STATE OF LOUISIANA

VERSUS

COREY D. FACIANE

NO. 17-KA-224

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 11-880, DIVISION "F"
HONORABLE MICHAEL P. MENTZ, JUDGE PRESIDING

November 15, 2017

ROBERT M. MURPHY
JUDGE

Panel composed of Judges Marc E. Johnson,
Robert M. Murphy, and Hans J. Liljeberg

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS AMENDED; COMMITMENT REMANDED FOR CORRECTION

RMM
MEJ
HJL

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MURPHY, J.

Defendant, Corey Faciane, appeals his convictions and enhanced sentences for being a felon in possession of a firearm, and for possession with intent to distribute cocaine. For the reasons that follow, defendant's convictions are affirmed. Defendant's sentences are vacated in part, and affirmed as amended. We further remand for the correction of errors patent.

PROCEDURAL HISTORY

On March 17, 2011, the Jefferson Parish District Attorney's office filed a bill of information charging defendant, Corey Faciane, with one count of being a felon in possession of a firearm ("count one"), in violation of La. R.S. 14:95.1, and one count of possession with intent to distribute cocaine ("count two"), a violation of La. R.S. 40:967(A). Defendant pled not guilty to both counts at his arraignment on March 18, 2011. Following the denial of defendant's pre-trial motions, defendant proceeded to a three-day jury trial starting on March 15, 2016, at the conclusion of which he was found guilty as charged. On March 22, 2016, defendant filed a motion for new trial, which was denied. Also, on March 22, 2016, the trial court sentenced defendant to 20 years at hard labor without benefit of probation, parole, or suspension of sentence, and a $1,000.00 fine on count one. On count two, the trial court sentenced defendant to 25 years at hard labor, with the first two years to be served without benefit of parole, probation, or suspension of sentence, and a $20,000.00 fine. Both sentences were ordered to run concurrently. On the same date as sentencing, the State filed a multiple offender bill of information that alleged defendant was a third felony offender, to which defendant pled not guilty. Defendant thereafter withdrew his not guilty plea on June 23, 2016, and stipulated to being a third felony offender as alleged in the multiple offender bill of information. Accordingly, the trial court vacated the sentences imposed on March 22, 2016, and re-sentenced defendant to 20 years hard labor

without benefit of parole, probation, or suspension of sentence on count one, and 25 years hard labor on count two, with the first two years to be served without benefit of probation, parole, or suspension of sentence, and the remainder without benefit of probation and suspension of sentence. Both sentences were again ordered to run concurrently, and defendant was assessed a $1,000.00 fine on count one and a $20,000.00 fine on count two. Defendant filed a motion for appeal on June 23, 2016, and the instant appeal follows.

FACTS

Detective Ashton Gibbs testified that he was employed by the Gretna Police Department, and was assigned to the Major Crimes Task Force in February of 2011, during which time he met with a reliable confidential informant ("C.I.") who provided information that led to the investigation of defendant, Corey Faciane. Detective Gibbs set up a controlled purchase between the C.I. and defendant, using five $100 bills that Detective Gibbs provided, which had been photocopied before the controlled purchase took place. Undercover surveillance was set up by Detective Gibbs, and other participating police detectives, at 2201 Manhattan Boulevard. Detective Gibbs watched defendant and the C.I. enter apartment H-206[1] at that address. After the C.I. had completed the purchase from defendant and returned to a predetermined location, Detective Gibbs retrieved a "light compressed powder" from the C.I. which tested positive for cocaine in a preliminary chemical field test. Based upon the controlled purchase, Detective Gibbs obtained a search warrant for 2201 Manhattan, H-206, and also for a second apartment located at 3300 Wall Boulevard, apartment 240. Detective Gibbs explained that a search warrant was obtained for both locations because defendant had been observed leaving the apartment on Wall Boulevard prior to the controlled

[1] The apartment at 2201 Manhattan Boulevard, building H, apartment 206, is referred to several different ways throughout the record. For the purposes of consistency, all references to that location in this opinion will be "H-206".

purchase taking place and returned to the Wall Boulevard apartment after the transaction had taken place. The warrants were obtained within 72 hours of when the controlled purchase took place and executed on February 10, 2011, at approximately 2:10 p.m.

Detective Gibbs was on the team that went to the apartment at 2201 Manhattan Boulevard to execute the search warrant. Although a "battery ram" was used to gain entrance to the apartment, police did have the front door key that was found on defendant's person. Detective Gibbs identified State's Exhibit 32, a photograph of an ottoman found in the living room of defendant's apartment, under which a firearm was found "velcroed" to the base. There was a live round in the chamber of the firearm. Other photographs identified by Detective Gibbs showed that there was also another round of ammunition found in defendant's kitchen drawer next to three bags of an "off white compressed powder" that was stored behind the utensil container. In a bag beneath the oven, more compressed powder was found. Two digital scales, which had trace amounts of white powder, were located in a kitchen cabinet. A third digital scale with white powder residue was found on top of a blue cookie tin. The tin itself contained several bags of white compressed powder and white "rock like" objects. A coffee pot and a Pyrex measuring container, both containing white residue, were also found in the kitchen area. Detective Gibbs opined that the items found are used in the creation of Crack cocaine.

