dog.

On or about April 19, 2007, the police were contacted when defendant attempted to retrieve the dog from the animal control shelter. Defendant again fled into a wooded area when an arrest was attempted. Assisted by police dogs, the police ultimately caught and arrested defendant. Before he was handcuffed, defendant kicked one of the police dogs several times and the dog bit defendant. Defendant was transported to the St. Tammany Parish Hospital for treatment. Deputy Shane Bennett of the St. Tammany Parish Sheriff's Office transported defendant from the hospital to jail. Before placing defendant in his car, Deputy Bennett conducted a pat-down search incident to defendant's arrest and seized a small portion of suspected marijuana from defendant's pants' pocket.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth assignment of error, defendant contends that the evidence in support of the conviction of attempted possession with intent to distribute marijuana was insufficient. We will address this issue before addressing the other assigned errors. Defendant notes that the state did not offer any evidence to contradict Brock's claim that he brought the marijuana into the vehicle and that defendant was unaware of its presence. Defendant further notes that the state had previously accepted Brock's guilty plea for the possession of the marijuana in question. Defendant notes that while the marijuana was found under the driver's seat, it was discovered after defendant had left the vehicle and was talking to Deputy Steinert. Defendant contends that the marijuana could have been placed under the driver's seat after he exited the vehicle. Defendant further contends that the state did not present any evidence that defendant placed the marijuana under the seat or knew of its presence. Defendant concludes that the hypothesis of innocence based on the proposition that Brock committed the crime and placed the marijuana under the seat without

defendant's knowledge is reasonable. Defendant does not raise as error the sufficiency of the evidence to support the second offense possession of marijuana conviction.

In reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Under this standard, the appellate court must determine 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. **State v. Brown**, 03-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18. The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821B, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 02-1492, p. 5 (La.App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a 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).

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La.App. 1 Cir. 1984). 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. **Richardson**, 459 So.2d at 38. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). In the absence of internal contradiction or irreconcilable conflict with

physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Thomas**, 05-2210, p. 8 (La.App. 1 Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 06-2403 (La. 4/27/07), 955 So.2d 683.

Louisiana Revised Statute 40:966A provides, in pertinent part, that it shall be unlawful for any person knowingly or intentionally 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 I. A defendant is guilty of distribution when he transfers possession or control of a controlled dangerous substance to his intended recipients. See LSA-R.S. 40:961(14); **State v. Cummings**, 95-1377, p. 4 (La. 2/28/96), 668 So.2d 1132, 1135. In cases where the intent to distribute a controlled dangerous substance is an issue, a court may look to various facts, including: (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 bags or scales, evidencing an intent to distribute. See **State v. House**, 325 So.2d 222, 225 (La. 1975). "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended." LSA-R.S. 14:27A. Specific criminal intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S. 14:10(1). Specific intent need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. **State v. Carter**, 96-0337, p. 3 (La.App. 1 Cir. 11/8/96), 684 So.2d 432, 434-35.

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. 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, p. 4 (La. 10/15/02), 833 So.2d 910, 913. Nonetheless, a person found in the area of the contraband can be considered in constructive possession if the illegal substance is subject to his dominion and control. **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983). A person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. **State v. Gordon**, 93-1922, p. 9 (La.App. 1 Cir. 11/10/94), 646 So.2d 995, 1002.

Before being requested to do so and before the officers were able to exit their units, defendant immediately exited his vehicle. According to Deputy Stienert, defendant was acting nervous. Deputy Stienert specifically stated that "he seemed to be real nervous the way he was moving around and never would look at me." Detective Godwin testified that the plastic storage bag was "hanging out from underneath the driver's seat" and that it was within arm's reach of the driver of the vehicle, who was defendant.

Lieutenant William Hart of the St. Tammany Parish Sheriff's Office, an expert in the field of narcotics packaging and identification, testified that the plastic storage bag contained six smaller bags of marijuana. The total weight of the marijuana was 35.29 grams (just over an ounce) and each of the smaller bags was nearly the same weight. It was Lieutenant Hart's opinion that the marijuana was packaged for distribution. He further noted that there were no items located during the inventory search of the vehicle that could be used for

smoking marijuana, such as rolling paper, pipes, bongs, or cigar wrappings. Lieutenant Hart concluded that the circumstances were typical of distribution.

