NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1434

STATE OF LOUISIANA

VERSUS

KAREN M. WHITESIDE

Judgment Rendered: February 10, 2012

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 497,613

Honorable Allison H. Penzato, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Karen M. Whiteside, was charged by felony bill of information with one count of issuing worthless checks, a violation of La. R.S. 14:71. She pled not guilty, but following a jury trial, she was found guilty as charged. Thereafter, the State filed a habitual offender bill of information against her, alleging she was a second-felony habitual offender.[1] The defendant admitted the allegations of the habitual offender bill and was adjudged a second-felony habitual offender. She was sentenced to five years at hard labor, without benefit of probation or suspension of sentence. She moved for reconsideration of sentence, but the motion was denied. She now appeals, contending: (1) the evidence was insufficient to support the conviction; and (2) the sentence imposed by the court was illegal and excessive. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

Raul Perez owned the El Portal restaurant in Covington, Louisiana. He knew the defendant as a customer of the business. On May 1, 2010, he gave the defendant $300.00 in exchange for her personal check #3336 in the amount of $300.00. On May 2, 2010, he gave the defendant another $300.00 in exchange for her personal check #3338 in the amount of $300.00. Perez deposited the checks at his bank, but they were returned due to insufficient funds in the defendant's account. On May 24, 2010, Perez sent a certified mail letter to the defendant at the address listed on her personal checks, advising her that her checks had been returned for insufficient funds, and in order to avoid a violation of La. R.S. 14:71, she must make restitution within ten days. The letter was subsequently returned to Perez by the post office as unclaimed. On July 7, 2010, Perez executed an affidavit before Justice of the Peace Connie G. Moore, indicating the defendant had committed the offense of issuing

[1] The predicate offense was set forth as the defendant's October 27, 1998 guilty plea to "felony theft," under 24th Judicial District Court Docket #984482.

worthless checks and that a ten-day notification letter had been sent to the defendant by certified mail. As of the time of Perez's testimony at trial, March 22, 2011, the defendant had failed to make restitution to him for the checks.

Kellie Jenkins managed deposit services for the defendant's bank, Central Progressive Bank (CPB). According to Ms. Jenkins, the defendant was the only person who had access to her checking account at CPB. In April and May of 2010, the defendant had the same address on file with CPB as she had listed on her checks. As of April 11, 2010, she had made thirty-two deposits and credits to her personal checking account, totaling $23,434.91. Beginning on April 21, 2010, however, the account was overdrawn, and CPB began mailing the defendant notices of insufficient funds on April 22, 2010. On May 1, 2010, and May 2, 2010, the balance in the defendant's account at CPB was negative $1,656.76. On May 4, 2010, when check #3336 was deposited for payment, the balance in the defendant's account at CPB was negative $2,181.81. On May 11, 2010, when check #3338 was deposited for payment, the balance in the account was negative $2,826.50.

Sam Gebbia, the director of the Worthless Check Division for the St. Tammany Parish District Attorney's office, also testified at trial. On August 11, 2010, following receipt of Perez's affidavit executed before the Justice of the Peace, Gebbia sent notice by regular mail to the address listed on the defendant's checks. The notice indicated that the two checks issued to El Portal had been accepted as the basis of a criminal complaint against the defendant for issuing worthless checks. The notice also informed the defendant that if she did not pay the checks, plus NSF charges and district attorney fees within ten days, a warrant would be issued for her arrest. Gebbia did not receive any response to the letter, and on September 2, 2010, an arrest warrant was issued for the defendant.

In closing argument, the defense argued the State had failed to prove the defendant's intent to defraud, because she could have made a mistake concerning the amount of money in her account at the time she issued the checks to El Portal.

SUFFICIENCY OF THE EVIDENCE

The defendant maintains that the evidence was insufficient to support the conviction, because the State failed to prove her intent to defraud beyond a reasonable doubt.[2] We find no merit to this assignment of error.

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. See **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

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.

