NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0353

STATE OF LOUISIANA

VERSUS

TROY W. VOLLENTINE

Judgment Rendered: September 14, 2011

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 479166

Honorable William J. Crain, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Troy W. Vollentine, was charged by amended indictment with one count of negligent homicide, a violation of LSA-R.S. 14:32(A), and pled not guilty. Following a jury trial, he was found guilty as charged. He moved for a post-verdict judgment of acquittal and for a new trial, but the motions were denied. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging that he was a sixth-felony habitual offender.[1] Following a hearing, he was adjudged a fourth-felony habitual offender and was sentenced to fifty years at hard labor, without benefit of probation or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating the following assignments of error:

1. The trial court erred by denying the defendant's motion for a continuance after the State amended the charge on the indictment.

2. The trial court erred by refusing to prevent spectators in the courtroom from wearing pictures of the victim on their clothing.

3. The trial court erred in denying the motion for new trial.

4. The trial court erred in denying the motion for post-verdict judgment of acquittal.

5. The evidence is insufficient to support the conviction.

6. The trial court erred in denying the motion for reconsideration of sentence.

7. The sentence is unconstitutionally excessive.

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[1] Predicate #1 was set forth as the defendant's January 6, 2003 guilty pleas, under Fortieth Judicial District Court Docket #01-276, to three counts of simple burglary and three counts of forgery. Predicate #2 was set forth as the defendant's January 6, 2003 guilty plea, under Fortieth Judicial District Court Docket #01-506, to simple burglary. Predicate #3 was set forth as the defendant's March 15, 1995 guilty plea, under Fortieth Judicial District Court Docket #92-322, to possession of cocaine. Predicate #4 was set forth as the defendant's March 15, 1995 guilty pleas, under Fortieth Judicial District Court Docket #95-109, to two counts of simple burglary. Predicate #5 was set forth as the defendant's June 23, 1993 guilty plea, under Fortieth Judicial District Court Docket #93-213, to second degree battery.

For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On September 3, 2009, at approximately 3:00 p.m., a vehicle driven by the defendant was involved in a head-on collision with a vehicle driven by Miranda Kennedy, and in which the victim, Theresa Mohon, and her brother, Michael Mohon, were passengers. The crash occurred on Louisiana Highway 21 in Bush, Louisiana, on a dry road in good weather. The speed limit was 55 miles per hour. The victim was sixteen years old, and died five days later as a result of injuries she received in the collision. Kennedy testified the collision occurred after the defendant suddenly drove into her lane of travel while she was in a curve.

James Arnold Callahan was driving behind the defendant for approximately three miles before the collision. According to Callahan, the defendant was driving "erratically[,] back and forth like a snake." He saw the defendant driving from the shoulder of the northbound lane to the shoulder of the southbound lane, and indicated the defendant had a "close call" with a pickup truck prior to the collision. Callahan was scared to try to pass the defendant due to the defendant's driving. Another witness, Amy Hill had just picked up her daughter from school prior to the collision and was also traveling behind the defendant's vehicle. She saw the defendant leave his lane of travel and collide with the Kennedy vehicle in the oncoming lane.

Louisiana State Trooper Huey Galmiche investigated the collision. The collision occurred in a no-passing zone for the defendant. Physical evidence at the scene indicated the defendant had crossed the centerline and struck the vehicle in which the victim was riding. There were no skid marks at the scene. The defendant claimed that at the time of the collision, he was on his way to see his doctor for pain in his thumb. He claimed the collision occurred after he leaned over to pick up a

cellular telephone. He did not claim that any "medical problem" caused the collision. Based on the statements of the defendant and other witnesses, Trooper Galmiche determined that the defendant had committed numerous traffic violations immediately prior to and during the collision, including: careless operation, driving from shoulder to shoulder, driving left of center, and driving on and off the roadway. Additionally, the defendant's license had been suspended.