Defense witness Roger Brock testified that he had been associated with defendant for two years. According to Brock, defendant had a landscape business, and he worked with defendant. Brock testified that the vehicle was stopped because the license plate light was out. Brock further testified that he had the bag of marijuana and brought it into defendant's vehicle without defendant's knowledge. According to Brock, he initially brought the marijuana into defendant's home. Defendant was on parole and asked Brock to get the marijuana out of his house. Brock told defendant he would put the marijuana outside but did not do so because he did not want to leave it. Brock further testified that he placed the marijuana where it was discovered. Brock stated that he was selling marijuana to sustain a crack cocaine habit and that he pled guilty to possession of the marijuana in question.

Based on a thorough review of the record, we are convinced that a rational trier of fact could have concluded beyond a reasonable doubt that the evidence was sufficient to exclude every reasonable hypothesis of innocence. The jury reasonably rejected Brock's testimony that defendant was unaware of the presence of the drugs. The marijuana was located within defendant's arm's reach as the driver of the vehicle. Defendant immediately exited the vehicle and created distance between him and the officers and the vehicle and acted nervous. Defendant fled from the scene when instructed to get on the ground, although Detective Godwin had not pulled the bag out or verbalized his discovery. The marijuana was packaged in a manner consistent with distribution, and the vehicle did not contain any paraphernalia that could be used in the consumption of the drugs. We find sufficient evidence to support the conviction of attempted possession with intent to distribute marijuana. This assignment of error lacks merit.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In the first assignment of error, defendant argues that the trial court erred in denying the motion to suppress the evidence seized on or about April 17, 2007. Defendant contends that in seizing the evidence, Detective Godwin intruded a protected area. Defendant further contends that the evidence was not in plain view since Detective Godwin used a flashlight to search the vehicle. Defendant argues that there was no need for Detective Godwin to look in the vehicle for weapons as defendant had exited the vehicle in a non-confrontational manner and Detective Godwin had already determined that the passengers were not armed. Defendant notes that Detective Godwin could have requested that the unarmed passengers step out of the vehicle. Defendant further asserts that the incriminating character of the evidence was not apparent without the enhanced light and that Detective Godwin did not have a lawful right of access to the car or its contents. Defendant argues that the safety concern was a pretext to execute a warrantless search of the vehicle for drugs. Defendant concludes that the warrantless search did not meet the requisites of the plain view doctrine.

In the second assignment of error, defendant argues that the trial court erred in denying the motion to suppress the evidence seized on or about April 19, 2007. Defendant contends that the underlying fact justifying the probable cause to arrest was the marijuana found in his vehicle and seized as a result of an unconstitutional search. Defendant concludes that the evidence was derived or tainted by an illegal arrest and is inadmissible as fruit of the poisonous tree.

When the constitutionality of a warrantless search or seizure is placed at issue by a motion to suppress the evidence, the state bears the burden of proving the admissibility of any evidence seized without a warrant. LSA-C.Cr.P. art. 703D. The exclusionary rule bars not only evidence seized as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." **State v. Davis**, 94-

2332, p. 10 (La.App. 1 Cir. 12/15/95), 666 So.2d 400, 406-07, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925.

Both the federal and state constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; LSA-Const. art. I, § 5. A search conducted without a warrant is per se unreasonable unless justified by one of the specifically established and well-delineated exceptions. **Schneckloth v. Bustamonte**, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); **Coolidge v. New Hampshire**, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); **State v. Hubbard**, 506 So.2d 839, 841 (La.App. 1 Cir. 1987). Law enforcement officers are authorized to conduct investigatory stops, which allow officers to stop and interrogate a person who is reasonably suspected of criminal activity. LSA-C.Cr.P. art. 215.1. Reasonable cause for an investigatory detention is something less than probable cause and must be determined under the facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. The right to make an investigatory stop and question the particular individual detained must be based upon reasonable cause to believe that he has been, is, or is about to be engaged in criminal conduct. **State v. Belton**, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). Although they may serve, and may often appear intended to serve, as a prelude to the investigation of much more serious offenses, even relatively minor traffic violations provide an objective basis for lawfully detaining the vehicle and its occupants. **State v. Waters**, 00-0356, p. 4 (La. 3/12/01), 780 So.2d 1053, 1056 (per curiam).

