NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1424

STATE OF LOUISIANA

VERSUS

LORI D. PERILLOUX

Judgment Rendered: February 10, 2012

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 491643

Honorable Raymond S. Childress, Judge Presiding

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Walter P. Reed
Covington, LA

Counsel for Appellee,
State of Louisiana

Kathryn W. Landry
Baton Rouge, LA

Lieu T. Vo Clarke
Mandeville, LA

Counsel for Defendant/Appellant,
Lori D. Perilloux

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BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

WHIPPLE, J.

The defendant, Lori Perilloux, was charged by bill of information with knowingly or intentionally acquiring or obtaining possession of hydrocodone, a controlled dangerous substance, by misrepresentation, fraud, forgery, deception or subterfuge in violation of LSA-R.S. 40:971(B)(1)(b). The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant admitted to the fourth felony offender allegations in a habitual offender bill of information filed by the State. Accordingly, the trial court sentenced the defendant to twenty years imprisonment at hard labor. The defendant now appeals, challenging the admission of hearsay testimony, the denial of the motion for new trial, the sufficiency of the evidence, the denial of the motion to reconsider sentence, and the constitutionality of the sentence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On the morning of April 13, 2010, Janelle Leibsritz, a pharmacist at CVS Pharmacy on La. Highway 21, Covington, Louisiana, in St. Tammany Parish, arrived at work and observed a note from the pharmacist who worked the night before, instructing her to verify a prescription request for Betty Regland made that night by voice mail. Leibsritz called the doctor's office as indicated and was informed that the patient name on the prescription was not in their system. Leibsritz then contacted the DEA officer of the St. Tammany Parish Sheriff's Office Narcotics Division, Detective Darren Blackmon, in regard to the prescription, who arrived to discuss the matter.

The defendant came to the pharmacy while Detective Blackmon was still there. The defendant drove up to the drive-through window and requested the prescription in question by name. Leibsritz filled the prescription, giving the defendant thirty 750-milligram Vicodin ES tablets (acetaminophen and

hydrocodone) as requested. Detective Blackmon exited the store and entered his unmarked unit, activated his lights, and stopped the defendant after she exited the drive-through area. Detective Blackmon and his partner, Detective Jed Sharp, approached the defendant's vehicle and identified themselves.

The defendant identified herself as Lori Burkett and Detective Blackmon advised the defendant of her Miranda rights. The defendant indicated that she was picking up the prescription for her mother, Betty Regland. Detective Sharp conducted a Sheriff's Office central dispatch and a national database (NCIC) check with the name Betty Regland, the social security number, date of birth, and driver's license information left with the prescription, and determined that the information did not provide a valid existing identity. The defendant was placed under arrest.

ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, AND THREE

The defendant's appeal brief includes a combined argument in support of assignments of error numbers one, two, and three. In assignment of error number one, the defendant contends that the trial court erred in allowing the State to use hearsay to prove an essential element of the crime charged. Specifically, the defendant notes that the State failed to call Dr. Billings or anyone in his office to testify that the prescription was, in fact, fraudulent, but instead relied on hearsay testimony by Janelle Leibsritz, the CVS pharmacist. The defendant further notes that in response to the defense objection, the State argued that the information from the doctor's office was not being offered for the truth of the matter, but was simply being offered to show Ms. Leibsritz's actions in response to the information she received from the doctor's office. In assignment of error number two, the defendant contends that the trial court erred in denying the motion for new trial, filed on the basis of the admission of the hearsay evidence.

