NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1933

STATE OF LOUISIANA

VERSUS

KENNETH WILLIAM McKINLEY

Judgment Rendered: MAY - 2 2008

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On Appeal from the Thirty-Second Judicial District Court
In and For the Parish of Terrebonne
State of Louisiana
Docket No. 464643

Honorable David Arceneaux, Judge Presiding

* * * * * *

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District Attorney
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State of Louisiana

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William McKinley

* * * * *

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

McDonald, J. concurs.

McCLENDON, J.

Kenneth McKinley, defendant, was charged by bill of information with one count of possession with intent to distribute cocaine, a violation of LSA-R.S. 40:967(A). Defendant initially entered a plea of guilty; however, following his **Boykin** examination, the trial court declined to accept defendant's guilty plea and reinstated a plea of not guilty. On the morning of trial, defendant made a motion to continue, which was denied by the trial court. Thereafter, defendant was tried before a jury, which returned a verdict of guilty. The trial court subsequently sentenced defendant to eight years at hard labor.

We affirm defendant's conviction and sentence.

FACTS

On January 31, 2006, Agents Neal Blades, Shane Fletcher, and Wes Hanlon, narcotics agents with the Terrebonne Parish Sheriff's Office, were conducting a "knock and talk" at the Holiday Motel on Highway 182 in Terrebonne Parish in response to complaints of illegal drug activity. The agents encountered Nina Butler in the first motel room they approached. Nina Butler had an outstanding warrant for a narcotics violation. The agents escorted Butler back to her room, where Butler agreed to assist the agents in their narcotics investigation.

In response to Agent Blades' inquiry as to Butler's supplier, Butler identified a black male named "Kenny," who would usually deliver the drugs, accompanied by his girlfriend. Agent Blades asked Butler for the phone number of this individual, which Butler provided. All three agents were in Butler's motel room at this time. Agent Blades then asked Butler to call Kenny and ask him to deliver $100.00 worth of crack cocaine. Butler made the call in Agent Blades' presence. Agent Blades could hear another

voice on the opposite end of the line, but did not have any equipment allowing him to monitor the entire conversation. Agent Blades heard Butler ask the person she called how long it would take. After ending the phone conversation, Butler reported to Agent Blades that Kenny told her he would be there in about fifteen minutes.

Approximately seventeen minutes later, there was a knock on Butler's motel room door. Butler asked who was knocking and a male voice on the other side of the door stated, "Kenny." Agent Hanlon opened the door, and Agent Blades walked through the door and identified himself as a law enforcement officer. Agent Fletcher, who was standing just behind Agent Blades, noticed that defendant was holding a white object in his right hand. According to Agent Blades, defendant stated, "Oh, shit, no." Agent Blades attempted to grab defendant and place him under arrest; however, a brief struggle between defendant and Agent Blades ensued. Agent Fletcher also joined in the struggle.

During this struggle, both Agents Blades and Fletcher noticed defendant make a throwing motion with his right hand away from them toward the middle of the parking lot; however, because they were attempting to subdue defendant, neither agent actually saw anything leave defendant's hand. Eventually, the agents were able to subdue defendant.

After defendant was placed in handcuffs, he was heard to make a threatening statement towards Butler. The agents also heard defendant attempt to get his girlfriend, Shantelle Parker, who had accompanied him to the motel, to "take the charge." The agents then searched defendant's person, the vehicle he exited, and the parking lot. After several minutes, Agent Fletcher recovered a piece of suspected crack cocaine from an area in

the parking lot approximately fifteen to twenty feet from where he observed defendant make a throwing motion with his hand during his earlier struggle.

According to Agent Fletcher, the crack cocaine appeared to have been rolled over by a vehicle and even had a line through it consistent with a tire tread. Because the lump of crack cocaine was smashed into the parking lot pavement, Agent Fletcher had to scrape it off with a knife before putting it into an evidence bag. Agent Fletcher noticed that at least two cars had driven through that area of the parking lot prior to recovery of the suspected crack cocaine. Agent Fletcher testified that he did not think it was possible the cocaine was in the parking lot before the agents arrived. Agent Blades agreed, stating that, "You just don't find discarded cocaine out in Terrebonne Parish that often."

Agent Blades seized a cellular phone that defendant identified as his.[1] The call history on the phone indicated that the last call made to defendant's cell phone originated from the Holiday Motel. Agent Blades also weighed the suspected crack cocaine recovered from the parking lot. The amount measured .6 grams. According to Agent Blades, this amount of crack cocaine was valued at approximately $100.00. Agent Blades admitted this amount of crack cocaine could be consistent with personal use, but in his experience, it was not an amount someone would purchase for a one-time use.