Thereafter, Trooper Galmiche saw the defendant sleeping in the hospital where he was taken for treatment. After he woke up, the defendant appeared groggy. His speech was slurred, his pupils were constricted, and he had foam at the sides of his mouth. According to Trooper Galmiche, the defendant indicated he had not consumed any alcohol that day, but "[took] Suboxone." Trooper Galmiche was aware that Suboxone was a synthetic form of heroin, similar to methadone, and an opiate-based drug. He was also aware that the side effects of taking the drug included restricted pupils, dry mouth, slurred speech, and tiredness. Trooper Galmiche then arrested the defendant and advised him of his **Miranda**[2] rights. Thereafter, prior to being discharged from the hospital, the defendant walked out of the hospital, still wearing hospital clothes, and was apprehended approximately one block from the hospital by another Louisiana State Trooper. A urine sample taken from the defendant at the hospital indicated the presence of opiates. The test results included a disclaimer that although there was a "presumptive positive" for the tested drug, substances other than the tested drug could yield a positive response, and the test results should be used for diagnostic purposes only. Testing of the defendant's blood by the Louisiana State Police Crime Lab did not reveal the presence of any drugs or alcohol.

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

The defendant testified at trial. He conceded he had been convicted of forgery in 1993 and burglary in 2001, and had pled guilty to second degree battery in 1993, had pled guilty to possession of cocaine in 1995, had pled guilty to three counts of burglary in 2003, had pled guilty to three counts of forgery in 2003, and had pled guilty to attempted burglary in 2010. He denied being under the influence of any drugs or alcohol at the time of the collision. He claimed he told the police that the last prescription medication he had taken was Suboxone, not that he had taken Suboxone on the day of the collision. He indicated he had used Suboxone in 2008 to treat an addiction to a prescription medication. He claimed he had a sixty-day supply of Suboxone at the beginning of 2009. He conceded his doctor had advised him not to drive "for the first week" after he began taking Suboxone. He claimed the collision occurred after he began looking for his cell phone, which rang while he was driving. He claimed he had received a morphine shot on August 25, 2009, for an injury to his thumb. He claimed he "blacked out" approximately two weeks before the collision and on the day of the collision. He conceded he had an MRI brain scan on March 16, 2010, which was normal. He claimed he was unaware his driver's license had been suspended. He conceded, however, his driver's license was indefinitely suspended on September 7, 2007, and again on February 10, 2009.

SUFFICIENCY OF THE EVIDENCE

The defendant combines assignments of error numbers 4 and 5 for argument. He argues the evidence was insufficient to support the conviction because there was conflicting scientific evidence of whether he was under the influence of drugs, and because he testified that he had a blackout immediately before the accident.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the

crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308–09 (La.1988). In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove", in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

Negligent homicide is the killing of a human being by criminal negligence. LSA-R.S. 14:32(A)(1). The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence. LSA-R.S. 14:32(B).

Any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of negligent homicide and the defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against the defendant indicates the jury rejected the defense theory that the defendant collided with the vehicle in which the victim was a passenger because he suffered a blackout

due to a seizure. 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). No such hypothesis exists in the instant case. Additionally, the verdict rendered against the defendant indicates the jury rejected the defendant's testimony and accepted the testimony offered against him. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

These assignments of error are without merit.

DENIAL OF CONTINUANCE

In assignment of error number 1, the defendant argues the trial court abused its discretion in denying his request for a continuance following amendment of the indictment from vehicular homicide to negligent homicide because the amendment completely surprised him and denied him an opportunity to prepare a defense

against a wholly different charge. He argues that if he had been given additional time, he could have moved for a bill of particulars and called medical experts to testify about his history of blackouts.

A motion for continuance shall be in writing and shall allege specifically the grounds upon which it is based and, when made by a defendant, must be verified by his affidavit or that of his counsel. It shall be filed at least seven days prior to the commencement of trial. LSA-C.Cr.P. art. 707. However, where the occurrences that allegedly make the continuance necessary arose unexpectedly, and the defendant had no opportunity to prepare a written motion, this court may review the denial. **State v. Roy**, 496 So.2d 583, 587 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987).

As a general rule, the denial of a continuance is not grounds for reversal absent an abuse of discretion and a showing of specific prejudice. It is incumbent upon the defendant to show in what respect his defense has been prejudiced by the amendment of the bill. In determining whether the defendant has been prejudiced in his defense upon the merits, the court shall consider all the circumstances of the case and the entire course of the prosecution. LSA-C.Cr.P. art. 489. Where the continuance motion is based upon the want of time for preparation by counsel, this specific prejudice requirement has been disregarded only in cases where the preparation time was so minimal as to cast doubt on the basic fairness of the proceedings. **Roy**, 496 So.2d at 588.