To convict a defendant for issuance of worthless checks in excess of $500, the State is required to prove beyond a reasonable doubt that: (1) the defendant issued, in

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[2] The defendant references La. C.E. arts. 302, 304, 305 and 306 in her argument. Those articles, however, apply only in civil cases. La. C.E. art. 301.

exchange for anything of value, whether the exchange is contemporaneous or not; (2) a check, draft, or order for the payment of money upon any bank or other depository; (3) knowing at the time of the issuing that the account on which the check was drawn has insufficient funds, and the defendant has insufficient credit with the financial institution on which the check is drawn to have the instrument paid in full on presentment; and (4) the instrument was issued with intent to defraud. La. R.S. 14:71; **State v. Washington**, 29,784 (La. App. 2d Cir. 9/26/97), 700 So.2d 1068, 1072. The intent to defraud must exist at the time the check is issued, i.e., coincident with the first delivery of the instrument in complete form. See **State v. Deluzain**, 2009-1893 (La. App. 1st Cir. 5/7/10), 38 So.3d 1054, 1057, writ denied, 2010-1318 (La. 1/14/11), 52 So.3d 898.

Louisiana Revised Statute 14:71(A)(2) creates a statutory rebuttable and permissible presumption that the issuer intended to defraud when the offender fails to pay the amount of the worthless check within ten days of the receipt of notification by certified mail of nonpayment of the check, sent to the address shown on the check or the address shown in the records of the bank on which the check was drawn. **Washington**, 700 So.2d at 1073.

In her brief, the defendant argues that **State v. Randel**, 573 So.2d 616 (La. App. 2d Cir. 1991), holds "when circumstantial evidence consisting of inferential reasoning alone is the only evidence offered by the State to prove the element of intent, this inference must be reasonable and the possibility of lack of intent must be eliminated." Initially, we note **Randel** does not contain the quoted holding. Further, the decision is inapposite. **Randel** involved review of a conviction for attempted purse snatching. **Randel**, 573 So.2d at 617. Randel reached into the front pocket of the victim's blouse, grabbed her eyeglasses case (which contained $40 or $50), and ran down the street. **Id.** On appeal, the court found the crime of attempted purse snatching required the specific intent to commit theft of anything of value contained

within a purse or wallet, and the State had failed to present any evidence Randel knew or could have known the contents of the victim's pocket. **Randel**, 573 So.2d at 618-19. The instant case does not involve attempted purse snatching.

A thorough review of the record convinces us that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of the offense of issuing worthless checks and the defendant's identity as the perpetrator of that offense. The verdict returned in this case indicates the jury rejected the defendant's claim of mistake, rather than fraudulent intent, at the time she issued the checks to El Portal. When a case involves circumstantial evidence and the jury 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). No such hypothesis exists in the instant case. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

EXCESSIVE SENTENCE

Next, the defendant argues the sentence[3] imposed was excessive and a violation of her constitutional rights, because without giving adequate reasons, the

[3] The defendant claims she was sentenced "to five years concurrent on each count." The record, however, indicates the defendant was charged, convicted, and sentenced on only one count of issuing worthless checks.

trial court sentenced her to five years when she was still eligible for a probated sentence. We find no merit to this assignment of error.

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. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Whoever commits the crime of issuing worthless checks, when the amount of the check or checks is five hundred dollars or more, shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both. La. R.S. 14:71(C) (prior to amendment by 2010 La. Acts, No. 585, § 1).

Any person who, after having been convicted within this state of a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows: if the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than her natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction. La. R.S. 15:529.1(A)(1)(a) (prior to amendment by 2010 La. Acts, No. 911, § 1 & 2010 La. Acts, No. 973, § 2). The

defendant was sentenced as a second-felony habitual offender to five years at hard labor without benefit of probation or suspension of sentence.

In imposing sentence, the court indicated it had considered aggravating and mitigating circumstances under La. Code Crim. P. art. 894.1, and a lesser sentence would deprecate the seriousness of the defendant's crime. We find the sentence imposed was not grossly disproportionate to the severity of the offense and, thus, was not unconstitutionally excessive. Further, the defendant's claim that she was "eligible for a probated sentence" is incorrect. See La. R.S. 15:529.1(G) (prior to amendment by 2010 La. Acts, No. 69, § 1) ("Any sentence imposed under the provisions of [La. R.S. 15:529.1] shall be without benefit of probation or suspension of sentence.").

REVIEW FOR ERROR

We note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in 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). See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

The trial court failed to order, as part of the sentence, restitution, plus a fifteen dollar per check service charge. See La. R.S. 14:71(G). Although the failure to comply with La. R.S. 14:71(G) is error under La. C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to comply with La. R.S. 14:71(G) was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **Price**, 952 So.2d at 123-25.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.