The Scientific Analysis Report (SAR) completed by the State Police Crime Lab confirmed the presence of cocaine in the substance recovered from the parking lot. However, the SAR indicated the crack cocaine had a weight of 2.32 grams. This discrepancy was explained at trial, when Captain Leroy Lirette, the evidence custodian for the Terrebonne Parish Sheriff's

[1] At trial, Shantelle Parker, defendant's girlfriend, testified the seized cellular phone belonged to her.

Office, testified that the original cellophane evidence bag, the crack cocaine, and a brown manila envelope used for packaging the evidence weighed a total of 2.32 grams.

Shantelle Parker testified on behalf of defendant. According to Parker, on January 31, 2006, she and defendant were riding in her Nissan Maxima when Butler called Parker's cell phone in an effort to locate defendant. Both Parker and defendant were familiar with Butler because they had provided transportation to Butler on previous occasions. After she handed her phone to defendant, she heard defendant ask Butler if she had gas money. After the conversation with Butler ended, Parker drove to the Holiday Motel. Parker testified that she and defendant were going to pick up Butler and take her to an apartment complex where Butler's sister lived.

Parker testified that when she and defendant arrived at the motel, defendant got out of her car and knocked on Butler's door. According to Parker, the door of the motel room "flew open" and "three men" tackled defendant to the ground. Parker explained she was not aware the men were police officers because they were not wearing uniforms. Parker denied defendant struggled with the agents and claimed she never saw defendant throw anything during the struggle. Parker further denied that she and defendant had gone to the motel to deliver crack cocaine, or that defendant engaged in narcotics dealing.

Defendant testified at trial. Defendant explained that on January 31, 2006, he received a call from Butler seeking transportation to his own sister Rosemary's house. According to defendant, Butler had obtained transportation from him in the past. Defendant characterized Butler as a "prostitute" and stated that he confirmed whether she had gas money to cover the transportation.

Defendant testified that he and Parker got out of her vehicle at the motel. Defendant stated he knocked on the door and heard Butler ask who was there. Defendant stated he responded, "Kenny," and then the door opened and three men pushed him down to the ground. Defendant denied he struggled with the agents, or that he had anything in his hand. Defendant denied that he was at the motel to deliver crack cocaine.

According to defendant, after he was handcuffed, the agents spent thirty minutes looking through the parking lot before they recovered something. Defendant also denied he asked Parker to "take the charge" for him. Defendant claimed that no vehicles traveled through the parking lot after he was handcuffed, but then admitted he was inside the motel room and could not see the parking lot.

MOTION TO CONTINUE

In his first assignment of error, defendant contends that the trial court erred in denying his motion for a continuance. On the morning of the trial, defendant obtained permission to address the court because he indicated he had a "conflict" with his attorney. The conflict centered on Nina Butler, who was listed as a witness for the State; however, neither the State nor the defense could affect service on Butler. Defendant explained to the trial court that he did not want to proceed to trial without Butler because he felt her testimony would be favorable to him. Defendant also stated that he did not understand how the trial could proceed without Butler since she was the one who supposedly made the phone call contacting him.

After listening to defendant's concerns and argument by defense counsel and the prosecutor, the trial court concluded that Butler was avoiding being served. The trial court questioned defendant as to whether he knew Butler's whereabouts, but defendant was unable to provide any

information. The trial court stated that because no one knew where Butler was and there was no reasonable likelihood of locating her, it could not continue the trial because of her absence. The trial court also stated that if information of Butler's whereabouts became known during trial, Butler would be brought to court to testify. Finally, the trial court stated that given the circumstances of the case, it was uncertain whether Butler's testimony would be helpful; rather, it appeared her testimony would actually harm defendant.

Defense counsel stated that she felt it was advantageous to defendant if the State did not call Butler as a witness on the basis that Butler's credibility would be at issue. Defense counsel explained that Butler had a prior conviction and pending drug charges, which might cause the jury to conclude defendant was involved in some type of drug transaction. Finally, when asked by the trial court how Butler's testimony might aid his defense, defendant responded he did not know.

Initially, we note that defendant's oral motion for a continuance presents nothing for review on appeal. **State v. Penny**, 486 So.2d 879, 887 (La.App. 1 Cir.), writ denied, 489 So.2d 245 (La. 1986). Assuming arguendo that he properly presented his contention, we conclude that the court properly denied his motion.

Louisiana Code of Criminal Procedure article 709 provides:

> A motion for a continuance based upon the absence of a witness must state:
>
> (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;
>
> (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and

(3) Facts showing due diligence used in an effort to procure attendance of the witness.

