NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0748

STATE OF LOUISIANA

VERSUS

KERI LYNNE MAGEE

DATE OF JUDGMENT: October 31, 2008

ON APPEAL FROM THE 22TH JUDICIAL DISTRICT COURT
DOCKET 06CR7 94590, CRIMINAL DIVISION
PARISH OF WASHINGTON

STATE OF LOUISIANA

THE HONORABLE DONALD M. FENDLASON, JUDGE

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BEFORE: KUHN, GUIDRY, AND GAIDRY, J.J.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

The defendant, Keri Lynne Magee, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1).[1] The defendant pled not guilty and, following a jury trial, she was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The defendant was sentenced to twelve years at hard labor with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence. The defendant made both an oral and a written motion to reconsider sentence, which were denied. The defendant now appeals, designating four assignments of error. We affirm the conviction and sentence.

FACTS

After receiving numerous anonymous complaints about drug activity at the defendant's house at 603 Avenue B in Bogalusa, Sergeant Kendall Bullen and Detective Wendell O'Berry, both with the Bogalusa Police Department, conducted surveillance of the house. Both officers observed known drug users and drug dealers enter and leave the defendant's house during the surveillance. They sent someone to the house in an undercover capacity, who confirmed the drug activity.

On November 3, 2005, Sergeant Bullen and Detective O'Berry, along with several other police officers from the Bogalusa Police Department and the

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[1] Michael John Tombow, a co-defendant, was also charged with this crime. In addition, both co-defendants were charged with one count of possession of marijuana and one count of possession of drug paraphernalia. While not indicated from the record, apparently the defendant was granted a separate trial and the remaining two counts against the defendant were dropped. Prior to opening statements, the clerk read the bill of information. In the reading, the only defendant listed was Keri Lynne Magee, and the only charge listed was possession with intent to distribute cocaine.

Washington Parish Sheriff's Office, executed a search warrant on the defendant's house. Upon attempt at initial entry, the officers struggled for about two to three minutes trying to open the front door of the defendant's house. Finally, the defendant opened the door. During the attempt to gain entry into the house, Sergeant Bullen and another police officer ran to the back of the house. Sergeant Bullen observed William Freeman walking out the back door. He stopped Freeman and brought him back inside. Along with Freeman, the defendant, the defendant's thirteen-year old son, Jody Miley, Kim Bailey, and Michael Tombow were in the house. Except for the defendant and her son, all of these people were known drug users.

Sergeant Bullen learned through Freeman that Russell Daugherty was also in the house, but he had managed to escape detection by the police by running out the back door. Daugherty was never found. Freeman testified at trial that he had never used crack cocaine. He also stated he had a problem with alcohol, but not with drugs. According to Freeman, when the police arrived at the defendant's house, Daugherty ran through the kitchen toward the back door saying, "They're coming." Freeman testified that he did not see Daugherty with anything in his possession when he ran by him. According to Freeman's police statement, however, Freeman told Sergeant Bullen that he saw Daugherty run from the front room out of the back door with cut cocaine. Detective O'Berry testified at trial that he heard Freeman's statement to Sergeant Bullen. According to Detective O'Berry, Freeman told Sergeant Bullen that Daugherty had run out of the house. Freeman further stated that Daugherty took an unknown amount of cut crack cocaine with him that had been on the coffee table in the living room. Detective

O'Berry also testified at trial that he knew Freeman, that he was a known drug user, and that he had "arrested him and dealt with him quite a bit."

The defendant had a two-story house. Sergeant Bullen found a safe in a downstairs closet. The key to the safe was found in Tombow's pants pocket. Prior to entering the house, Sergeant Bullen had received information that narcotics were kept in the safe. Sergeant Bullen opened the safe and found a green plastic container with several pieces of crack cocaine in it. Also in the safe were $3,112 in cash, three money bands, two crack pipes, a razor blade, a filter, some nails and little sticks, and some FEMA paperwork with Tombow's name on it. Sergeant Bullen explained at trial that razor blades are used to cut crack cocaine into smaller pieces, and the nails and sticks, or "push rods," are commonly used to push the filter into the crack pipe. According to Sergeant Bullen, Tombow said that the contents of the safe were his. Detective O'Berry was present when Sergeant Bullen was questioning Tombow at the scene. In his supplemental police report, Detective O'Berry wrote that Tombow stated the contents of the safe were his. Detective O'Berry testified at trial that he searched the defendant's bedroom upstairs and found, inside her dresser drawer, a container that contained a number of burnt Chore Boy pot scrubbers commonly used as filters in crack pipes. The defendant and Tombow were arrested. No others were arrested.