The plain view doctrine is an exception to the rule that a search and seizure conducted without a warrant is presumed unreasonable. See **Coolidge**, 403 U.S. at 465, 91 S.Ct. at 2037. Seizure of evidence under the plain view doctrine is permissible when: (1) there is prior justification for an intrusion into the protected area; and (2) it is immediately apparent without close inspection

that the items are evidence or contraband. **Horton v. California**, 496 U.S. 128, 136-38 and 140-42, 110 S.Ct. 2301, 2308 and 2310, 110 L.Ed.2d 112 (1990); **State v. Gordon**, 93-1922, p. 7 n.7 (La.App. 1 Cir. 11/10/94), 646 So.2d 995, 1001 n.7. "Immediately apparent" requires no more than probable cause to associate the property with criminal activity. **State v. Howard**, 01-1487, p. 8 (La.App. 1 Cir. 3/28/02), 814 So.2d 47, 53, writs denied, 02-1485 (La. 5/16/03), 843 So.2d 1120, and 06-2125 (La. 6/15/07), 958 So.2d 1180.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. **State v. Long**, 03-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). In determining whether the ruling on a motion to suppress was correct, the court is not limited to the evidence adduced at the hearing on the motion, but may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

The instant case is highly distinguishable from **State v. Schmidt**, 359 So.2d 133 (La. 1978), and **State v. Dorociak**, 493 So.2d 173 (La.App. 3 Cir. 1986), cited in defendant's appellate brief. In **Schmidt**, the supreme court found that the police officer did not have a legitimate reason to flash his light into the automobile. The facts indicated that the compact automobile had been stopped for traffic violations. The car was located on the grounds of a state hospital and was surrounded by a number of police officers. The driver and two passengers had been removed from the vehicle. Clearly, the subsequent flashlight check into the vehicle was not done to determine if some person who might have harmed the police officer was concealed in the automobile. Rather, the supreme court found that the flashlight check was done either as a prelude to or as part of the inventory search of the car. **Schmidt**, 359 So.2d at 135-36.

In **Dorociak**, an officer observed that a car had hit a culvert and was partially off the roadway. He noticed a white male sitting next to the vehicle. The officer stopped and began an investigation of the accident, obtaining a

driver's license and other information from the defendant. The officer determined that the car was inoperable and would have to be towed. He then began an inventory search of the car by shining his flashlight through the windows. The court found that even though the police officer's observation of drugs on the floorboard of the vehicle was inadvertent, his approach to the vehicle and subsequent flashlight check evidenced intention on his part to survey the contents of the vehicle, when there existed no prior valid justification for him to do so. Therein, it could not be said that the use of a flashlight to aid observation did not cause an intrusion upon a protected area. Therefore, the observation was not valid under the plain view doctrine. **Dorociak**, 493 So.2d at 174-75 and 177-78.

Herein, the record reflects that the vehicle defendant was driving was stopped for a traffic violation and, therefore, the deputies were lawfully in a place from which the marijuana could be viewed. It was dark at the time of the traffic stop, and it occurred in a high-crime area. There were three civilians and only two officers. Defendant exited his vehicle first, immediately creating distance between him and the vehicle. The two passengers and a pit bull remained in the vehicle. The officers' hesitancy in ordering the subjects out of the vehicle was reasonable as the officers were outnumbered. Detective Godwin testified (during the hearing on the motion to suppress and at trial) that the bag of marijuana was in plain view when he poked his head in the window and scanned his flashlight along the floorboard of the vehicle to insure that there were no weapons within arms reach of the passengers. In **State v. Ford**, 407 So.2d 688, 690 (La. 1981), and in **State v. McGary**, 397 So.2d 1305, 1307 (La. 1981), an officer's shining a flashlight into a car was perceived as an intrusion but justified for the protection of the officers. Similarly, in this case, the fact that Detective Godwin used a flashlight to illuminate the inside of the vehicle is inconsequential because it was a safety precaution. See **State v. Curtis**, 98-1283, p. 7 (La.App. 5 Cir. 6/1/99), 738 So.2d 657, 661, writs denied, 99-1950 (La. 12/17/99), 751 So.2d 873, and 99-2679 (La. 3/31/00), 758 So.2d 810.