Detective Gibbs identified State's Exhibit 65, which was a photograph of five $100 bills contained within the approximate $28,000.00 recovered from defendant's apartment on Wall. Detective Gibbs testified that the serial numbers on the bills matched those of the "pre-recorded currency" that was given to the C.I. prior to making a controlled purchase of illegal narcotics from defendant. Detective Gibbs identified defendant in open court.

Tom Angelica testified that he is the crime lab director at the Jefferson Parish Sheriff's Office Crime Lab. Part of his job duties is to analyze evidence for the presence of controlled dangerous substances, including cocaine. Angelica identified a lab report that he wrote on April 12, 2011, which involved testing 12 bags of "white compressed powder" seized in connection with defendant's case. After analyzing all of the bags, Angelica concluded that they each contained cocaine.

Lieutenant Shane Klein testified that he was employed by the Jefferson Parish Sheriff's Office Narcotics Section. By stipulation of defendant, Lieutenant Klein was accepted as an expert in the field of the packaging of narcotics. He described the mechanical process used for creating Crack cocaine, as well as how it was packaged for sale. Lieutenant Klein opined that items found pursuant to the search warrant in this case, namely the coffee pot, measuring cup, utensils and sandwich bags found in defendant's kitchen, could be used to create and package Crack cocaine. Similarly, the digital scales found in defendant's kitchen are typical of those commonly used to weigh narcotics. Lieutenant Klein examined the amount of cocaine seized in this case, and testified that the volume was not consistent with what is typically kept for personal use. He further explained that it was common in his investigations to learn that a drug dealer has multiple residences and a surplus of cash on hand. Based upon the evidence he reviewed in this case, Lieutenant Klein concluded that all of the elements needed to deal drugs were present.

Detective Alfred Disler testified that he was employed by the Gretna Police Department in February of 2011, and was assigned to the narcotics unit of the Major Crimes Task Force. During that time, he participated in an investigation

with Detective Ashton Gibbs, during which he observed a controlled purchase involving a C.I. at 2201 Manhattan Blvd., H-206. Detective Disler saw defendant's black Acura enter the apartment's parking lot, and watched defendant exit the vehicle then proceed to go into the apartment complex and up the stairs into an apartment. Detective Disler then saw the C.I. go to the same apartment, where defendant opened the door. He watched the C.I. enter and exit the apartment a short time later. After the C.I. left, Detective Disler saw defendant get back into the black Acura, and he followed defendant to the apartment complex on Wall Boulevard. Detective Disler was also involved in the execution of the warrant for 2201 Manhattan Boulevard. He identified defendant in open court.

Detective Disler was recalled on rebuttal later in the trial by the State, and testified that he had indicated the wrong building on a Google Earth map of the apartment complex presented by defendant where the controlled buy had taken place. He had circled building J, when the purchase took actually place in building H.

Shawn Vincent testified at trial that he is a Detective with the Gretna Police Department and, in February of 2011, was assigned to the Major Crimes Task Force, where he primarily investigated violations of narcotics laws. He recalled that he came into contact with defendant while executing a warrant at 3300 Wall Boulevard along with other officers. The officers were located in the parking lot of 3300 Wall Boulevard, at approximately 2:00 in the afternoon, when they approached defendant, who was accompanied by a female. Defendant and the woman were detained and handcuffed while the search warrant was executed. Detective Vincent identified a photograph of the key taken from defendant, which was used to open the apartment door deadbolt lock. During the search of the Wall Boulevard apartment, Detective Vincent found a shoebox containing over $28,000.00 in U.S. Currency that was located in the master bedroom closet. Some

of the money was photocopied after being identified as funds used for "the initial buy" by police. There was men's clothing in the bedroom, as well as "paperwork" with defendant's name on it. Upon completing the search of the apartment, evidence was secured, and both the defendant and his companion were transported to the Gretna Police Department. This concluded Detective Vincent's role in the investigation.

On cross examination, Detective Vincent testified that he did not recall whether he placed defendant and Ms. McCallon, the woman accompanying defendant, face down on the ground after handcuffing them. Detective Vincent did not remember speaking to defendant prior to the search, but he believed that defendant and Ms. McCallon were advised of their rights by Detective Arnold. No drugs, or other contraband, were found at the time the apartment was searched.

On redirect examination, Detective Vincent testified that he was aware of a "simultaneous search" of another location, which also involved defendant, taking place at the same time the warrant was executed on Wall Boulevard. Detective Vincent identified defendant in open court as the person he arrested at 3300 Wall Boulevard.

Sergeant Joel O'Lear of the Jefferson Parish Sheriff's Office was tendered as an expert in latent print processing and comparison and accepted by stipulation of defendant. Sergeant O'Lear testified that he had taken defendant's fingerprints on a "ten print card" earlier on the date of trial and compared these to the fingerprints contained in a certified conviction packet from a possession of Crack cocaine charge dated May 26, 2009, and determined that the fingerprints were made by the same individual.

