NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0724

STATE OF LOUISIANA

VERSUS

JUSTIN M. ANDREWS

Judgment Rendered: September 14, 2007.

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On Appeal from the
20th Judicial District Court,
in and for the Parish of West Feliciana
State of Louisiana
District Court No. W-05-9-280

The Honorable William G. Carmichael, Judge Presiding

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

CARTER, C.J.

The defendant, Justin M. Andrews, was charged by amended bill of information with one count of possession of methadone, a violation of LSA-R.S. 40:967C, and entered a plea of not guilty. The defendant waived his right to a jury trial and, following a bench trial, was found guilty as charged. The defendant's motions for new trial and for post-verdict judgment of acquittal were denied. The defendant was sentenced to three years at hard labor, and the trial court denied his motion for reconsideration of sentence. The defendant appeals. For the reasons that follow, we affirm the conviction and sentence.

FACTS

On September 8, 2005, West Feliciana Sheriff's Deputy Terry L. Minor was alerted to a private citizen report of a car being driven in a reckless and careless manner. The citizen provided the license plate number and a description of the vehicle. Deputy Minor located the vehicle parked at a gas pump at the Southern Belle Truck Stop. Deputy Minor pulled up behind the vehicle and advised the only occupant, the defendant, that the police had received a report that he was driving in a reckless manner. In speaking to the defendant, Deputy Minor noticed that the defendant appeared tired and had poor balance, slurred speech, and glassy eyes.

Deputy Minor advised the defendant of his **Miranda**[1] rights and asked the defendant if he was on any type of medication. The defendant indicated he was on medication and that it was located in his vehicle. The defendant gave consent for Deputy Minor to search the vehicle and gave Deputy Minor a pill

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

bottle containing several pills from the vehicle console. The pill bottle was not labeled with any information indicating its contents, a prescription, or a pharmacy. The defendant identified only the methadone tablets in the bottle. Deputy Minor requested assistance from Deputy Ellis Diaz, who was familiar with narcotics and able to identify four methadone pills and five alprazolam/Xanax pills in the bottle. Deputy Minor testified that the defendant claimed the drugs belonged to his cousin. Deputy Minor also stated that the defendant claimed he had taken methadone.

Marcus Todd Odom testified that on September 7, 2005, he traveled with the defendant to West Monroe. Odom claimed that on that date he was taking approximately six or eight prescription medications, including methadone. Odom claimed he took a couple of each of his medications with him on the trip but forgot the loose methadone tablets on the floor of the defendant's car. Odom explained that he put the tablets on the floor because he had difficulty manipulating his fingers and grasping objects due to injuries sustained from a fire. Odom claimed the defendant subsequently telephoned him and indicated he had Odom's methadone and would keep the drugs until he saw Odom again. Odom explained he did not have papers indicating he had a prescription for methadone at the time in question because his pharmacy had been in New Orleans and no longer existed. He conceded he had convictions for issuing worthless checks and possession of marijuana.

The defendant also testified at trial. He claimed he was on his way back from dropping off Odom in Monroe when he was arrested on September 8, 2005. He claimed he noticed Odom's methadone pills loose on the floor of his car when he stopped for fuel. The defendant claimed he put the methadone

pills and some of his own medication into a pill bottle that he had used to store fuses. The defendant explained that the original bottle he had for his own medication had become wet. At trial, the defendant produced a March 2005 written prescription in his name for Xanex. The defendant confirmed that he had telephoned Odom, told him that he had four of Odom's methadone pills, and that he would give Odom the pills when he saw him the next time. The defendant denied telling Deputy Minor that he was taking methadone. The defendant conceded he had prior convictions for distribution of Ecstasy and distribution of marijuana. He also conceded he did not have a prescription for methadone on September 8, 2005.

SUFFICIENCY OF THE EVIDENCE

The defendant maintains the evidence was insufficient to support his conviction for possession of methadone. The defendant claims the methadone belonged to Marcus Odom, who had been legally prescribed the drug, and it was uncontested that Odom placed the methadone on the floor of the defendant's car.

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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. 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. LSA-R.S. 15:438; **State v. Wright**, 98-0601 (La. App. 1 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.

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. When a case involves circumstantial evidence and the fact finder reasonably rejects the hypothesis of innocence presented by the defendant, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. See **State v. Captville**, 448 So.2d 676, 680 (La. 1984).

Louisiana Revised Statutes 40:967C provides:

> It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner, as provided in R.S. 40:978 while acting in the course of his professional practice, or except as otherwise authorized by this Part.

Methadone is a controlled dangerous substance classified in Schedule II. LSA-R.S. 40:964, Schedule II, B(11).

After a thorough review of the record, we are convinced the evidence, viewed in the light most favorable to the State, proved beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession of methadone and the defendant's identity as the perpetrator of that offense. The burden of showing that the controlled

dangerous substance was possessed pursuant to a valid prescription was on the defendant as an affirmative defense to the crime of possession. **State v. Rodriguez**, 554 So.2d 269, 270 (La. App. 3 Cir. 1989), writ granted in part, denied in part on other grounds, 558 So.2d 595 (La. 1990). Without reaching the issue of whether the possession of a prescription for the methadone by Odom, if established, would have shielded the defendant from criminal liability in this case, we note the record indicates the trial court rejected Odom's testimony as "dubious." This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **State v. Lofton**, 96-1429 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The trial court reasonably rejected the hypothesis of innocence presented by the defense, and the evidence did not support another hypothesis that would have raised a reasonable doubt. In reviewing the evidence, we cannot say that the fact finder's determinations were irrational under the facts and circumstances presented to him. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

EXCESSIVE SENTENCE

The defendant contends a sentence of three years for the instant offense is unconstitutionally excessive and grossly out of proportion to the seriousness of the crime.

Article I, section 20, of the Louisiana Constitution 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. **State v. Hurst**, 99-2868 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

Whoever violates LSA-R.S. 40:967C as to any controlled dangerous substance other than pentazocine shall be imprisoned with or without hard labor for not more than five years and, in addition, may be sentenced to pay a fine of not more than five thousand dollars. LSA-R.S. 40:967C(2). The defendant was sentenced to three years at hard labor.

In sentencing the defendant, the trial court noted it had considered the relevant factors of LSA-C.Cr.P. art. 894.1. The court noted in mitigation that the defendant probably did not contemplate that his conduct would cause serious harm and that imprisonment would entail excessive hardship. The court noted in aggravation: that the defendant had a prior history of delinquency or criminal activity; his conduct had threatened serious harm; the possession of controlled dangerous substances always poses a threat of harm in many forms; the defendant's conduct was likely to recur; the defendant's

criminal record indicated the instant offense was not his first contact with controlled dangerous substances, and that fact considered, it was probable he would continue to have contact with controlled dangerous substances; there was no provocation for the defendant's action; there was no evidence to excuse or justify the defendant's conduct; the record indicated that it was likely that the defendant would commit another crime during any period of probation because he was on probation when he committed the instant offense; the defendant was in need of correctional treatment that could be provided most effectively by his commitment to an institution; and a lesser sentence would deprecate the seriousness of the offense.

A thorough review of the record reveals the sentence imposed was not grossly disproportionate to the severity of the offense and was not unconstitutionally excessive. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.