NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0125

STATE OF LOUISIANA

VERSUS

JOHN K. ROACH, JR.

Judgment Rendered: September 20, 2006

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On Appeal from the Twentieth Judicial District Court
In and For the Parish of West Feliciana
State of Louisiana
Docket No. W-04-3-88

Honorable William G. Carmichael, Judge Presiding

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Samuel C. D'Aquilla
District Attorney
St. Francisville, LA

Counsel for Appellee
State of Louisiana

Haley Major Green
Jesse L. Means, Jr.
Assistant District Attorneys
St. Francisville, LA

Martin E. Regan, Jr.
New Orleans, LA

Counsel for Defendant/Appellant
John K. Roach, Jr.

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, John K. Roach, Jr., was charged by bill of information with possession with intent to distribute a Schedule II controlled dangerous substance, cocaine (860.14 grams), a violation of LSA-R.S. 40:967(A)(1). He pled not guilty. The defendant was tried by a jury and convicted as charged. The defendant was sentenced to imprisonment at hard labor for twenty-five years. The court ordered that the sentence run consecutively to any other sentence the defendant was serving. The defendant now appeals, urging the following assignments of error:

1. The evidence adduced at trial was insufficient to support the verdict.
2. The defendant received an excessive sentence.
3. The defendant requests a review of the record for errors patent.

Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On December 29, 2003, Deputy Joseph Shane White and Lieutenant Chris Green of the West Feliciana Parish Sheriff's Office were parked in a small driveway off of Louisiana Highway 421 in West Feliciana Parish. On that day, they observed a blue, older model, Pontiac vehicle as it passed by them. There were two black males, subsequently identified as the defendant, Mr. Roach, and his cousin, Derrick Davis, inside the vehicle. When the officers noticed that the driver of the vehicle, who Lt. Green recognized as the defendant, was not wearing a safety belt, they immediately initiated a traffic stop. The officers also noticed that, although it was raining lightly and the windshield wipers on the vehicle were continuously in operation, the headlights were not engaged. Once the officers entered the highway and

pulled up behind the defendant's vehicle, the defendant accelerated. A pursuit ensued. Shortly thereafter, a large blue plastic bag was thrown out of the passenger side of the vehicle. The officers discontinued pursuit, called in a BOLO (be on the lookout) for the vehicle, and stopped to retrieve the discarded package. A blue Wal-Mart shopping bag was recovered from the side of the road. The bag contained a fire log starter box with two gallon-sized bags of compressed powder believed to be cocaine, a smaller bag of suspected powder cocaine, and a small bag of suspected crack cocaine.

Approximately five minutes after receiving the BOLO for the blue Pontiac with an antique Mississippi license plate, Sgt. Stewart Hawkins of the West Feliciana Parish Sheriff's Office stopped the defendant in the described vehicle. Derrick Davis, the defendant's cousin, was seated on the passenger side of the vehicle. Lt. Green and Deputy White arrived at the scene, identified the defendant, and confirmed that the vehicle was the same one they attempted to stop on Highway 421 minutes earlier. The defendant and Mr. Davis were both arrested.[1]

Scientific analysis of the substances recovered revealed the presence of cocaine with a total net weight of approximately 860.14 grams. The clear plastic bag with the rock-like substance was determined to contain cocaine with a net weight of 30.86 grams. The remaining bags containing the white powdered substance were determined to contain cocaine with a total net weight of 829.28 grams. The street value of the cocaine recovered was determined to be approximately $100.00 per gram.

SUFFICIENCY OF THE EVIDENCE

[1] Although Mr. Davis was originally charged with possession with intent to distribute cocaine, he pled guilty to obstruction of justice pursuant to a negotiated plea agreement. In exchange for the plea agreement, Mr. Davis agreed to testify on behalf of the state at the defendant's trial. Mr. Davis received a two-year suspended sentence, one year of active supervised probation and a $500.00 fine plus court costs. The details of the plea agreement were disclosed to the jury during the defendant's trial.