Defendant failed to establish any facts and circumstances showing a probability that the witness would be available to testify at some later date. Under these circumstances, we find no abuse of discretion by the trial court in denying the motion for a continuance. See also **State v. Washington**, 407 So.2d 1138, 1147-48 (La. 1981); **State v. Gordy**, 380 So.2d 1347, 1353-54 (La. 1980).

This assignment lacks merit.

STATEMENTS OF NINA BUTLER

In his second assignment of error, defendant argues the trial court erred in overruling his objection to what Butler told the police officers. Defendant contends that the content of Butler's statements, i.e., that her supplier was named Kenny; that Butler asked Kenny to deliver $100.00 worth of crack cocaine to her; that Kenny normally arrived with his girlfriend; and that Kenny would arrive in approximately fifteen minutes, was inadmissible hearsay.[2]

The prosecutor contended that these statements made by Butler to Agent Blades were not being offered to prove the truth of their content, but to show what the police officers did and why. The trial court overruled defendant's objection and ruled the statements were not hearsay under LSA-C.E. art. 801(D)(4).

[2] Hearsay evidence is defined as testimony in court, or written evidence, of a statement made out of court, when the statement is being offered as an assertion to show the truth of matters asserted therein. LSA-C.E. art. 801(C). One of the primary justifications for the exclusion of hearsay is that the adversary has no opportunity to cross-examine the absent declarant to test the accuracy and completeness of the testimony. The declarant is also not under oath at the time of the statement. **State v. Wille**, 559 So.2d 1321, 1329 (La. 1990).

Louisiana Code of Evidence article 801(D)(4) provides that a statement is not hearsay if:

> The statements are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events, and which are necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction.

Although it is possible that a police officer, in explaining his own actions, may refer to statements made to him by other persons, not to prove the truth of the out-of-court statement, but to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the investigating officer, the supreme court, in **State v. Broadway**, 96-2659, p. 8 (La. 10/19/99), 753 So.2d 801, 809, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000), discussed the limitations on the admission of such "explaining" testimony:

> Information about the course of a police investigation is not relevant to any essential elements of the charged crime, but such information may be useful to the prosecutor in "drawing the full picture" for the jury. However, the fact that an officer acted on information obtained during the investigation may not be used as an indirect method of bringing before the jury the substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule.

In the instant case, the content of Butler's statements to Agent Blades was nonassertive in that it was purportedly offered merely to show the basis for subduing and detaining defendant once defendant arrived at Butler's motel room door; however, it was assertive in that it implicated defendant as the "Kenny" that was her drug supplier that would be arriving in fifteen minutes to deliver $100 worth of cocaine. The primary purpose of Agent Blades' testimony about the information received from Butler was to place before the jury the fact that Butler's statements identified defendant as the

perpetrator. Because these out-of-court assertions were not given under oath nor subjected to cross-examination, they should have been excluded. The trial court erred in ruling them admissible under LSA-C.E. art. 801(D)(4).

However, the erroneous admission of such hearsay evidence does not require a reversal of defendant's conviction, because the error was harmless beyond a reasonable doubt. Reversal is mandated only when there is a reasonable possibility that the evidence might have contributed to the verdict. **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990).

The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination was fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. Factors to be considered by the reviewing court include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case. **State v. Wille**, 559 So.2d at 1332.

In the present case, we cannot say Butler's statements naming her drug supplier as "Kenny" is cumulative of any other evidence. However, the prosecution presented overwhelming evidence of defendant's guilt. First, the agents had initiated contact with Butler in order to execute an arrest warrant based on a narcotics violation. The motel where this incident occurred was a well-known location for narcotics activity based on the number of complaints and arrests involving the agents. Although defendant offered an innocent explanation for his arrival at Butler's motel room, i.e., to provide her with transportation, Butler had made no mention of anyone else due to arrive at her motel room during this time. Moreover, defendant's

actions once the agents opened the door and identified themselves clearly indicate his guilt. Defendant initially cursed, then made a throwing motion with his hand in order to discard the white object he was holding at the time, resisted the attempts by the agents to place him in handcuffs, made threatening statements toward Butler, and made multiple statements to his girlfriend urging her to "take the charge" for him. Following defendant's detainment, the agents recovered an amount of crack cocaine from the parking lot in the area defendant was observed to make the throwing motion with his hand. The amount recovered was considered to be an unusually high amount to be on the ground in a parking lot for no apparent reason.

Accordingly, we find the evidence supporting defendant's guilt is extremely strong. As the reviewing court, we conclude that the instant guilty verdict is surely unattributable to any possible error in admitting Butler's statements. See LSA-C.Cr.P. art. 921; **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

Defendant also argues that Butler's statements should have been inadmissible because he was denied his right to confront Butler under **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).[3] In **Crawford**, the United States Supreme Court held that a hearsay statement that is testimonial in nature will not be admitted unless the witness testifies and is subject to cross-examination, or if the witness is unavailable and defendant had a prior opportunity for cross-examination. 541 U.S. at 68, 124 S.Ct. at 1374.

