NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0297

STATE OF LOUISIANA

VERSUS

GLEN DESLATTE

Judgment Rendered: JUN 10 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 436434

THE HONORABLE AUGUST J. HAND, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

Defendant, Glen Deslatte, was charged by bill of information with illegal possession of stolen things having a value over $500.00, a violation of La. R.S. 14:69.[1] He pled not guilty and, following a trial by jury, was found guilty as charged. The trial court sentenced him to ten years at hard labor. Thereafter, the state filed a habitual offender bill of information seeking to enhance defendant's sentence pursuant to La. R.S. 15:529.1.[2] Following a hearing, the trial court adjudicated defendant to be a fourth-felony habitual offender, vacated the original sentence, and sentenced him to thirty-eight years at hard labor. Defendant now appeals, arguing in five assignments of error that the evidence was insufficient to support his conviction and that the trial court imposed an excessive sentence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

ASSIGNMENTS OF ERROR

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

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

3. The evidence is insufficient to support the verdict.

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[1] All references to statutory provisions in this opinion are made to those provisions as they existed as of the date of the instant offense (June 11, 2007). We further note that, although the state charged defendant with illegal possession of stolen things with a value of "over" $500.00, at the time of the offense, the actual applicable classification of the offense under La. R.S. 14:69B(1) was for stolen things having a value of "five hundred dollars or more."

[2] The predicate offenses delineated in the habitual offender bill of information are: (1) a December 3, 1987 conviction for simple burglary of an inhabited dwelling under docket number 163580, 22nd Judicial District Court, St. Tammany Parish, Louisiana; (2) a November 21, 1990 conviction for possession of stolen things (having a value over $500.00) under docket number 191660, 22nd Judicial District Court, St. Tammany Parish Louisiana; (3) a September 4, 1991 conviction for simple escape under docket number 351-650, Orleans Parish Criminal District Court, Louisiana; (4) a June 15, 1992 conviction for simple burglary of an inhabited dwelling under docket number 90-3567, 24th Judicial District Court, Jefferson Parish, Louisiana; and (5) a November 29, 1994 conviction for burglary under case number 93-054, Circuit Court of Washington County, Alabama.

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

5. The sentence imposed is unconstitutionally excessive.

FACTS

In January 2007, a fire destroyed the home of Donna D'Antoni Pratt and her husband, Jack Pratt, in Lacombe, Louisiana. Following the fire, they moved in with Mrs. Pratt's mother, who lived several miles away. However, certain items of equipment owned by the Pratts and used in their sheetrocking business, as well as lawn equipment, remained covered with a tarp on the property of their former home.

Mr. Pratt was in ill health and passed away on June 4, 2007. Several days later, one of Mrs. Pratt's former neighbors, Debra Greer, informed her that she had observed a man removing items from the Pratt property. Shortly thereafter, Mrs. Pratt learned that certain items of her property were seen at a nearby house.

On June 11, 2007, Mrs. Pratt and Mrs. Greer proceeded to the house in question, which was the home of defendant's brother, Joe Deslatte. While they were questioning Mr. Deslatte, defendant arrived. Mrs. Greer recognized him as the person she had seen removing property from the Pratt's former residence. Upon being confronted by the ladies, defendant denied having any knowledge of property belonging to the Pratts. However, once a sheriff's deputy arrived in response to Mrs. Pratt's call, defendant admitted having several items of property belonging to the Pratts. He showed the deputy where a generator, an air compressor, a pressure washer, and two string trimmers, all of which were

identified by the victim as her property, were located. The deputy arrested defendant for the instant offense.

SUFFICIENCY OF THE EVIDENCE

(Assignments of Error One, Two and Three)

In these assignments of error, defendant argues the trial court erred in denying his motions for new trial and for a post-verdict judgment of acquittal because the evidence was insufficient to support his conviction. Specifically, he contends there was no evidence to establish the essential element that the aggregate value of the stolen property was over $500.00.

Initially, we note that the denial of a defendant's motion for a new trial under La. Code Crim. P. art. 851(1) challenging the sufficiency of the evidence is not subject to review on appeal. See **State v. Guillory**, 2010-1231 (La. 10/8/10), 45 So.3d. 612, 614-15 (per curiam); **State v. Hampton**, 98-0331 (La. 4/23/99), 750 So.2d 867, 880, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). However, we will consider the sufficiency of the evidence in reviewing the denial of defendant's motion for post-verdict judgment of acquittal.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, 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 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; **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. 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, Louisiana Revised Statute 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Riley**, 91-2132(R) (La. App. 1st Cir. 5/20/94), 637 So.2d 758, 762.