In his first assignment of error, the defendant contends the evidence presented at the trial of this matter was insufficient to support the conviction. Specifically, he avers that Mr. Davis's self-serving testimony that the discarded cocaine belonged to the defendant was insufficient to meet the state's burden of proving his guilt beyond a reasonable doubt. The defendant further contends the state failed to provide sufficient evidence of intent to distribute the cocaine.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821; **State v. Johnson**, 461 So.2d 673, 674 (La.App. 1 Cir. 1984). The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in Louisiana Code of Criminal Procedure article 821 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 the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Nevers**, 621 So.2d 1108, 1116 (La.App. 1 Cir.), writ denied, 617 So.2d 906 (La.1993); **State v. McLean**, 525 So.2d 1251, 1255 (La.App. 1 Cir.), writ denied, 532 So.2d 130 (La.1988). Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885, pp. 3-4 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 159.

The **Jackson** standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. **State v. Mussall**, 523 So.2d 1305, 1308-11 (La.1988). Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Marcantel**, 2000-1629, (La. 4/3/02), 815 So.2d 50, 56. It is not the function of an appellate court to assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. See **State v. Houston**, 98-2658, (La.App. 1 Cir. 9/24/99), 754 So.2d 256, 259.

The crime of possession with intent to distribute cocaine is defined as follows: "it shall be unlawful for any person knowingly or intentionally ... [t]o ... possess with intent to ... distribute ... a controlled dangerous substance ... classified in Schedule II." LSA-R.S. 40:967(A)(1). Thus, in order to support a conviction, the state must prove beyond a reasonable doubt that the defendant possessed the drug with the intent to distribute it. The state is not required to prove actual possession, but needs only to show the defendant exercised dominion or control over the illegal substance. **State v. Walker**, 369 So.2d 1345, 1346 (La.1979).

In the instant case, Deputy White and Lt. Green both testified that a large blue bag was thrown from the passenger-side window of the defendant's vehicle during the pursuit. Barbara Woodruff, an eyewitness who happened to be traveling on Highway 421, testified that she observed the blue, older model vehicle approaching her at a high rate of speed. Woodruff also testified that as she observed the vehicle through her rearview

mirror, she noticed what appeared to be a blue Wal-Mart shopping bag "fly" out of the window on the passenger side of the vehicle.

Mr. Davis, the passenger, testified that the defendant threw a large blue bag out of the passenger window of the vehicle during the pursuit. Although Mr. Davis claimed to have been unaware of the contents of the bag, he unequivocally testified that the defendant possessed the bag and that the defendant discarded the bag during the pursuit.

Lt. Green testified that the evidence discarded from the defendant's vehicle was immediately recovered. David Ellis, the evidence custodian for the West Feliciana Parish Sheriff's Office, testified that the evidence remained in his custody until he delivered it to the Louisiana State Police Crime Laboratory for testing. He further testified that the controlled dangerous substances examination of the evidence revealed that it was in fact over 800 grams of cocaine.

In light of the foregoing, we find that the jury could have found beyond a reasonable doubt that the defendant was in possession of the cocaine. Although the defendant did not have the cocaine on him at the time he was taken into custody, several witnesses observed the cocaine filled bag being thrown out of the window of the vehicle. It is obvious from the jury's verdict that, despite his status as a co-defendant testifying pursuant to a lenient plea agreement, a fact that was fully disclosed during the trial, the jury believed all or certain aspects of Mr. Davis's uncontradicted trial testimony regarding the ownership and possession of the cocaine. As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson,** 98-1407, p. 6 (La.App. 1 Cir. 4/1/99), 734 So.2d 800, 805, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439.

According to Mr. Davis, the defendant asked him to lower the window and he complied. The defendant then proceeded to throw the bag out of the window. Mr. Davis claimed he was unaware of the existence of the bag and/or its contents prior to the time the defendant prepared to discard it. That testimony, coupled with the fact that the defendant, the driver of the vehicle, attempted to flee from the officers, was sufficient to support the conclusion that the defendant had been in actual possession of the cocaine up until the time that he discarded it in an attempt to avoid a drug charge. Thus, we are satisfied that the jury reasonably could have determined that the defendant unlawfully possessed cocaine.

