NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1310

STATE OF LOUISIANA

VERSUS

JEROME T. MARTIN

Judgment Rendered: FEB 10 2012

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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 473,563

Honorable Raymond S. Childress, Judge Presiding

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KUHN, J CONCURS & ASSIGNS REASONS

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

The defendant, Jerome T. Martin, was charged by bill of information with one count of possession of methylenedioxymethamphetamine (MDMA) (count I), a violation of La. R.S. 40:966(C); one count of possession of cocaine (count II), a violation of La. R.S. 40:967(C); and one count of second-offense possession of marijuana (count III), a violation of La. R.S. 40:966(C).[1] He pled not guilty on all counts. Following a jury trial, on count I, he was found guilty of the responsive offense of attempted possession of MDMA, a violation of La. R.S. 14:27 & La. R.S. 40:966(C); and on counts II and III, he was found not guilty. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging, on count I, he was a fourth-or-subsequent-felony habitual offender.[2] Following a hearing, the defendant was adjudged a fourth-or-subsequent-felony habitual offender, and was sentenced to twenty years. He now appeals, challenging the sentence on count I as unconstitutionally excessive. For the following reasons, we vacate the conviction, habitual offender adjudication, and sentence on count I, and remand for further proceedings.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant argues the trial court abused its discretion by imposing a constitutionally excessive sentence. We note error under La. C.Cr.P. art. 920(2), which causes us to pretermit consideration of this assignment of error.

REVIEW FOR ERROR

Initially, we note our review for error is pursuant to La. C.Cr.P. art. 920, which provides the only matters to be considered on appeal are errors designated in

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[1] A second-offense possession of marijuana charge is actually a violation of La. R.S. 40:966(E)(2).

[2] Predicate #1 was set forth as the defendant's December 13, 2004 guilty plea, under Twenty-Second Judicial District Court Docket #382544, to attempted possession with intent to distribute marijuana. Predicate #2 was set forth as the defendant's February 20, 2001 guilty plea, under Twenty-Second Judicial District Court Docket #316548, to possession of cocaine. Predicate #3 was set forth as the defendant's October 13, 1997 guilty plea, under Twenty-Second Judicial District Court Docket #274836, to carnal knowledge of a juvenile. Predicate #4 was set forth as the defendant's October 30, 1995 guilty plea, under Twenty-Second Judicial District Court Docket #241877, to simple burglary.

the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920(2).

The punishment for count I was necessarily confinement at hard labor. La. R.S. 40:966(C)(3). The punishment for counts II and III included the possibility of confinement at hard labor. La. R.S. 40:967(C)(2); La. R.S. 40:966(E)(2). A case in which the punishment may be confinement at hard labor shall be tried before a jury of six persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. La. Const. art. I, § 17(A); La. C.Cr.P. art. 782(A). Offenses in which punishment is necessarily confinement at hard labor may be charged in the same indictment or information with offenses in which the punishment may be confinement at hard labor, provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. La. C.Cr.P. art. 493.2. The instant case was tried before a six-person jury.

Unanimous conviction by a twelve-person jury where La. Const. art. I, § 17(A) and La. C.Cr.P. art. 782(A) require a six-person jury constitutes a trial error subject to harmless error analysis. See State v. Jones, 05-0226 (La. 2/22/06), 922 So. 2d 508, 511. The denial in this case, however, of at least ten concurring votes of a twelve-person jury on count I was not harmless error.[3] See State v. Young, 06-0234 (La. App. 1st Cir. 9/15/06), 943 So. 2d 1118, 1123-24, writ denied, 06-2488 (La. 5/4/07), 956 So. 2d 606. Accordingly, the conviction, habitual offender adjudication, and

[3] Having determined that the jury trial error in regard to count I was a constitutional error, which was not harmless, we need not, and thus, do not, address whether or not the error was structural.

sentence on count I are vacated, and this matter is remanded for further proceedings.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT I VACATED; REMANDED FOR FURTHER PROCEEDINGS.

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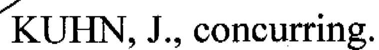

KUHN, J., concurring.

Although I fully agree with the majority's disposition of defendant's appeal, I write separately to point out that in light of the vacating of defendant's sentence on Count I, on re-trial, he may be convicted of the offense and not merely the attempted offense. As such, he is now exposed to the imposition of a potentially longer sentence.