By stipulation of defendant and the State, a redacted transcript of prior testimony given by Detective Stephen Arnold on October 14, 2011, was read to the

jury.[2] Detective Arnold testified that he was employed by the Jefferson Parish Sheriff's Office and assigned to the Major Crimes Task Force. Detective Arnold participated in a narcotics investigation that ultimately led to the arrest of defendant, whom he identified in court. Detective Arnold took a statement from defendant on February 10, 2011, after advising him of his constitutional rights, both verbally and on a written form. The Rights of Arrestee form, which was initialed by defendant, indicated that defendant was under arrest and would be charged with possession of over 28 grams of Crack cocaine. That same form indicated that defendant wished to give a statement without the presence of an attorney. Defendant indicated to Detective Arnold that he understood his rights and agreed to waive them before defendant gave a statement.[3] An address given by defendant at the time of his statement was 2101 Manhattan, apartment H-206. Detective Arnold stated that the Manhattan address provided by defendant was one of the apartments searched in this case.

Detective Arnold denied telling defendant that his girlfriend would be charged along with him unless he cooperated with the investigation.

In connection with Detective Arnold's testimony that was read into the record, the State introduced the recorded statement of defendant and a transcription of defendant's statement. The audio statement was played for the jury. In his statement, defendant first acknowledges that he was advised of his rights and waived those rights to give a statement without an attorney present. Defendant said that the statement was being given of his own free will and was not coerced. The remaining relevant portions of the statement were as follows:

DETECTIVE ARNOLD:

> Ok at that time we executed a lawful order of search and located no contraband at that location, we also had search warrants for your other

[2] The transcript was introduced into evidence as State's Exhibit 22.
[3] The statement referred to was introduced as State's Exhibit 3 at the October 14, 2011 proceeding.

locations that you used for residences at time to time, uh, one which is on King's Road and also another one is uh, the St. Germaine Apartments on Manhattan Boulevard in Harvey, I want to talk to you about the, the apartments on Manhattan, 2101 Manhattan, Apartment H206, have you resided at that apartment in the recent past?

DEFENDANT:

Yes.

DETECTIVE ARNOLD:

Ok located at that apartment was um, over twenty-eight grams of cocaine, was that uh, was that drugs, are you aware of that [sic] drugs?

DEFENDANT:

Yes.

DETECTIVE ARNOLD:

Was that for anybody else but yourself?

DEFENDANT:

No.

DETECTIVE ARNOLD:

So that cocaine was for you, is that correct?

DEFENDANT:

Yes.

DETECTIVE ARNOLD:

Ok, how long have you been selling cocaine?

DEFENDANT:

Five years.

DETECTIVE ARNOLD:

Do you use cocaine?

DEFENDANT:

Sometimes.

DETECTIVE ARNOLD:

Do you sell it to support your own habit sometimes?

DEFENDANT:

Yes.

DETECTIVE ARNOLD:

Ok, about how much if you had to estimate, how much are you selling every month?

DEFENDANT:

Ounce, two ounce.

…

DETECTIVE ARNOLD:

Ok, alright we also located a uh substantial amount of, of cash money, it's pretty safe to assume that money was from drug sale proceeds is that correct?

DEFENDANT:

Most of it.

Defendant denied that his girlfriend, who lived at 3300 Wall, was involved with the sale of drugs or that she knew he sold drugs.

Defendant's brother, David Faciane, testified that, in early 2011, he spoke with defendant about the possibility of opening a janitorial franchise. To that end, he gave defendant $8,000.00 in cash to start the business. He had no documentation to support that he gave the money to defendant, or for what purpose.

L'erin McCallon testified that she had known defendant for approximately eight years, and lived with him in February of 2011 at 3300 Wall. At the time she owned a 2006 Nissan Altima. Defendant was employed at that time doing oil spill cleanup in Lafitte earning approximately $1,000.00 a week. Ms. McCallon testified that, on the date in February when defendant was arrested, she was with

him and was also placed under arrest. She got on her hands and knees and was handcuffed. She and defendant were transported to the Gretna Police station in separate vehicles and placed in separate areas once she and defendant arrived there.

ASSIGNMENT OF ERROR 1

The evidence presented at trial was insufficient to support the jury's verdict of guilty on any count.

LAW AND ANALYSIS

The question of sufficiency of the evidence is properly raised in the trial court by a motion for post-verdict judgment of acquittal. La. C.Cr.P. art. 821; *State v. Hooker*, 05-251 (La. App. 5 Cir. 1/17/06), 921 So.2d 1066, 1074. In the present case, defendant did not file such a motion; however, the failure to file a post-verdict judgment of acquittal does not preclude appellate review of the sufficiency of the evidence. *State v. Robinson*, 04-964 (La. App. 5 Cir. 2/15/05), 896 So.2d 1115, 1120, n.3.

