NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1073

STATE OF LOUISIANA

VERSUS

KAREN L. WILCOX

Judgment Rendered: December 23, 2009

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 432880, Division "D"

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

The defendant, Karen L. Wilcox, was charged by bill of information with distribution of cocaine, a violation of LSA-R.S. 40:967A(1), possession of hydrocodone, a violation of LSA-R.S. 40:968C, and two counts of possession of a legend drug without a prescription, a violation of LSA-R.S. 40:1238.1.[1] The defendant pleaded not guilty. After a trial on the merits, a jury found her guilty as charged on all counts. The trial court sentenced the defendant on count one to twenty years at hard labor, the first two years of which were to be served without benefit of parole, probation, or suspension of sentence, and five years at hard labor on each of the remaining counts. The defendant was subsequently adjudicated a second-felony habitual offender. The trial court vacated the defendant's twenty-year sentence as to count 1 and re-sentenced her to thirty years at hard labor under the Habitual Offender Statute, LSA-R.S. 15:529.1 Defendant appeals, designating three assignments of error. Finding no error, we affirm the convictions, habitual offender adjudication, and sentences.

FACTS

On March 24, 2007 Detective Jeremy Church, a narcotics detective in the St. Tammany Parish Sheriff's Department, acting in his capacity as an undercover operative, met with the defendant. A confidential informant set up the meeting, which occurred in the parking lot of a gas station. Church wore a device throughout the operation that transmitted a digital signal to a receiver monitored by other detectives who were hidden near the gas station.

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[1] "Legend drug" means any drug or drug product bearing on the label of the manufacturer or distributor, as required by the Federal Food and Drug Administration, the statement "Caution: Federal law prohibits dispensing without prescription." La. R.S. 40:1237(3). The specific legend drugs the defendant was convicted of possessing are Soma (carisoprodol) and Zoloft (sertraline).

Those detectives were able to hear and record Church's interaction with the defendant.

After Church parked his truck in the gas station parking lot, the defendant pulled her truck next to his. Church then got out of his truck and into the front-passenger seat of the defendant's truck. After a couple of minutes of idle conversation, Church asked the defendant if she had "the stuff." The defendant then pulled two plastic baggies from her bra, one containing "powder" cocaine and the other "crack" cocaine. The defendant stated that there was at least "a quarter" in each, and told Church it would cost $600 for both baggies. Church agreed to pay $600 for the drugs, pulled out the money in denominations of $100 bills and $20 bills, and began counting out $600.

Church and the other detectives involved in this undercover operation had previously agreed that the "money count" would be Church's cue to the detectives listening to the receiver to arrest the defendant. About the time that Church finished counting the money, the officers tasked with making the arrest surrounded the defendant's truck. Church never handed the money to the defendant, but left it on the front-passenger seat of the defendant's truck when he was pulled out by the officers making the arrest.[2] Neither the drugs nor the money were removed from the truck during the arrest.

Once the defendant was removed from her truck and placed under arrest, Sergeant Brad Rummel and Detective Fred Ohler searched the defendant's truck. In plain view, they found the two plastic baggies containing cocaine on the front-passenger seat and a pill bottle containing various prescription medications on the driver's seat. The defendant's name

[2] Church remained undercover throughout the arrest. He was handcuffed and "taken into custody."

was displayed on the pill bottle, as was the fact that it had originally been filled by a pharmacy pursuant to a prescription for a generic variation of Zoloft.

The plastic baggies containing cocaine and the various pills found in the pill bottle were sent to the Sheriff's Department Crime Lab for analysis. Sergeant Harry O'Neal tested the substances and determined them to be cocaine, hydrocodone, Soma (carisoprodol), and Zoloft (sertraline), the substances the defendant was charged with distributing and possessing.

MOTION TO SUPPRESS EVIDENCE

In her first assignment of error, the defendant contends that the trial court erred in denying her motion to suppress the contents of the pill bottle seized pursuant to a search of her truck incident to her arrest.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at a trial on the merits on the ground that it was unconstitutionally obtained. LSA-C.Cr.P. art. 703(A). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908, p. 4 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. **State v. Long**, 2003-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may

consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

Relying on the recent United States Supreme Court opinion in **Arizona v. Gant**, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the defendant argues that the search incident to arrest was unlawful because she was completely outside of the vehicle and surrounded by a "takedown team" when the search occurred. Therefore, she contends, the area inside the truck was not within her immediate control, and there was no real possibility she could have reached inside the vehicle to retrieve the pill bottle. Thus, she urges, the warrantless seizure of the pill bottle was unreasonable.