We likewise conclude that the jury reasonably could have determined that the defendant had the intent to distribute the cocaine. In order to prove the element of intent to distribute, the state must prove the defendant's subjective specific intent to possess in order to distribute. **State v. Hills**, 498 So. 2d 240, 243 (La.App. 1 Cir. 1986), writ denied, 503 So.2d 13 (La.1987). Specific intent is a state of mind. It need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. **State v. Fisher**, 628 So.2d 1136, 1141 (La.App. 1 Cir. 1993), writs denied, 94-0226 & 94-0321 (La. 5/20/94), 637 So.2d 474, 476. Mere possession of a drug does not amount to evidence of intent to distribute, unless that quantity is so large that no other inference is possible. **State v. Hearold**, 603 So.2d 731, 735-736 (La.1992).

Certain factors are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance. These factors include: (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 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 baggies or scales, evidencing an intent to distribute. **State v. Hearold**, 603 So.2d at 735.

Analyzing the facts of the instant case and applying the aforementioned factors, we conclude the state adequately proved the defendant's intent to distribute the cocaine. As the defendant correctly notes, there was no evidence that he had distributed or attempted to distribute the cocaine he possessed on the morning of his arrest or that he had distributed controlled dangerous substances in the past. There likewise was no paraphernalia seized in connection with his arrest. Nonetheless, the state established through the testimony of Lt. Green that the extremely large amount of cocaine, over 800 grams, was consistent with distribution. Lt. Green explained that it would take a person "years" to consume the extremely large amount of cocaine recovered. Thus, he opined that the amount was very inconsistent with personal use. We find, as did Lt. Green, that the quantity of cocaine possessed by the defendant in this case is so large that intent to distribute is the only reasonable inference to be made. Therefore, viewing all the evidence in the light most favorable to the state, and giving deference to the credibility determinations of the jurors, a rational trier of fact could have concluded beyond a reasonable doubt and to the exclusion of any reasonable hypothesis of innocence that defendant was guilty of the charged offense of possession of cocaine with the intent to distribute. This assignment of error lacks merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant contends the trial court erred in imposing an unconstitutionally excessive sentence. The procedural requirements for objecting to a sentence are provided in LSA-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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> 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).

Following the imposition of the sentence herein, defense counsel stated, "I'd wish to file a notice of appeal at this time...we wish to advise the Court, respectfully, that [defendant] intends to appeal both the conviction and the sentence." Thereafter, the defendant failed to file a motion to reconsider sentence.

In **State v. Jones**, 97-2521, pp. 1-2 (La.App. 1 Cir. 9/25/98), 720 So.2d 52, 53, this court held that a defendant who made a general oral motion to reconsider his armed robbery sentence at sentencing and later timely filed a written motion to reconsider sentence, which only urged that he had been convicted of the offense and sentenced to thirty years imprisonment at hard labor, was precluded from appellate review of his

assignment of error alleging an excessive sentence. We found that the defendant's failure to urge a claim of excessiveness, or any other specific ground for reconsideration of sentence by his oral or written motion, precluded review of his assignment of error. See also **State v. Green**, 94-0617, p. 8 (La.App. 3 Cir. 12/7/94), 647 So.2d 536, 540-541.

Herein, it is clear that the language used by the defense counsel upon imposition of sentence was insufficient to constitute an oral motion to reconsider sentence. The defendant did not urge a claim of excessiveness or any other specific ground for reconsideration of the sentence. Therefore, the defendant is procedurally barred by LSA-C.Cr.P. art. 881.1(E) from raising any objection to the sentence on appeal, including a claim of excessiveness. **State v. Felder**, 2000-2887, p. 10 (La.App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173; **State v. Duncan**, 94-1563, p. 2 (La.App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

PATENT ERROR

In his final assignment of error, the defendant requests that this court examine the record for errors patent. Because this court routinely reviews the record for errors patent, such a request is unnecessary. Under LSA-C.Cr.P. art. 920(2), our patent error review is limited to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After reviewing the record in these proceedings, we find no errors patent.[2] Therefore, we affirm the conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.

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[2] Except for the trial court's failure to state that the first two years of the defendant's sentence are without the benefit of parole, probation, or suspension of sentence, the sentence imposed was appropriate under the correct sentencing statute, LSA-R.S. 40:967B(4)(b). However, notwithstanding the omission by the trial court, the defect is automatically cured by LSA-R.S. 15:301.1.