The standard of review for determining the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Both direct and circumstantial evidence must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. *State v. Harrell*, 01-841 (La. App. 5 Cir. 2/26/02), 811 So.2d 1015, 1019.

Circumstantial evidence is evidence of facts or circumstances from which one might infer or conclude, according to reason and common experience, the existence of other connected facts. *State v. Kempton*, 01-572 (La. App. 5 Cir. 12/12/01), 806 So.2d 718, 722. The rule as to circumstantial evidence is "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438. The

reviewing court is not required to determine whether another possible hypothesis of innocence suggested by the defendant offers an exculpatory explanation of events. Rather, the reviewing court must determine whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. *State v. Mitchell*, 99-3342 (La. 10/17/00), 772 So.2d 78, 83.

Under the *Jackson* standard, a review of a criminal conviction record for sufficiency of evidence does not require the court to ask whether it believes that the evidence at trial established guilt beyond a reasonable doubt, but rather whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution. *State v. Flores*, 10-651 (La. App. 5 Cir. 5/24/11), 66 So.3d 1118, 1122. When addressing the sufficiency of the evidence, consideration must be given to the entirety of the evidence, both admissible and inadmissible, to determine whether the evidence is sufficient to support the conviction. *State v. Hearold*, 603 So.2d 731, 734 (La. 1992).

Possession of a Firearm by a Convicted Felon

Defendant challenges the sufficiency of the evidence regarding his possession of a firearm by a convicted felon conviction on the basis that the State failed to prove that he was either in actual or constructive possession of the gun found in the apartment on Manhattan Boulevard.

In order to convict a defendant of illegal possession of a firearm by a convicted felon, the State must prove beyond a reasonable doubt that the defendant had 1) possession of a firearm; 2) a prior conviction for an enumerated felony; 3) an absence of the ten-year statutory period of limitation; and 4) the general intent to commit the offense. *State v. Chairs*, 12-363 (La. App. 5 Cir. 12/27/12), 106 So.3d 1232, 1250.

Actual possession of a firearm is not necessary to prove the possession element of La. R.S. 14:95.1. Constructive possession is sufficient to satisfy the element of possession. *State v. Day*, 410 So.2d 741, 743 (La. 1982). A person is in constructive possession of a firearm if the firearm is subject to his dominion and control. *State v. Johnson*, 03-1228 (La. 4/14/04), 870 So.2d 995, 998. A person's dominion over a weapon constitutes constructive possession, even if it is only temporary in nature and even if control is shared. *Id.* at 999. A defendant's mere presence in an area where a firearm was found does not necessarily establish possession. *Id.* The State must prove that the offender was aware that a firearm was in his presence and that the offender had the general intent to possess the weapon. Guilty knowledge may be inferred from the circumstances and proved by direct or circumstantial evidence. *Id*. at 998.

In this case, Sergeant Joel O'Lear testified that he had taken defendant's fingerprints on a "ten print card" earlier on the date of trial and compared these to the fingerprints contained in a certified conviction packet from a possession of Crack cocaine charge dated May 26, 2009, and determined that the fingerprints were made by the same individual, defendant. Thus, evidence of the elements of defendant being a convicted felon, as well the date of his previous conviction being within the 10-year cleansing period, was presented to the jury. The jury was also presented evidence, through defendant's own statement to Detective Arnold, that his recent address was 2101 Manhattan, apartment H-206, which was the same apartment where the gun was found. Further, Detective Ashton Gibbs testified that a controlled buy took place between defendant and a C.I. at 2101 Manhattan, apartment H-206, and also that defendant had a key on his person when he was arrested that opened the apartment door.

Taking into account the uncontradicted evidence of defendant's prior felony conviction and his own admission that 2101 Manhattan, apartment H-206, was his

residence, as well as the other factors described above which demonstrated defendant's access to the apartment, in viewing the evidence detailed above in the light most favorable to the prosecution, we find that the jury had a rational basis to conclude that the State proved all essential elements of defendant being a felon in possession of a firearm.

Possession With Intent To Distribute Cocaine

Defendant also claims that the evidence was insufficient to support his conviction for possession with intent to distribute cocaine.

To prove possession with the intent to distribute cocaine, the State must show the defendant knowingly or intentionally possessed the drugs and he did so with the specific intent to distribute them. Specific intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." Specific intent may be inferred from the circumstances of a transaction and from the actions of the accused. Further, specific intent is a legal conclusion to be resolved by the fact-finder. *State v. Robinson*, 02-1253 (La. App. 5 Cir. 04/09/03), 846 So.2d 76, 80. The intent to distribute may be established by proving circumstances surrounding defendant's possession which gave rise to an inference of such intent. Such circumstances include (1) previous attempts to distribute; (2) whether the drugs are in a form consistent with distribution; (3) the amount of the drugs; (4) expert testimony indicating the amount of the drugs recovered is not consistent with personal use; and (5) paraphernalia evidencing an intent to distribute. *State v. Robinson, supra,* at 81.