Detective Godwin, who worked in law enforcement since 1999, testified that he immediately recognized the bagged substance as marijuana.

A law enforcement officer may lawfully arrest a person without a warrant when he has probable cause to believe the person to be arrested has committed an offense. LSA-C.Cr.P. art. 213. Probable cause to arrest exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. **State v. Lumpkin**, 01-1721, pp. 3-4 (La.App. 1 Cir. 3/28/02), 813 So.2d 640, 644, writ denied, 02-1124 (La. 9/26/03), 854 So.2d 342.

After Detective Godwin observed the marijuana in plain view, he had probable cause to arrest defendant for possession of marijuana or possession of marijuana with intent to distribute. The search of defendant that occurred two days later when he was finally apprehended was a permissible search incidental to a lawful arrest. Thus, the trial court properly denied the motion to suppress the evidence. Assignments of error numbers one and two lack merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, defendant argues that the state's improper attack of the credibility of defense witness Roger Brock during opening remarks, before defendant presented his testimony, undermined defendant's case. Defendant contends that the jury apparently did not believe Brock, even though he previously pled guilty to possession of the marijuana seized from defendant's vehicle, because the state prejudiced his testimony before it was given. Defendant concludes that the error was not harmless.[3]

[3] As noted by defendant, due to the difficulty in locating Brock, he had not been served with a subpoena for trial. The trial court denied defendant's motion to continue the trial until Brock's presence could be obtained. The trial court did not rule on defendant's motion to introduce an affidavit executed by Brock wherein he supposedly stated that the marijuana located in the vehicle that was being driven by defendant on the date of the traffic stop belonged to him and that defendant did not know of its presence. The issue became moot when Brock appeared and testified.

Defendant refers to the following portion of the state's opening argument, in pertinent part:

> The defendant's fall guy, Roger Brock, has executed now an affidavit which you will be allowed to see ... which you may find to be ludicrous on its face.
>
> In this affidavit, he describes a mysterious business venture that he and Ducre were going to go into. Brock describes this scenario where he just happens to have six bags of weed in the house, in the defendant's house, and the defendant is so shocked and abhorred and disgusted and says, Mr. Brock, you cannot have that type of thing in my home.
>
> ... And so you may find that that affidavit and Brock's testimony, should he choose to testify, is ludicrous in and of itself. He's already pled guilty of (sic) charge. He's got nothing to fear by taking the stand and taking the fall for his buddy.
>
> One of the other things that will come to your attention is that the defendant has a previous conviction from July 5th of 2000 for possession of marijuana, and for that reason, the next set of information will become even more important. That is, that this affidavit that you'll be asked to look at and listen to the testimony of Brock to decide whether or not it's believable testimony or not, that Ducre was so fearful or disgusted by there being marijuana in his house.

After the state's opening argument, a bench conference was held wherein the defense counsel lodged an objection to the above portion of the state's argument. The defense counsel stated that the affidavit could only be used to impeach Brock if he testified, and added, "I think the [s]tate's limited in opening statements only to information of evidence that they can present." The defense counsel further stated that the state was attacking the credibility of a witness before his testimony with an affidavit that he may or may not be able to get into evidence.