Because the crime of being in illegal possession of stolen things is a graded offense, with the value of the stolen item(s) determining the severity of possible punishment, the state is required to prove the value of the stolen items possessed by the defendant. If the defendant is in possession of multiple items of stolen property, the grade of the offense is determined by the aggregate value of the items illegally possessed. La. R.S. 14:69B(4); **State v. Peoples**, 383 So.2d 1006, 1008 (La. 1980).

In arguing that the state's evidence was insufficient to establish the stolen property had a value over $500.00, defendant notes the absence of testimony as to the purchase price of the pressure washer or string trimmers. He notes further that, although Mrs. Pratt testified as to the purchase prices of the generator and air compressor, she did not testify as to their value at the time of the offense. Citing **Peoples**, defendant asserts that testimony as to the original purchase price of an item is insufficient to prove its value. Defendant also notes there was testimony that the generator sustained some heat damage as a result of the fire that occurred at the Pratt residence, and argues there was no evidence of the operational status of the remaining items of property. Therefore, he maintains any value the jury could have placed on the stolen items was pure speculation.

In order to establish the value of the stolen property at trial, the state presented the testimony of the victim, Mrs. Pratt. She was unable to produce receipts for the stolen items because they were destroyed in the fire. However, Mrs. Pratt testified that the generator, a Coleman, was purchased new from Home Depot for the sum of between $1,000.00 and $1,200.00 sometime after Hurricane Katrina (which occurred in August 2005). Thus, at the time of the instant offense, it was less than two years old. With respect to the damage the generator sustained as a result of the fire, she testified that one wire was damaged and the plastic housing, including the gas tank area, on one side of the generator was partially melted. However, she stated that she had the wire repaired and the generator was still functional. In fact, she testified a friend started the generator for her after it was returned to her following the theft.

Mrs. Pratt further testified that the Sears Craftsman 5-horsepower, 25-gallon air compressor was purchased in used condition in late 2005 or early 2006, which would have been approximately eighteen months before the instant offense, for the sum of approximately $125.00 to $135.00. While the evidence indicates that there was a large amount of rust on the compressor at the time of the offense, Mrs. Pratt testified that it was rusted at the time of purchase.

There was no testimony presented as to the purchase prices of the pressure washer, which was acquired at approximately the same time as the air compressor, or of the string trimmers. However, the state introduced photographs of these items, which were taken at the time of their recovery from defendant. The photograph of the pressure washer established that it was a Craftsman 4.5-horsepower high-pressure washer.

The state also introduced photographs of the Craftsman air compressor, and the Coleman generator owned by Mrs. Pratt. Since the state introduced photographs of each of the stolen items, the jurors were able to observe the condition of the items for themselves. The state also introduced testimony from the arresting sheriff's deputy that he had reviewed two listings on craigslist.org for used generators of the same model as the victim's and that each had an asking price of $750.00, and two listings for used Craftsman 5-horsepower, 25-gallon air compressors that had asking prices of approximately $200.00. On appeal, defendant argues these listings are not evidence of the value of the stolen items herein, because there is no indication that the listed items were comparable to Mrs. Pratt's generator or air compressor in age, amount of use, or condition.

After a thorough review of the record, we conclude the evidence was sufficient to establish the stolen items had an aggregate value over $500.00. Although defendant relies on the holding in **Peoples** as authority for his argument to the contrary, that case is factually distinguishable from the present one. In **Peoples**, the defendant was convicted of receiving stolen property, consisting of several items of office equipment, with a value in excess of $500.00. The state's only evidence of value was testimony as to the original purchase price of the equipment -- ranging in age from two to seven years at the time of the crime -- and the replacement cost for similar new equipment. In finding the evidence insufficient to support the conviction, the Supreme Court specifically noted that the state failed to introduce photographs of the equipment, depriving the jury of an opportunity to assess its condition. Moreover, the defense introduced testimony

from an expert valuing the property at only $220.00 to $400.00. See **Peoples**, 383 So.2d at 1008.

In the present case, we agree with defendant's contention that the testimony regarding the craigslist.org listings did not establish the value of Mrs. Pratt's generator and air compressor, since there was no indication that the condition of the advertised items was comparable to those of Mrs. Pratt. However, the state also introduced testimony from Mrs. Pratt that the generator was purchased new for between $1,000.00 and $1,200.00, and the air compressor was purchased in used condition for between $125.00 and $135.00. Each of these purchases occurred less than two years before the instant offense. According to Mrs. Pratt, the pressure washer was acquired at approximately the same time. Further, unlike the situation in **Peoples**, the state did not rely exclusively on Mrs. Pratt's testimony to establish value, nor was there any testimony from a defense expert valuing the stolen items at less than $500.00. The state introduced photographs of each of the stolen items, which allowed the jury the opportunity to assess the condition and value of these items. Contrary to defendant's contention in brief, a photograph was included, not only of the undamaged side of the generator, but also of its damaged side. Thus, in making its determination of value, the jury was fully apprised of the nature and extent of the damage to the generator, as well as the condition of the other stolen items.