The defendant testified at trial that her son, Tombow, Bailey, and Bailey's boyfriend lived with her. Bailey's boyfriend had moved out prior to the execution of the search warrant. During this time (November of 2005), it was shortly after Hurricane Katrina, and Tombow, Bailey, and her boyfriend needed a place to stay. Tombow stayed in a bedroom downstairs. The defendant testified that the safe

found with the drugs had originally belonged to her, but she gave it to Tombow the day before the search warrant was executed so that Tombow would have something in which to keep his FEMA money. She said she kept the safe in the living room before she gave it to Tombow and was unaware he had put the safe in the closet after she gave it to him. Tombow did not have a closet in his bedroom. She gave Tombow the key and did not have a key to the safe. According to the defendant, Tombow had received a FEMA check, which was "a good sum of money." However, she did not know the amount of the FEMA check. Although she had used crack cocaine before and was aware that the people living with her had used drugs before, she testified she did not observe any drug transactions on the night the search warrant was executed. She further testified that she had no reason to believe that Tombow was selling, trading, or giving drugs to anyone from her home. In denying knowledge of any drugs, the defendant stated that she was not aware Tombow had drugs in the safe, and she was not engaged in distribution of drugs.

ASSIGNMENTS OF ERROR NOS. 1 AND 2

In her first and second assignments of error, the defendant argues, respectively, that the evidence was insufficient to support the conviction, and the trial court erred in denying the motion for postverdict judgment of acquittal. Specifically, the defendant contends that the State failed to prove that she had constructive possession of the seized drugs and that she had the intent to distribute the drugs.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of

review for the sufficiency of the evidence to uphold a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in La. Code Crim. P. art. 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

To support a conviction for possession with intent to distribute, the State had to prove beyond a reasonable doubt that the defendant: 1) possessed the controlled dangerous substance; and 2) had an intent to distribute the controlled

dangerous substance. La. R.S. 40:967(A)(1); **State v. Young**, 99-1264, p. 10 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1006.

On the issue of whether possession is sufficiently proved, the State is not required to show actual possession of the narcotics by a defendant in order to convict; constructive possession is sufficient. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, the mere presence in the area where narcotics are discovered or mere association with the person who controls the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 2003-0917, pp. 5-6 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 799.

A variety of factors are considered in determining whether or not a defendant exercised dominion and control over a drug, including: a defendant's knowledge that illegal drugs are in the area; the defendant's relationship with any person found to be in actual possession of the substance; the defendant's access to the area where the drugs were found; evidence of recent drug use by the defendant; the defendant's physical proximity to the drugs; and any evidence that the particular area was frequented by drug users. **State v. Harris**, 94-0696, pp. 3-4 (La. App. 1st Cir. 6/23/95), 657 So.2d 1072, 1075, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477.

In the instant matter, while the defendant testified she was not aware there were drugs in her house, she kept many mesh filters, or crack pipe screens, in her

bedroom dresser. She further admitted on cross-examination to using crack cocaine not long before the execution of the search warrant. She also testified that she had used drugs at her house while other people were there. While Tombow claimed the contents inside the safe were his, Tombow was living with the defendant in the defendant's house. Also, according to the defendant's testimony, the safe had belonged to her the day before the execution of the search warrant. After Tombow allegedly took possession of the safe, the safe was kept by him in a hall closet instead of in his bedroom. Although Tombow had a safe key on his person when he was arrested, the defendant testified on cross-examination that there were two safe keys. She testified that she thought she had given him a safe key before she gave him the safe in case one of the keys got lost. As far as she knew, however, Tombow had both keys.

There was also evidence that the defendant's house was frequented by drug users. Sergeant Bullen and Detective O'Berry testified about several complaints of drug activity at her house. Sergeant Bullen and Detective O'Berry both testified that, during surveillance of the defendant's house, they saw known drug dealers and users go into the house. Further, a person in an undercover capacity confirmed reports of drug activity in the house. Also, despite Freeman's testimony that he did not use drugs, Sergeant Bullen testified that he knew Freeman as a drug user. Sergeant Bullen testified that Miley was also a known drug user.

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). The defendant's hypothesis of innocence was based on the theory that she knew nothing about the crack cocaine in her house that was kept in a safe she had allegedly given to Tombow the day before the execution of the search warrant. Further, Tombow claimed the contents of the safe were his. According to the defendant's contentions, she had neither actual nor constructive possession of the drugs.

The jury's verdict reflected the reasonable conclusion that, based on the **Harris** factors, the testimony of the police officers, and the physical evidence, the defendant was in constructive possession of the crack cocaine. In finding the defendant guilty, it is clear the jury rejected the defendant's claim of lack of knowledge of the crack cocaine, as well as her claim of no knowledge of the pipe screens in her dresser drawer, and concluded that the defendant's version of the events was a fabrication designed to deflect blame from her. The conclusion by the jurors that the defendant did not testify truthfully could reasonably support an inference that the "truth" would have been unfavorable to her claim that she knew nothing about the drugs. See **Captville**, 448 So.2d at 680. It is clear the jury also rejected Freeman's testimony, wherein he claimed, despite Detective O'Berry's testimony and Sergeant Bullen's testimony to the contrary, that he had never seen crack cocaine at the defendant's house, and that he did not see anything in Russell Daugherty's possession as Daugherty ran by Freeman and out of the defendant's house. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). We are constitutionally precluded from acting as a "thirteenth juror" in

assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

On the issue of whether the defendant's intent to distribute the crack cocaine was sufficiently proved, it is well settled that intent to distribute may be inferred from the circumstances. Factors useful in determining whether the State's circumstantial evidence is sufficient to prove intent to distribute include: (1) whether the defendant ever distributed or attempted to distribute illegal drugs; (2) whether the drug was in a form usually associated with distribution; (3) whether the amount was such to create a presumption of intent to distribute; (4) expert or other testimony that the amount found in the defendant's actual or constructive possession was inconsistent with personal use; and (5) the presence of other paraphernalia evidencing intent to distribute. In the absence of circumstances from which an intent to distribute may be inferred, mere possession of drugs is not evidence of intent to distribute unless the quantity is so large that no other inference is reasonable. For mere possession to establish intent to distribute, the State must prove the amount of the drug in the possession of the accused and/or the manner in which it was carried is inconsistent with personal use only. **Smith**, 2003-0917 at pp. 7-8, 868 So.2d at 800.

While the defendant testified at trial that prior to the instant matter she had never been arrested for or convicted of drug activity, the testimony of both Detective O'Berry and Sergeant Bullen established that a search warrant was prepared because they had received numerous anonymous complaints about narcotics activity at the defendant's house. Their testimony further established that, while the defendant's house was under surveillance, they saw known drug

users and dealers enter and leave her house. Further, the police sent a person in an undercover capacity into the defendant's house, who confirmed the complaints of drug activity.

According to the Crime Lab Scientific Analysis Report, the total weight of the crack cocaine found in the green plastic container inside the safe was 1.04 grams. There was a large rock of crack cocaine, as well as a smaller rock and several smaller pieces. According to Sergeant Bullen's testimony on direct examination, the small rock could be cut up into four pieces and the large rock could be cut up into eight to ten pieces, and each piece could be sold. There was also $3,112 in cash found in the safe. According to the defendant's testimony, this was Tombow's money he had obtained from cashing a FEMA check. There were also in the safe three bank money bands, each marked "$2,000" in "TWENTIES." One stack of what appeared to be twenty dollar bills was found in the safe wrapped in one of these money bands.

On cross-examination, Sergeant Bullen testified that, while the entire amount was not an extremely large quantity of cocaine, all the crack rocks combined might yield enough individual pieces for ten to fourteen uses. Thus, for a frequent user, according to Sergeant Bullen, this amount of cocaine might be a day or two supply. He further testified that there were no baggies or scales found in the house, items normally found when cocaine is intended to be sold. Sergeant Bullen also testified that the mesh filters found in the defendant's bedroom were consistent with use, not sale or distribution, of crack cocaine.

On redirect examination, Sergeant Bullen testified that a "bunch" of filters in a container with more steel wool was found in the defendant's bedroom. He

also testified that smaller amounts of crack cocaine are not sold by weight, but rather by size, such as $20 and $40 rocks. Accordingly, it was no surprise to him that no scales were found. Also, since rocks are sold in loose form and are broken off from "cookies," it was not surprising to Sergeant Bullen that there were no baggies found, either. Sergeant Bullen further testified that he had made arrests for distribution of cocaine in sizes equal to and smaller than the amounts of cocaine in the instant matter. He further testified that, in an undercover capacity, he had sold fake cocaine in amounts smaller than the amounts in this case.

Given that, at the time the search warrant was executed, there were five drug users in the defendant's house (i.e., the defendant, Tombow, Freeman, Miley, and Daugherty), along with several pieces of crack cocaine, a razor blade, and over $3,000 in cash found in a safe, and Freeman's statement that Daugherty ran out of the back of the house with cut crack cocaine that had been on the living room coffee table, the jury could have reasonably concluded that the defendant had the intent to distribute crack cocaine.

After a thorough review of the record, we find that the evidence supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of possession with intent to distribute cocaine. The trial court did not err in denying the motion for postverdict judgment of acquittal.

These assignments of error are without merit.

ASSIGNMENTS OF ERROR NOS. 3 AND 4

In her third and fourth assignments of error, the defendant argues, respectively, that the sentence imposed is excessive, and the trial court erred in denying the motions to reconsider sentence. Specifically, the defendant contends the trial court failed to give appropriate weight to mitigating factors, namely that she is a first-time felony offender.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. Code Crim. P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, her prior criminal record, the seriousness of the offense, the likelihood that she will commit another crime, and her potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981).

In the instant matter, the trial court imposed a twelve-year sentence at hard labor, with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence. The trial court noted the defendant was forty-eight years old and that it had taken into consideration the La. Code Crim. P. art. 894.1 guidelines, including whether there was an undue risk that during the period of probation or a suspended sentence, the defendant would commit another crime; whether the defendant was in need of correctional treatment or custodial environment that could be provided most effectively by commitment to an institution; and whether a lesser sentence would deprecate the seriousness of the crime.

The maximum sentence pursuant to La. R.S. 40:967(B)(4)(b) is thirty years at hard labor with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence.[2] Given the trial court's

[2] Under La. R.S. 40:967(B)(4)(b), a defendant may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars.

consideration of the circumstances and the fact that the defendant was sentenced to less than half of the maximum sentence, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. Accordingly, the trial court did not err in denying the motion to reconsider sentence.

These assignments of error are without merit.

CONCLUSION

For these reasons, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.