The defense counsel asked the trial court to strike the remarks regarding the affidavit and the credibility of Brock and to admonish the jury to disregard them. The trial court overruled the objection, did not strike the remarks or admonish the jury, but noted that the jury would be instructed in that regard if the statements or arguments presented by the state were not supported by the evidence presented during the trial. During the trial, the state questioned Brock during cross-examination regarding the affidavit as follows:

> Q. And then somebody explained to you that you can fill out an affidavit and you can take the fall because the state can't do anything further to you, right?
>
> A. I wouldn't perjure myself. It was mine. I was selling it to sustain a crack cocaine habit. I was selling it and trading it for crack.

It is improper under the language of LSA-C.E. art. 607B to attack a witness's credibility before the witness is sworn. Upon request of the defendant or the state, the court may in its discretion grant a mistrial or an admonishment, premised upon argument by the opposing party which is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant or the state in the mind of the jury. LSA-C.Cr.P. art. 771.

Opening and closing arguments in criminal cases shall be limited to the evidence admitted, the lack of evidence, conclusions of fact that may be drawn therefrom, and the law applicable to the case. LSA-C.Cr.P. art. 774. The argument shall not appeal to prejudice. However, prosecutors have wide latitude in choosing argument tactics. See **State v. Casey**, 99-0023, p. 17 (La. 1/26/00), 775 So.2d 1022, 1036, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). The court will not reverse a conviction if not "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. See **State v. Legrand**, 02-1462, p. 16 (La. 12/3/03), 864 So.2d 89, 101, cert. denied, 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005). Much credit should be accorded to the good sense and fair-mindedness of jurors who will see the evidence, hear the argument, and be instructed repeatedly by the trial judge that arguments of counsel are not evidence. See **State v. Dilosa**, 01-0024, p. 22 (La.App. 1 Cir. 5/9/03), 849 So.2d 657, 674, writ denied, 03-1601 (La. 12/12/03), 860 So.2d 1153.

When giving opening remarks and charging the jury, the trial court informed the jurors that the opening and closing arguments of counsel are not evidence. During closing remarks, the trial court reminded the jurors of the state's burden of proof and reiterated the instruction that statements and

arguments by the attorneys are not evidence. Even assuming that the trial court erred in overruling defendant's objection or failing to admonish the jury to disregard the remarks in question, considering the above instructions to the jurors and the evidence presented in this case, we are not thoroughly convinced that the argument influenced the jury or contributed to the verdicts. For the above reasons, this assignment of error is meritless.

ASSIGNMENT OF ERROR NUMBER FIVE

In the fifth and final assignment of error, defendant argues that the trial court erred in overruling his objection to the sentencing. Defendant contends that the trial court used two of the predicate felonies presented by the state to adjudicate him a third felony offender: possession with intent to distribute cocaine in docket number 254618 and simple burglary of an inhabited dwelling in docket number 160867 (both of the 22nd Judicial District Court). Defendant argues that the trial court used the same two offenses to enhance two separate crimes to give defendant two life sentences. Defendant contends that the trial court violated the double jeopardy prohibition against multiple punishments for the same offense.

Defendant alternatively argues that the life sentences imposed by the trial court are excessive. Defendant notes that he was forty years of age at the time of the sentencing and that the underlying offenses were marijuana charges, one of which someone else pled guilty to. Defendant argues that a life sentence is grossly out of proportion to the severity of his crimes. Defendant contends that while he received the maximum sentence allowed under the applicable statutes, there is a lack of aggravating circumstances, he is not the worst type of offender, and the offenses are not the worst type of offenses. Defendant concludes that the sentencing is cruel and unusual punishment and the needless imposition of pain and suffering.

At the outset, we note that habitual offender proceedings are not subject to double-jeopardy constraints. The habitual offender hearing is not a trial, and legal principles such as res judicata, double jeopardy, the right to a jury trial, and