On November 19, 2009, the grand jury returned an indictment against the defendant, charging him with vehicular homicide by killing the victim, while engaged in the operation of, or in actual physical control of, a motor vehicle while under the influence of alcoholic beverages and/or a controlled dangerous substance. The defendant was arraigned on that charge on January 22, 2010.

On the day prior to trial, September 7, 2010, the defense moved for a continuance, claiming medical records relating to seizures suffered by the defendant had not been mailed to the defense until August 19, 2010. The defense argued that it planned to subpoena several medical professionals to come to court. The State pointed out the records concerned a medical examination which took place six months after the incident. The court noted that at the January 22, 2010, arraignment, trial was set for April 5, 2010, and counsel were granted thirty days to file special pleadings. On April 5, 2010, on motion of the defense, the matter was continued to May 24, 2010. On May 13, 2010, on motion of the defense, the matter was continued to July 19, 2010. On July 19, 2010, on motion of the defense, the matter was continued to September 7, 2010.

The court pointed out that the defense did not move for the production of medical records until June 9, 2010; and then, on August 20, 2010, the defense filed another motion for subpoena duces tecum to University Hospital. The court also noted it ordered the subpoena to issue, noted the discovery motion was untimely and that no continuance would be granted in the event that the records could not be timely produced, and set trial for September 7, 2010. The court ruled the defense could adequately defend the defendant with the records in its possession and denied the motion for continuance. The court offered to issue an instanter subpoena to the treating physician, but the defense did not accept the offer, objected to the court's ruling, and gave notice of intent to apply to this court for supervisory relief.[3]

On the first day of trial, September 8, 2010, the defense moved for a competency hearing, citing a notation of "epilepsy convulsive" in the defendant's

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[3] This court denied the subsequent writ application on the showing made. **State v. Vollentine**, 10-1658 (La. App. 1st Cir. 9/9/10) (unpublished).

medical records and the fact that he had been prescribed antiseizure medication. The court "question[ed] the timing of the motion," given its denial of the motion for continuance the previous day. After questioning the defendant concerning his age, his employment, his understanding of the charges against him, his understanding of his right to trial, and his ability to assist in his defense, the court denied the motion. The defense again moved for a continuance, and the court denied the motion.

Thereafter, the State amended the indictment to charge negligent homicide. The defense requested time to file special pleadings and again requested a continuance. The court denied the motion for continuance, noting the new charge was a lesser included offense and the elements of the offense were essentially the same, and the defense objected to the ruling.

There was no abuse of discretion in denying the motion to continue based on the amendment of the indictment. On January 22, 2010, at arraignment, the defendant was notified of the State's theory against him, i.e., he had killed the victim while engaged in the operation of, or in actual physical control of, a motor vehicle while under the influence of alcoholic beverages and/or a controlled dangerous substance. The amended charge, negligent homicide, was based on the killing of the victim by the criminal negligence of the defendant in operating a motor vehicle. Medical records, relating to seizures suffered by the defendant, were mailed to the defense on August 19, 2010, approximately three weeks prior to trial, and the defense did not accept the court's offer of an instanter subpoena.

This assignment of error is without merit.

DISPLAY OF PHOTOGRAPHS OF THE VICTIM AT TRIAL

The defendant combines assignments of error numbers 2 and 3 for argument. He argues the trial court erred in denying his motion in limine to prevent display of

photographs of the victim by the spectators at trial. He also complains that the victim's mother testified while wearing a photograph of the victim on her shirt. Further, he contends that the trial court erred in denying his motion for new trial, because allowing the spectators and witness to wear pictures of the victim effectively prevented the defendant from receiving a fair trial.

LSA-C.Cr.P. art. 851, in pertinent part, provides:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
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> . . .
>
> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error[.]

The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Maize**, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

Prior to trial, the defense moved, "[t]o prevent court spectators from wearing in the court room [sic] attire or anything of any type to attempt to emotionalize this case or influence the court or jury at any court proceedings." At the hearing on the motion, the court noted the motion dealt with ribbons and pictures of the victim worn by certain members of the audience who were sitting on one side of the courtroom in support of the family of the victim. The court stated it was obvious that the audience members were supporters of the family, and instructed them that no demonstrations or outbursts would be tolerated. The court found that the ribbons and pictures were not offensive and did not draw an inordinate amount of attention. The court denied the motion in limine, and the defense objected to the court's ruling.