Prior to **Gant**, the law provided that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." **New York v. Belton**, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) (footnotes omitted). The Supreme Court in **Gant** expressed concern that **Belton** was being generally applied far beyond the underlying justifications for warrantless vehicle searches incident to the arrest of a recent occupant, *i.e.,* officer safety and preservation of evidence. It observed that **Belton** "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." **Gant**, 129 S.Ct. at 1718. Wanting to restrict such searches, the Court in **Gant** re-defined the lawful parameters of such searches, holding that the search-incident-to-lawful-arrest exception to the warrant requirement of the Fourth Amendment is applicable only when a defendant is unsecured and within reaching distance of the passenger

compartment at the time of the search. **Gant**, 129 S. Ct. at 1723. Based on this law, the defendant argues that the search of her truck was unlawful.

However, the defendant fails to acknowledge that the Supreme Court further recognized in **Gant** "that circumstances unique to the vehicle context [still] justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Id. at 1719 (internal citations omitted). Specifically, the Court emphasized that, based on the factual circumstances of the case, "the offense of arrest will [continue to] supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." Id.

Here, the defendant was arrested after she displayed and offered to sell cocaine to Church, the undercover officer. In accordance with **Gant**, the police had a reasonable belief that supported the search of the vehicle for evidence pertaining to the distribution of cocaine, the crime which had just occurred in Church's presence and within the audible presence of multiple other detectives. The cocaine that the defendant intended to sell to Church was in plain view on the front-passenger seat, where Church left it when he was pulled out of the truck by the arresting officers. Further, the officers could have reasonably believed that the pill bottle, also in plain view on the driver's seat, contained further evidence relevant to the offense of arrest.

The officers were within the scope of the automobile exception when they initiated the warrantless entry into the defendant's truck subsequent to her arrest. See id. at 1721 ("If there is probable cause to believe a vehicle contains evidence of criminal activity, . . . a [warrantless] search of any area of the vehicle in which the evidence might be found[ ] [is authorized]."); **United States v. Ross**, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982) (stating the automobile exception permits a search that "is no

broader and no narrower" than that which could be authorized pursuant to a warrant). Therefore, the trial court properly denied the motion to suppress.

The defendant further argues, without citation to authority, that the evidence was purposely left inside the truck by Church, and that "the purposeful leaving of evidence of the crime inside of a vehicle was not contemplated as a good reason to allow a warrantless search." The defendant fails to articulate how the fact that Church left the cocaine in the truck once he and the defendant were taken into custody led to the search that resulted in the seizure of the evidence. On the contrary, her arrest and the subsequent search incident thereto resulted from the defendant's delivery of the cocaine to Church, not from his leaving it on the seat of the truck after the decision to arrest was made. The officers would have been justified in searching the truck for additional evidence of the crime for which the defendant was arrested whether or not the specific baggies handed to Church by the defendant had remained in the truck subsequent to her arrest. We hold that the trial court acted within its discretion in denying the motion to suppress. This assignment of error lacks merit.

SUFFICIENCY OF THE EVIDENCE

In her second assignment of error, the defendant challenges the sufficiency of the evidence to support her conviction for possession of Zoloft without a valid prescription.[3] See LSA-R.S. 40:1238.1. She contends that the fact that the pills were found in a prescription bottle with her name on it indicating that generic Zoloft had been prescribed for her shows "that it was more likely than not that she did have a valid prescription for Zoloft ... ."

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the

[3] Defendant cites no authority to support this issue on appeal.

United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting Code of Criminal Procedure Article 821, is whether, 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 beyond a reasonable doubt. LSA-C.Cr.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 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. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where 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. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). 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, p. 6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is

another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statutes 40:1238.1(A) states:

> A. It shall be unlawful for any person to sell, deliver, or possess any legend drug except upon the order or prescription of a physician or licensed health care practitioner as defined in R.S. 40:961(31). This Section shall not apply to sale, delivery, or possession by drug wholesalers or drug manufacturers, or their agents or employees, or to any practitioner acting within the scope of his license, or to a common or contract carrier or warehouseman, or any employee thereof, whose possession of any legend drug is in the usual course of business or employment.