As he does with his felon in possession of a firearm conviction, defendant asserts that the State failed to establish that the apartment at 2101 Manhattan was, in fact, his apartment. For the reasons discussed above, however, we find this argument is without merit. Turning to the other elements of the offense that the

State was required to prove, the record shows the following evidence. First and foremost, the jury was provided evidence of defendant's own confession, in which he stated that he was aware of the cocaine found in the apartment at 2101 Manhattan, apartment H-206, and also claimed ownership of it, specifying that he both used and sold the drug. Confessions are considered to be direct evidence of guilt. *See State v. Marr*, 626 So.2d 40, 45 (La. App. 1st Cir. 1993), *writ denied*, 93-2806 (La. 1/7/94), 631 So.2d 455. The jury was also presented with the testimony of Detective Gibbs, who detailed that upon execution of the search warrant at 2101 Manhattan, apartment H-206, an "off white compressed powder" was found in several locations, along with digital scales, a coffee pot and a measuring container, also coated with white powder, all of which, as explained by Detective Gibbs, are used in the creation of Crack cocaine. Jefferson Parish Sheriff's Office Crime Lab Director, Tom Angelica, testified that, after analyzing all of the bags, he concluded in his report that they each contained cocaine. Finally, Lieutenant Shane Klein, accepted as an expert in the field of the packaging of narcotics, testified that the coffee pot, measuring cup, utensils and sandwich bags and digital scales found in defendant's kitchen could be used to create and package Crack cocaine. Lieutenant Klein also testified that the amount of cocaine seized in this case was not consistent with what is typically kept for personal use.

In applying the *Jackson* standard to the evidence introduced by the State at trial relative to defendant's possession with intent to distribute cocaine conviction, we find that, after viewing the evidence in the light most favorable to the prosecution, the jury could have found the essential elements of this offense beyond a reasonable doubt. This assignment has no merit.

ASSIGNMENT OF ERROR 2

The trial court erred in denying the defense's request for mistrial after the State presented evidence which was not disclosed previous to trial and in violation of the trial court's order.

LAW AND ANALYSIS

In his second assignment of error, defendant contends that a mistrial should have been granted when Detective Disler testified as to the position of the surveillance team during the controlled buy, because defendant had previously been denied this information and therefore could not test the accuracy of the testimony, which had the effect of prejudicing his defense.

At trial, Detective Disler testified that he was positioned at 2201 Manhattan Boulevard when the controlled buy took place and saw defendant enter apartment H-206, let the C.I. inside, and exit the same apartment afterward.

On cross examination, Detective Disler was asked by defense counsel if he was in a vehicle during the surveillance of defendant. He was then asked to identify defense photographs of what appeared generally to be 2201 Manhattan Boulevard. From his location during surveillance, while using binoculars, Detective Disler said that he saw defendant enter apartment H-206 with a key. After the controlled buy, Detective Disler followed defendant to 3300 Wall Boulevard; however, he did not personally see defendant use a key to open an apartment door in that complex.

On cross examination, defense counsel then provided Detective Disler with a "Google Earth" map, an overview of the St. Germain apartments on Manhattan Boulevard. Detective Disler identified on the map where the defendant and the C.I. parked on the date of the controlled buy, and also marked the building that was under surveillance. Detective Disler said that he was stationary during the course of the surveillance.

Following the conclusion of Detective Disler's testimony, defendant called Joseph Northcutt as a witness. Mr. Northcutt testified that he was employed by a private investigation service and had gone to an apartment complex on Manhattan Boulevard on the morning of his testimony at the request of the defense. He stated, in summary, that Detective Disler had identified the wrong building in the apartment complex where the controlled buy had taken place, as shown on defendant's "Google Earth" map.

Detective Disler was subsequently recalled by the State to present rebuttal evidence and, at that time, testified he previously circled the wrong building on Defense Exhibit 15. Specifically, he stated that he had circled building J, when he should have circled building H, right above it, as the location of the controlled buy. Detective Disler explained that the makeup of buildings J and H are the same, and that the parking spaces outside of those buildings are also relatively similar. Detective Disler further testified that he had not been back to the complex since the controlled buy in 2011 and that the aerial view of the complex is not the same as the view from the ground. On State's Exhibit 75, a map showing the St. Germain apartments on Manhattan Boulevard, Detective Disler identified the area where he "observed the control purchase" through binoculars with an unobstructed view.

While there was no objection made to Detective Disler's testimony while it was being given, defense counsel immediately moved for mistrial after the testimony had concluded on the basis that defense counsel could not test whether Detective Disler had an unobstructed view of the location at issue. The trial court denied the motion for a mistrial, struck State's Exhibit 75, and ordered the jury to disregard Detective Disler's testimony regarding his location at the time of the surveillance of the controlled buy.