Defendant further argues there was no evidence of the operational status of the stolen items. To the contrary, Mrs. Pratt specifically testified that the generator was in working order. According to her, the reason she and her husband stopped using the stolen items approximately six months before the instant offense

was due to her husband's ill health, rather than because the equipment was not functional. Mrs. Pratt's testimony was uncontradicted.

Testimony as to the purchase price of stolen items, when combined with photographs of those items, has been held sufficient to establish the present value of the items. See **State v. Moses**, 2001-0909 (La. App. 4th Cir. 12/27/01), 806 So.2d 83, 89; **State v. Armstead**, 572 So.2d 762, 763 (La. App. 4th Cir. 1990).

Considering the totality of the evidence presented, we are convinced that any rational factfinder, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the aggregate value of the generator, air compressor, pressure washer, and string trimmers found to be in defendant's illegal possession was over $500.00. We cannot say that the jury's determination was irrational under the facts and circumstances presented to it. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a trier of fact's determination of guilt. See **Lofton**, 691 So.2d at 1368. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

For the above reasons, the trial court did not err in denying defendant's motions for post-verdict judgment of acquittal and for new trial.

These assignments of error are without merit.

EXCESSIVE SENTENCE

(Assignments of Error Four and Five)

In these assignments of error, defendant argues that the thirty-eight year sentence imposed was unconstitutionally excessive. Because he was forty years old at the time of sentencing, he contends that he essentially will be incarcerated for the remainder of his life.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Even when a sentence falls within statutory limits, it may be unconstitutionally 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 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. A trial court has wide, although not unbridled, discretion in imposing a sentence within statutory limits. **State v. Trahan**, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 708. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion. **Andrews**, 655 So.2d at 454.

For his conviction for illegal possession of stolen things having a value over $500.00, defendant ordinarily would have been exposed to a penalty of imprisonment, with or without hard labor, for not more than ten years and a fine of not more than $3,000.00, or both. See La. R.S. 14:69B(1). However, as a fourth-felony habitual offender, defendant was subject to a minimum sentence of twenty

years and a maximum sentence of life imprisonment at hard labor under La. R.S. 15:529.1(A)(1)(c)(i). Thus, the thirty-eight year sentence imposed complied with statutory requirements.

In imposing sentence upon defendant, the trial court noted that it had considered both the mitigating and aggravating factors delineated in La. Code Crim. P. art. 894.1. In particular, the trial court noted defendant's extensive criminal history, as well as the fact that he chose to "re-offend" after being released from a substantial period of incarceration. Given this history of repeated criminality, the trial court believed it was likely that defendant would "re-offend" upon his release in the future. Therefore, the trial court considered the risk to public safety as a factor in determining the length of the sentence imposed.

Defendant argues the thirty-eight year sentence was excessive because it was nearly four times the maximum sentence for the offense of illegal possession of stolen things. This argument ignores the fact that the purpose of the Habitual Offender Law is to subject a defendant to enhanced punishment on the basis of his status as a repeat offender in order to deter and punish recidivism by punishing more harshly those who commit the most crimes. See **State v. Shaw**, 2006-2467 (La. 11/27/07), 969 So.2d 1233, 1243-44; **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 677. Additionally, we note that the sentence imposed was near the lower range of possible sentences the trial court could have imposed upon defendant as a habitual offender.

Defendant further argues that the trial court should have considered as a mitigating factor the fact that all of the victim's property was recovered and returned to her. However, we note that the defendant did not voluntarily return the

property to the victim. In fact, defendant had an opportunity to do so when the victim initially confronted him, but instead chose to deny having any knowledge of her property. It was only after the arrival of the sheriff's deputy that defendant revealed the location of the stolen property.

Finally, defendant contends the sentence is excessive in view of the fact that the instant offense was a non-violent crime. In this respect, we note that, while the classification of a defendant's instant or prior offenses as non-violent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. See **Johnson**, 709 So.2d at 676.

Considering the reasons for sentencing given by the trial court, especially defendant's propensity for continued criminal conduct, we find no abuse of the trial court's sentencing discretion occurred in this case. The sentence imposed is not grossly disproportionate to the severity of the offense and does not shock the sense of justice. The sentence is not unconstitutionally excessive.

These assignments of error are without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.