The defendant does not contest her possession of Zoloft. Rather, she argues that the State failed to prove that she did not have a valid prescription for it. However, pursuant to LSA-R.S. 40:990(A), the *defendant* bears the burden of proving that she possessed otherwise illegal drugs pursuant to a valid prescription. **State v. Lewis**, 427 So.2d 835, 839-40 (La. 1983) (on rehearing); **State v. Ducre,** 604 So.2d 702, 708-09 (La. App. 1st Cir. 1992). Louisiana Revised Statutes 40:990(A) reads as follows:

> It shall not be necessary for the state to negate any exemption or exception set forth in this part in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under this part, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

See also **State v. Beridon**, 449 So.2d 2, 7 (La. App. 1st Cir.), writ denied, 452 So.2d 178 (La. 1984). Thus, the State is not required to prove the absence of a prescription. Rather, the defendant had the burden to rebut the State's charges by asserting an affirmative defense. See **State v. Rodriguez**, 554 So.2d 269, 270 (La. App. 3d Cir. 1989), writ granted in part, denied in part on other grounds, 558 So.2d 595 (La. 1990) (burden of showing the

controlled dangerous substance was possessed pursuant to valid prescription was on defendant as an affirmative defense to the crime of possession).[4]

The evidence revealed that one prescription bottle containing Zoloft, Soma, and hydrocodone was found on the driver's seat of the defendant's truck immediately after she was removed from that seat by the police. The information on the pill bottle was worn, but officers could read a label claiming that it was originally filled with the generic version of Zoloft, for the defendant, in October of 2006, which was four or five months prior to the defendant's arrest. Sergeant Rummel testified that such a bottle is a common carrying container for people who are arrested for prescription drug use. Although the label on the bottle indicated that it originally had been filled for the defendant with a generic version of Zoloft, there were several types of drugs in the bottle, and the report from the Sheriff's Department Crime Lab indicates that the tablets determined to be Zoloft were marked "ZOLOFT/100 mg," indicating that the pills were not a generic variation. The defendant offered no other evidence to suggest that the Zoloft in her possession on the day of arrest was possessed lawfully.[5] Rummel testified that he took no action to determine whether the defendant had a valid prescription for Zoloft at the time of her arrest because the defendant never indicated that she had a valid prescription for any of the pills that were seized on that day.

A reviewing court is not called upon to decide whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). We are constitutionally precluded from acting as a

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[4] Although the bill of information does include the language "without a valid prescription," the Code authorizes the Court to disregard surplusage in the bill. LSA-C.Cr.P. art. 486; **State v. Wagner**, 229 La. 223, 228, 85 So.2d 272, 274 (1956); **State v. Baker**, 28,152, p. 6 (La. App. 2d Cir. 5/8/96), 674 So.2d 1108, 1112, writ denied, 96-1909 (La. 12/6/96), 684 So.2d 925.

[5] The defendant did not testify.

"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. The fact that the record may contain evidence which conflicts with the trier of fact's verdict does not render the evidence accepted by the trier of fact insufficient. See **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460; **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). The jury obviously rejected the defendant's hypothesis of innocence based upon the contention that the Zoloft was obtained pursuant to a valid prescription. We find such rejection reasonable.

After a thorough review of the record, we are convinced that, viewing the evidence in the light most favorable to the prosecution, 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 of Zoloft, a legend drug. The defendant's second assignment of error is without merit.

JURY CHARGE

In her third assignment of error, the defendant argues that the trial court gave "an erroneous and misleading jury charge" regarding possession of hydrocodone because the charge failed to inform the jury that it was not illegal to possess hydrocodone with a valid prescription. The record reveals no objection to the court's charge.

In order to preserve an issue for appeal, a party must make a contemporaneous objection. Code of Criminal Procedure Article 841(A) provides, in part, that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." Louisiana courts have consistently recognized this as the "contemporaneous objection rule,"

noting its dual purposes: "(1) to put the trial judge on notice of the alleged irregularity so that he may cure the problem, and (2) to prevent a defendant from gambling for a favorable verdict and then resorting to appeal on errors that might easily have been corrected by objection." **State v. Potter**, 591 So.2d 1166, 1169 n.6 (La. 1991). This rule applies to a claim that a jury charge was improper. **State v. Cooper**, 2005-2070, p. 8 (La. App. 1st Cir. 5/5/06), 935 So.2d 194, 199, writ denied, 2006-1314 (La. 11/22/06), 942 So.2d 554; LSA-C.Cr.P. art. 801C ("A party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error.") Accordingly, the defendant has not preserved this issue for review. Therefore, this assignment of error lacks merit.[6]

CONCLUSION

Having found no merit in the defendant's assignments of error, the convictions, habitual offender adjudication, and sentences are affirmed.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

[6] Moreover, as discussed regarding the defendant's second assignment of error, the existence of a valid prescription is not an element of the offense of possession. Rather, it is an affirmative defense. By failing to request a charge on this affirmative defense, the defendant waived it. See **State v. St. Romain,** 505 So.2d 223, 227 (La. App. 3d Cir.), writ denied, 508 So.2d 86 (La. 1987) ("Having failed to properly request this [affirmative defense] jury instruction at the time of trial, the defendant waived his right to this instruction.").