La. C.Cr.P. art. 775 provides for a mistrial if prejudicial conduct inside or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or

when authorized under La. C.Cr.P. arts. 770 or 771. A mistrial under La. C.Cr.P. art. 775 is discretionary and is warranted only when trial error results in substantial prejudice to the defendant depriving him of a reasonable expectation of a fair trial. *State v. Davis*, 07-544 (La. App. 5 Cir. 12/27/07), 975 So.2d 60, 68, *writ denied*, 08-380 (La. 9/19/08), 992 So.2d 952. Under La. C.Cr.P. art. 771, a mistrial is discretionary when a witness makes an irrelevant remark that might prejudice the defendant. Article 771 gives the trial court the option to either admonish the jury, upon motion of the defendant, or, if an admonition does not appear sufficient, to declare a mistrial. *State v. Johnson*, 10-209 (La. App. 5 Cir. 10/12/10), 52 So.3d 110, 124, *writ denied*, 10-2546 (La. 4/1/11), 60 So.3d 1248. A mistrial should be granted under Article 771 only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. *State v. Thomas*, 08-390 (La. App. 5 Cir. 1/27/09), 8 So.3d 80, 86-87, *writ denied*, 09-626 (La. 11/25/09), 22 So.3d 170; *State v. Pierce*, 11-320 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1271-72.

A mistrial is a drastic remedy and is warranted only when trial error results in substantial prejudice to a defendant that deprives him of a reasonable expectation of a fair trial. Whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Lagarde*, 07-123 (La. App. 5 Cir. 5/29/07), 960 So.2d 1105, 1113-14, *writ denied*, 07-1650 (La. 5/9/08), 980 So.2d 684.

Prior to trial, in a writ to this Court, defendant challenged the trial court's ruling on the State's Motion for a pre-trial ruling that the testifying officers in this case would not be required to tell defendant the time and location of their surveillance. The trial court declined to require the State to tell the defendant the time and location of the surveillance on relator, on the basis that it could

compromise the C.I.'s identity. We found no error in the trial court's ruling. *State v. Faciane*, 15-660 (La. App. 5 Cir. 10/21/15) (unpublished writ). On March 14, 2016, the trial court denied a second motion by defendant, styled as a "Motion for Discovery of Information Pertaining to the Controlled Buy," which again sought to learn "the date, time and location of the alleged controlled buy, in particular the location of law enforcement during their surveillance." As he does on appeal, defendant argued that in denying his motion for this information, the trial court was hindering his ability to present a defense. We denied defendant's writ application on the showing made. In addition, on March 14, 2016, the day before trial, defendant filed a Motion for Discovery of Information Pertaining to the Controlled Buy. At the hearing, defense counsel stated that he wanted to know exactly where the surveillance officers were in the apartment complex during the controlled buy. The trial judge subsequently denied the motion.

It is not disputed that defendant was aware, well in advance of trial, that the basis of the search warrant which led to his arrest in this case was a controlled narcotics purchase set up by police at 2101 Manhattan, apartment H-206. The probable cause statement indicated that defendant was under continuous surveillance prior to the controlled buy, and that Detective Disler saw the defendant enter 2101 Manhattan, apartment H-206, before the controlled buy took place, and leave from that same apartment after the transaction had concluded. Detective Disler's testimony was consistent with that of Detective Gibbs and what was provided in the probable cause affidavit.

Both the Sixth Amendment to the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee a criminal defendant the right to present a defense. *State v. Decay*, 07-966, p. 18 (La. App. 5 Cir. 6/19/08), 989 So.2d 132, 144, *writ denied*, 08-1634 (La. 4/13/09), 5 So.3d 161. However, the right to present a defense does not require the trial court to permit the introduction of

evidence that is irrelevant or has so little probative value that it is substantially outweighed by other legitimate considerations in the administration of justice. *State v. Marsalis*, 04-827 (La. App. 5 Cir. 4/26/05), 902 So.2d 1081, 1088. In this case, the exact physical location of Detective Disler during the surveillance of defendant while the controlled buy was conducted was not disclosed in order to protect the identity of the C.I. While defendant claims that the exact location of Detective Disler was necessary to prepare his defense, defendant was not charged with any conduct related to the controlled buy. Rather, defendant was charged with possession with intent to distribute cocaine that was seized at a later date pursuant to a search warrant. As previously discussed, defendant gave a statement to police wherein he identified his recent address as 2101 Manhattan, apartment H-206, and also admitted to ownership of the cocaine found at that address. In light of these two facts alone, we cannot say that information about Detective Disler's exact location during the controlled buy is of significant probative value. *State v. Clark*, 05-61 (La. App. 5 Cir. 06/28/05), 909 So. 2d 1007, 1015-1016. Additionally, Detective Disler was not the only detective conducting surveillance who placed the defendant at the scene during the controlled buy. Multiple detectives were involved in the surveillance operation, one of whom, Detective Ashton Gibbs, also testified at trial as to his own observations that he observed the CI and defendant enter the apartment and leave after several minutes.

Based on the foregoing, we find no error in the trial court's denial of defendant's motion for mistrial.