the like do not apply. Louisiana's habitual offender statute is simply an enhancement of punishment provision. **State v. Richardson**, 91-2339, p. 9 (La.App. 1 Cir. 5/20/94), 637 So.2d 709, 715. It does not punish status and does not on its face impose cruel and unusual punishment. **State v. Dorthey**, 623 So.2d 1276, 1279 (La. 1993). The supreme court in **State v. Johnson**, 03-2993, pp. 17-18 (La. 10/19/04), 884 So.2d 568, 578-79, held that the habitual offender statute does not contain a sequential conviction requirement. The only requirement in the statute is that, for sentence enhancement purposes, the subsequent felony must be committed after the predicate conviction or convictions. See also **State v. Lowery**, 04-0802, pp. 13-14 (La.App. 1 Cir. 12/17/04), 890 So.2d 711, 722, writ denied, 05-0447 (La. 5/13/05), 902 So.2d 1018. Further, in **State v. Shaw**, 06-2467, p. 20 (La. 11/27/07), 969 So.2d 1233, 1245, the supreme court held that all authorized multiple sentences imposed after a single criminal act or episode can be enhanced under the habitual offender law. Thus, the trial court did not err in adjudicating defendant a third-felony habitual offender as to both of the instant convictions based on the two predicate convictions noted above.

The habitual offender statute, LSA-R.S. 15:529.1A, provides, in pertinent part:

> (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> . . . .
>
> (b) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (i) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction; or
>
> (ii) If the third felony and the two prior felonies are felonies defined ... as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be

imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

As noted, the following prior felony convictions were considered in the adjudication of defendant as a third-felony habitual offender as to both instant convictions: possession with intent to distribute cocaine and simple burglary of an inhabited dwelling.[4] Attempted possession of marijuana with intent to distribute is a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for not more than fifteen years. LSA-R.S. 40:966B(3); LSA-R.S. 14:27D(3); see also LSA-R.S. 40:979A. However, second offense possession of marijuana is only punishable by imprisonment for not more than five years. LSA-R.S. 40:966E(2). Thus, pursuant to LSA-R.S. 15:529.1A(1)(b)(ii), defendant was subject to a mandatory life imprisonment sentence on the enhancement of the attempted possession with intent to distribute marijuana conviction. As to the enhancement of the second offense possession of marijuana conviction, pursuant to LSA-R.S. 15:529.1A(1)(b)(i), defendant was subject to a sentence of imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction. Thus, as to count two, the sentence of life imprisonment is illegal. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. LSA-C.Cr.P. art. 882A. The life imprisonment sentence imposed on count two is hereby vacated, and we remand for resentencing. Moreover, defendant's excessive sentence claim as to count two is moot.

Further, defendant's excessive sentence claims are procedurally barred. 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 defendant may make or file a motion to reconsider sentence. LSA-C.Cr.P. art. 881.1A(1). The motion shall be oral at the time of sentence or shall be in writing thereafter

[4] Possession with intent to distribute cocaine is a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment of ten years or more, and simple burglary of an inhabited dwelling is punishable by twelve years. LSA-R.S. 40:967B(4)(b); LSA-R.S. 14:62.2.

and shall set forth the specific grounds on which the motion is based. LSA-C.Cr.P. art. 881.1B. 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. LSA-C.Cr.P. art. 881.1E.

Following the imposition of sentence herein, the defense counsel stated, "Note our objection, Your Honor." No written motion to reconsider sentence was filed. The objection did not include any grounds upon which a motion to reconsider sentence may be based. Accordingly, review of the instant assignment of error is procedurally barred. LSA-C.Cr.P. art. 881.1E; see **State v. Bickham**, 98-1839, p. 6 (La.App. 1 Cir. 6/25/99), 739 So.2d 887, 891 ("[A] general objection to a sentence preserves nothing for appellate review."); **State v. Jones**, 97-2521, pp. 2-3 (La.App. 1 Cir. 9/25/98), 720 So.2d 52, 53 ("[D]efendant's failure to urge a claim of excessiveness or any other specific ground for reconsideration of sentence by his oral or written motion precludes our review of his assignment of error.").

CONVICTIONS AND HABITUAL OFFENDER ADJUDICATIONS AS TO COUNTS ONE AND TWO AND SENTENCE AS TO COUNT ONE AFFIRMED. ENHANCED SENTENCE AS TO COUNT TWO VACATED AND REMANDED FOR RESENTENCING UNDER LSA-R.S. 15:529.1A(1)(b)(i).