In the third assignment of error, the defendant contends that the evidence is insufficient to support the verdict. The defendant argues that, in addition to the

State's failure to prove that the prescription at issue was invalid and fraudulent, the State also failed to prove that she had anything to do with the voice mail containing the request for the prescription. The defendant maintains that she was picking up a prescription for her mother, who also was named Betty, and that she received the prescription in question by mistake, noting that the pharmacist failed to follow protocol or ask for address verification. The defendant contends that there is no evidence that the prescription was presented by her or that it was not authorized.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979). The Jackson standard of review, incorporated in Article 821, 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. 821B; State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660. The Jackson standard 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 the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

The defendant was convicted for violating LSA-R.S. 40:971(B)(1)(b), which provides that "[i]t shall be unlawful for any person knowingly or intentionally ... [t]o acquire or obtain possession of a controlled dangerous substance by misrepresentation, fraud, forgery, deception or subterfuge." Thus, the State must show that the prescription was fraudulent and that the defendant knowingly obtained possession of the controlled dangerous substance through

misrepresentation or fraudulent or deceptive means. See State v. Scott, 456 So. 2d 1383, 1385 (La. 1984).

Hearsay is an oral or written assertion, other than the one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. LSA-C.E. art. 801(A)(1) & (C). However, if such a statement is offered for any other purpose, then the statement is not hearsay. State v. Valentine, 464 So. 2d 1091, 1093 (La. App. 1st Cir.), writ denied, 468 So. 2d 572 (La. 1985). Additionally, hearsay evidence may be admissible under the exceptions provided by the Code of Evidence or other legislation. LSA-C.E. art. 802.

Confrontation errors are subject to a harmless error analysis. 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. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986). 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 of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Van Arsdall, 475 U.S. at 684, 106 S. Ct. at 1438; State v. Wille, 559 So. 2d 1321, 1332 (La. 1990), cert. denied, 506 U.S. 880, 113 S. Ct. 231, 121 L. Ed. 2d 167 (1992). The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. See Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

During the State's opening statement, the defendant objected on the grounds of hearsay when reference was made to the Leibsritz communication with the

doctor's office regarding the prescription in question. The defense renewed its objection when Leibsritz testified regarding said communication. Leibsritz testified that she called Dr. Billings's office at Ochsner Clinic in New Orleans. She added, "There was no patient by that name in the system, nor at Ochsner, at all." According to additional testimony by Leibsritz, when the defendant arrived at the CVS she requested the prescription in question by name, specifically Betty Regland.

Detective Blackmon testified that after he and Detective Sharp stopped the defendant and informed her of her Miranda rights, the defendant stated that she was picking up the prescription for her mother, Betty Regland. Without defense objection, Detective Blackmon further testified that after Detective Sharp determined that the identity provided for the owner of the prescription was false, Detective Blackmon called Ochsner Clinic and spoke to an employee in Dr. Billings's office who advised him that they did not have a patient by the name of Betty Regland. After the defendant provided the detective with her mother's cellular telephone number, Detective Blackmon spoke to her. According to Detective Blackmon, the defendant's mother, whose name was Betty Burkett, stated that she knew nothing about the defendant picking up a prescription.[1]

The defendant's probation officer, Nicole Harrison, testified as a defense witness. Harrison tested the defendant for drug use during her probationary period and testified that she had not failed a drug screening during the two-year period prior to the trial. During cross-examination, Harrison confirmed that the defendant had not been drug screened from April 22, 2009 (the date the defendant was released from prison and placed on parole) to April 13, 2010 (the date of the instant offense).

[1]The State also presented other crimes evidence to show that the defendant committed the offense of possession of controlled dangerous substances (Halcion and Vicodin ES) and acquiring or obtaining possession of controlled dangerous substances by fraud in 2007.

The defendant's mother, Betty Burkett, testified that the defendant was her primary caretaker and that the defendant went with her to drop off the prescription in question at the CVS, and she later called to inform them that the defendant would be picking up the prescription for her. Burkett stated that when she spoke to Detective Blackmon on the date in question, she thought he was asking her if she had given someone her purse. Burkett further testified that her daughter had no reason to obtain any drugs since she had access to the drugs that Burkett had in her home. She further testified that the defendant had been rehabilitated and was no longer abusing drugs at the time of the offense.