ASSIGNMENT OF ERROR 3

The trial court erred in failing to impose appropriate sanctions for violation of the sequestration order by two State witnesses.

LAW AND ANALYSIS

In this assignment, defendant contends that communication between Detective Disler and Detective Gibbs, prior to Detective Disler's rebuttal testimony, constituted a violation of the court's sequestration order. The State responds that defendant has not properly preserved this issue for appeal.

As indicated above, the record shows that Detective Disler was recalled by the State as a rebuttal witness on the last day of trial. At that time, on cross-examination of Detective Disler by defense counsel, the following exchange took place.

DEFENSE COUNSEL:

Detective Disler, when did you were first realize that you had made a mistake regarding the identification of these buildings?

DETECTIVE DISLER:

I was called today regarding having to retestify [sic].

DEFENSE COUNSEL:

All right. So, you didn't call the DA after you testified and tell them you made a mistake, they called you and told you you made a mistake; isn't that correct?

DETECTIVE DISLER:

Yes, ma' am. Yes, sir. I'm sorry.

DEFENSE COUNSEL:

And did you ask -- and specifically who was it that called you?

DETECTIVE DISLER:

I believe it was Detective Gibbs asked me to contact Ms. Angel [the Assistant District Attorney].

DEFENSE COUNSEL:

Okay. Did you speak to Ms. [Angel] Varnado?

DETECTIVE DISLER:

Yes, I did.

DEFENSE COUNSEL:

And did she tell you the mistake that you had made?

DETECTIVE DISLER:

Yes, sir, she did.

Defendant thereafter filed a Motion For New Trial in which he alleged that the communication between Detective Gibbs and Detective Disler was an "egregious" violation of the trial court sequestration order that had the result of depriving him of a fair trial.

The record shows that defendant did not lodge an objection pertaining to the sequestration order at the time of Detective Disler's testimony. La. C.Cr.P. art. 841(A) provides, in part, that "an irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." The purpose behind the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity so that he may cure the problem and to prevent the defendant from gambling for a favorable verdict and then resorting to appeal on errors that might easily have been corrected by an objection. *State v. Soler*, 93-1042 (La. App. 5 Cir. 4/26/94), 636 So.2d 1069, *writs denied*, 94-0475 (La. 4/4/94), 637 So.2d 450, and 94-1361 (La.11/4/94), 644 So. 2d 1055; *State v. Styles*, 96-897 (La. App. 5 Cir. 3/25/97), 692 So.2d 1222, *writ denied*, 97-1069 (La. 10/13/97), 703 So.2d 609. In order to preserve the right to seek appellate review of an alleged trial court error, the party claiming the error must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for that objection. La. C.Cr.P. art. 841A; *State v. Berroa-Ryes*, 12-581 (La. App. 5 Cir. 1/30/13), 109 So.3d 487, 498; *State v. Richoux*, 11-1112 (La. App. 5 Cir. 9/11/12), 101 So.3d 483, 490-491, *writ denied*, 12-2215 (La. 4/1/13), 110 So.3d 139; *State v. Alvarez*, 10-925 (La. App. 5 Cir. 6/29/11), 71 So.3d 1079, 1085. Defendant is limited on

appeal to matters to which an objection was made, but also to the grounds for his objection articulated at trial. *State v. Jackson*, 450 So.2d 621 (La. 1984); *State v. Baker,* 582 So.2d 1320 (La. App. 4 Cir. 1991), *writ denied*, 590 So.2d 1197 (La. 1992), *cert. denied*, 506 U.S. 818, 113 S.Ct. 62, 121 L.Ed.2d 30 (1992).

Since defendant did not object at trial to the testimony of Detective Disler at the time the alleged violation of the sequestration order took place, we find that he may not now assert this error on appeal. Nevertheless, even if an objection had been timely made, there is no evidence in the record that Detective Disler and Detective Gibbs actually discussed the case. Detective Disler's testimony was that Detective Gibbs had relayed a message for Detective Disler to call the prosecuting attorney. *See, State v. Draughn*, 05-1825, (La. 1/17/07), 950 So.2d 583, *cert. denied*, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007).

ASSIGNMENT OF ERROR 4

It was error for the trial court to deny the defendant's motion for a new trial.

LAW AND ANALYSIS

In this assignment, defendant argues that a new trial was warranted based on "the verdict's contrariness to the law and evidence presented at trial, the violation of the sequestration order by Detectives Gibbs and Disler, and the trial court's denial of the Defense's request to learn of the surveillance team's location during surveillance of the apartment building where the controlled buy allegedly took place."