Following the conviction, the defendant moved for a new trial, arguing he was denied a fair trial because courtroom spectators created a tense and emotionally-charged atmosphere. He also argued "a witness testified wearing a picture of the victim" in an effort to unduly influence the jury against the defendant. Following a hearing, the motion was denied, and the defense objected to the ruling.

There was no clear abuse of discretion in denying the motion for new trial. The case relied upon by the defendant in his motion for new trial and on appeal, **State v. Allen**, 00-0346 (La. App. 4th Cir. 10/17/01), 800 So.2d 378 (per curiam), writ denied, 01-3086 (La. 9/30/02), 825 So.2d 1188, is distinguishable. **Allen** involved a trial for first degree murder, where the identity of the assailant was at issue. During trial, the State continued to display a photograph of the victim on its table after the photograph had been identified. The trial court directed the State to refrain from displaying the photograph, unless it was being used in connection with the testifying witness. The next day, the defense again objected to the display of the photograph on the State's table. The court ordered the State to take down the photograph. **Allen**, 800 So.2d at 389. Additionally, in **Allen**, a witness testified, over defense objection, wearing a T-shirt "emblazoned with a photograph of the victim." **Allen**, 800 So.2d at 390.

In the instant case, the defendant was apprehended at the scene, and there was no question that he caused the collision resulting in the death of the victim. The only issue was whether the collision was the result of his criminal negligence. Thus, there were fewer issues for the jury to resolve and less potential for prejudice to the defendant from the display of any photographs of the victim. Further, the photographs at issue in **Allen** were different than those at issue in this case. The trial judge in this case found that the ribbons and pictures at issue were not offensive and did not draw an inordinate amount of attention to themselves. The

trial court in **Allen**, however, ordered the photograph removed from the State's table unless it was being used by a testifying witness. In **Allen,** the court of appeal determined that the combination of the picture being displayed and the witnesses's shirt "emblazoned" with the victim's picture denied the defendant a fair trial. Additionally, the challenged photograph in this case was displayed by friends and family of the victim, rather than by the State itself, as in **Allen.**

These assignments of error are without merit.

EXCESSIVE SENTENCE

In assignment of error number 7, the defendant argues that the sentence imposed was unconstitutionally excessive because he was forty-one years old and was sentenced to fifty years for an offense that "under normal circumstances" carried a maximum sentence of five years.

Louisiana Code of Criminal Procedure article 894.1 sets forth items which must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962. Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Harper**, 07-0299 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 602, writ denied, 07-1921 (La. 2/15/08), 976 So.2d 173.

Louisiana Constitution Article I, Section 20 prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is

subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **Hurst**, 797 So.2d at 83.

As applicable here, whoever commits the crime of negligent homicide shall be imprisoned, with or without hard labor, for not more than five years, fined not more than five thousand dollars, or both. LSA-R.S. 14:32(C)(1). However, as a fourth-felony habitual offender, the defendant's sentencing exposure was a determinate term, not less than the longest prescribed for a first conviction, but in no event less than twenty years and not more than his natural life. LSA-R.S. 15:529.1(A)(1)(c)(i) (prior to amendment by 2010 La. Acts, Nos. 911, § 1 and 973, § 2). The defendant was sentenced to fifty years at hard labor, without benefit of probation or suspension of sentence.

The trial court found that the defendant's prior felony convictions indicated he had an inability to conform to the rules of our normal and civil society. The court noted that the defendant's criminal conduct had resulted in the unnecessary loss of a very promising life, and had inflicted immeasurable pain upon the family and friends of the victim. The court also found: that during any period of a suspended sentence, there would be an undue risk that the defendant would commit another crime; that the defendant was in need of correctional treatment in a custodial environment; and that the crime resulted in a loss of life.

A thorough review of the record reveals that the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing sentence. See LSA-C.Cr.P. art. 894.1(A)(1), (A)(2), (B)(9) & (B)(21). Additionally, the sentence imposed was not grossly disproportionate to the severity of the offense and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTION, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.