The defendant testified that she pled guilty to prior controlled dangerous substance offenses, but that she had been rehabilitated since then. The defendant further testified that when she arrived at the CVS pharmacy on the date in question, she informed the pharmacist that she was picking up a prescription for her mother Betty, adding that she was not sure if the prescription would be under Betty Burkett, Betty Bauer, or Betty Taylor because her mother had used all three of those last names based on marriage and her maiden name. The defendant further testified that the pharmacist never verified her mother's date of birth. She further stated that her mother had an ample supply of drugs that she could have obtained and had no need to obtain hydrocodone by fraud. The defendant testified that she specifically informed Detective Blackmon that she was picking up the prescription for her mother.

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. 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 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. 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. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984).

Regarding the defendant's hearsay argument, we note that the information presented by Leibsritz regarding the evidence provided by the doctor's office was also presented, without objection, during Detective Blackmon's testimony. Regardless of whether Leibsritz's testimony was presented to establish the truth of the matters asserted, considering the nature of the evidence in this case and the cumulative nature of the testimony in question, any error in admission of the testimony in question was harmless beyond a reasonable doubt. Thus, the trial court did not err in denying the motion for new trial on this basis. See LSA-C.Cr.P. art. 921. Leibsritz testified that the defendant asked for a prescription for Betty Regland. Detective Sharp confirmed that such identity was false. Based on the defendant's request using a false identity, the trier of fact was reasonable in concluding that she knew the prescription was invalid. Based on our review of the evidence, we find that the jury reasonably rejected the defendant's hypotheses of innocence. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder 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). Viewing the evidence in the light most favorable to the

prosecution, the record supports a finding that all essential elements of LSA-R.S. 40:971(B)(1)(b) were proven beyond a reasonable doubt. Accordingly, assignments of error numbers one, two, and three lack merit.

ASSIGNMENTS OF ERROR NUMBERS FOUR AND FIVE

The defendant's brief also includes a combined argument in support of assignments of error numbers four and five. In the fourth assignment of error, the defendant contends that the trial court erred in denying her motion to reconsider sentence. In the fifth and final assignment of error, the defendant contends that although the trial court imposed the statutory minimum sentence, it is excessive in this case. The defendant notes that she was twenty-nine years old at the time of the offense, she has three prior non-violent felony offenses, the instant offense is non-violent, she has a drug addiction that contributed to her criminal history, and she has made rehabilitation efforts.

At the outset, we note that the defendant's oral motion to reconsider sentence at the sentencing hearing and subsequent written motion did not include any grounds for the motion. At the sentencing hearing after the trial court imposed sentence, defense counsel stated: "Your Honor, I want a motion for – I'd like to orally motion for appeal. And orally motion for reconsideration of sentence. And we'll be filing that within the thirty (30) day time limit." The written motion to reconsider sentence was timely filed, but simply states that the defendant was sentenced to twenty (20) years at hard labor.

In State v. Mims, 619 So. 2d 1059 (La. 1993) (per curiam), the Louisiana Supreme Court held that (under LSA-C.Cr.P. art. 881.1, which requires that a defendant's motion for reconsideration set forth the "specific grounds" upon which the motion is based in order to raise an objection to the sentence on appeal) a defendant, who urges excessiveness of sentence as a ground in a motion to reconsider sentence, need not allege any specific ground other than excessiveness

of sentence in order to preserve appellate consideration of a bare claim of constitutional excessiveness. However, under the clear wording of LSA-C.Cr.P. art. 881.1(E),[2] even if a defendant has successfully preserved a bare claim of constitutional excessiveness by raising excessiveness as the only ground for the motion, the defendant is precluded from asserting any other "ground not raised in the motion on appeal or review." See State v. Scott, 634 So. 2d 881, 882 (La. App. 1st Cir. 1993). Therefore, the defendant's failure herein to urge a claim of excessiveness or any other specific ground for reconsideration of sentence by her oral or written motion precludes our review of assignments of error numbers four and five. See State v. Jones, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So. 2d 52, 53.

Accordingly, we affirm the defendant's conviction, habitual offender adjudication and sentence.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

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[2]Louisiana Code of Criminal Procedure article 881.1(E) provides as follows:

> Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.