La. C.Cr.P. art. 852 requires that: "[a] motion for new trial shall be in writing, shall state the grounds upon which it is based and shall be tried contradictorily with the district attorney." La.C.Cr.P. art 853 requires that the motion for a new trial be filed and disposed of before sentence. A motion for new trial is based on the supposition that injustice has been done to the defendant. *State v. Raines*, 00-1941, p.10 (La. App. 5 Cir. 5/30/01), 788 So.2d 635, 642, *writ*

denied, 01-1906 (La. 5/10/02), 815 So. 2d 833, (*citing State v. Washington*, 98-69 (La. App. 5 Cir. 1/26/99), 727 So.2d 673, 677). On appeal, a trial judge's ruling on a motion for a new trial will not be disturbed absent a clear showing of an abuse of discretion. *State v. Richoux*, 11-1112 (La. App. 5 Cir. 9/11/12), 101 So.3d 483, 490, *writ denied*, 12-2215 (La. 4/1/13), 110 So.3d 139.

We have considered all issues raised by defendant in his motion for new trial, which have also been assigned as errors in this appeal. In finding no merit to these assignments, we also find no abuse of discretion in the trial court's denial of defendant's motion for new trial. With respect to defendant's claim that the "ends of justice" would be served by a new trial, this Court has previously held that such a claim presents nothing for appellate review. *State v. Daniels*, 15-78 (La. App. 5 Cir. 9/23/15), 176 So.3d 735, 740, *writ denied*, 15-1997 (La. 11/29/16), 211 So.3d 386 (*citing State v. Onstead*, 03-1413 (La. App. 5 Cir. 5/26/04), 875 So.2d 908). Accordingly, we find this assignment of error to be without merit.

ERROR PATENT

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556 So.2d 175 (La. App. 5th Cir. 1990). The following matters require corrective action.

First, the trial court erred in imposing fines as part of defendant's enhanced sentences. La. R.S. 15:529.1 does not authorize imposition of a fine but only provides for enhanced sentences relating to the term of imprisonment. *State v. Dickerson*, 584 So.2d 1140 (La. 1991)(*per curiam*). Pursuant to our authority to correct an illegal sentence at any time under La. C.Cr.P. art. 882, we therefore vacate those portions of defendant's sentences which imposed the fines, affirm as amended, and order the Clerk of the 24th Judicial District Court to transmit notice of the amended sentences to the appropriate authorities in accordance with La. C.Cr.P. art. 892(B)(2). *See State v. Baskin*, 13-351 (La. App. 5 Cir. 10/30/13), 129

So.3d 614, 624 (*citing State v. Marshall*, 45,567 (La. App. 2 Cir. 9/22/10), 47 So.3d 1083, *writ denied*, 10-2411 (La. 2/15/11), 58 So.3d 457).

Next, under La. R.S. 15:529.1(G), the trial court incorrectly ordered defendant's enhanced sentence on count two to be served without benefit of parole, probation, or suspension of sentence, when La. R.S. 40:967(B)(4)(b), the underlying statute, does not provide for the prohibition of parole for the entire length of the sentence, only for the first two years. Accordingly, we amend the enhanced sentence on count two to delete the prohibition on parole except for the first two years of that sentence and affirm the sentence as amended. We further order the 24th Judicial District Court Clerk of Court to transmit notice of this amended sentence to the appropriate authorities in accordance with La. C.Cr.P. art. 892(B)(2) and to the Department of Corrections' legal department. *State v. Richard*, 12-310 (La. App. 5 Cir. 4/24/13), 115 So.3d 86, 94, *writ denied*, 13-1220 (La. 12/2/13), 126 So.3d 497.

We note several discrepancies in the uniform commitment order (UCO). The UCO states that the offense in count two was "distribution of cocaine;" however, the offense in count two was actually "possession of cocaine with intent to distribute." The UCO also states that the offense date was, "02/10/2011 – 03/22/2016 Multiple Bill filed." The offense date was actually on February 10, 2011. The UCO further states that the adjudication date was March 22, 2016; however, the date of conviction for the underlying offense was March 17, 2016, and the date defendant was adjudicated a third felony offender was June 23, 2016. The UCO provides that the sentence date was, "03/22/2016 – 06/23/2016 Multiple Bill Sentence." The multiple offender sentence was imposed on June 23, 2016. The UCO also provides that, "This sentence shall be concurrent with any or every sentence the offender is now serving;" however, the trial judge only ordered the two enhanced sentences to run concurrently to one another, not to any other

sentence. The UCO further provides that defendant was given 20 years without benefit of parole, probation, or suspension of sentence; however, the UCO does not reflect those restrictions were for count one only. The UCO fails to provide any information regarding the restriction of benefits on count two.

In light of the foregoing, we remand this matter for correction of the UCO, as identified above, to ensure accuracy of the record and direct the 24th Judicial District Court Clerk of Court to transmit the corrected UCO to the appropriate authorities, in accordance with La. C.Cr.P. art. 892(B)(2), and to the Department of Corrections' legal department. *See State v. Long*, 12-184 (La. App. 5 Cir. 12/11/12), 106 So.3d 1136, 1142.

DECREE

For the foregoing reasons, defendant's convictions are affirmed. Defendant's sentences are vacated in part, amended in part, and affirmed as amended. We remand the matter pursuant to the instructions provided in accordance with this opinion.

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS AMENDED; COMMITMENT REMANDED FOR CORRECTION

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 15, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-224

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
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