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[3] At trial, defendant's objection to Agent Blades' testimony regarding Butler's statements was based on hearsay. Defendant failed to articulate any objection based on **Crawford v. Washington**. However, we are mindful that one of the primary justifications for the exclusion of hearsay is to protect a defendant's right to confront the witnesses against him. See **California v. Green**, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). Therefore, we find defendant's general hearsay objection sufficient to preserve this issue for appellate review.

However, we note that confrontation errors are subject to a harmless-error analysis. **Delaware v. Van Arsdall**, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986). We have previously determined that although Butler's statements were erroneously admitted, there was ample evidence in the record of defendant's guilt, and the guilty verdict in this trial is surely unattributable to such error. See **State v. Bonit**, 05-0795, pp. 11-12 (La.App. 1 Cir. 2/10/06), 928 So.2d 633, 641, writ denied, 06-1211 (La. 3/16/07), 952 So.2d 688.

Accordingly, this assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his third assignment of error, defendant argues the evidence was insufficient to support his conviction for possession with intent to distribute cocaine.

The standard of review for the 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 beyond a reasonable doubt. LSA-C.Cr.P. art. 821. The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review, incorporated in article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be mindful of Louisiana's circumstantial evidence test, i.e., assuming every fact to be proved that the evidence tends to prove, every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently

reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. **State v. Young**, 99-1264 at p. 10, 764 So.2d at 1005.

To support a conviction for the crime charged, the state had to prove beyond a reasonable doubt that defendant: 1) possessed the controlled dangerous substance; and 2) intended to distribute the controlled dangerous substance. **State v. Young**, 99-1264 at p. 10, 764 So.2d at 1006.

As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, 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. A determination of the weight to be given is a question of fact for the trier of fact, not subject to appellate review. **State v. Young**, 99-1264 at p. 10, 764 So.2d at 1006.

In reaching its verdict, the jury obviously believed the testimony of Agents Blades and Fletcher and rejected the testimony of Parker and defendant. Shortly after Butler was directed to contact her supplier to set up a drug transaction, defendant arrived at Butler's hotel room. None of the agents testified that Butler informed them she had called someone for transportation. When the motel room door was opened and the agents identified themselves as police officers, defendant was heard to state, "Oh, shit, no." Moreover, Agent Fletcher saw defendant holding a white-colored object in his right hand. As the agents attempted to subdue and handcuff defendant, both agents saw defendant make a throwing motion with his right hand. Later, Agent Fletcher recovered the crack cocaine in the parking lot some fifteen to twenty feet from where defendant was standing when he made the throwing motion. Clearly, the testimony that defendant held something that was later identified to be crack cocaine is sufficient to satisfy

the element of possession of cocaine. See **State v. Young**, 99-1264 at pp. 10-11, 764 So.2d at 1006.

In order to prove the element of intent to distribute, the state must prove defendant's specific intent to possess to distribute. Specific intent is a state of mind. It need not be proven as a fact and may be inferred from the circumstances present and the actions of the defendant. There are certain factors that are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance. These factors include: (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of the drug created an inference of an intent to distribute; (4) whether expert or other testimony established the amount of the drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. **State v. Young,** 99-1264 at p. 11, 764 So.2d at 1006.

Applying these factors to the present case, there is sufficient evidence of defendant's intent to distribute the crack cocaine. The agents had directed Butler to contact her supplier and set up a drug transaction. Defendant's arrival at the motel was shortly after this phone call and his reaction to the agents' presence clearly indicates he realized he was about to be arrested. The amount of crack cocaine recovered from the parking lot was consistent with the value of cocaine Butler had requested from her supplier. The crack cocaine was also recovered in an area that was clearly the direction in which defendant made a throwing motion while struggling with the agents. Although the crack cocaine appeared to have been run over by a vehicle, Agent Blades testified that it would be highly unusual for this amount of

cocaine to have been in the parking lot prior to their encounter with defendant, due to its value. Although this amount could be consistent with personal use, no paraphernalia associated with the use of crack cocaine was recovered from defendant's person or in the vehicle, which would lead to the reasonable conclusion that defendant did not intend to use the crack cocaine himself. Finally, the agents overheard defendant urging his girlfriend, Parker, to "take the charge" for him.

Viewing the evidence in the light most favorable to the state, we find the evidence is sufficient to support defendant's conviction for possession of cocaine with intent to distribute. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.