APPENDIX A

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 1257

STATE OF LOUISIANA

VERSUS

KASSIM M. NAGI

DATE OF JUDGMENT:

APR 09 2018

ON APPEAL FROM THE THIRTY-SECOND
JUDICIAL DISTRICT COURT
NUMBER 664039, DIVISION E,
PARISH OF TERREBONNE,
STATE OF LOUISIANA

HONORABLE RANDALL L. BETHANCOURT,
JUDGE

* * * * * *

Joseph L. Waitz, Jr. District Attorney Ellen Daigle Doskey Assistant District Attorney Houma, Louisiana	Counsel for Appellee State of Louisiana
Mark D. Plaisance Thibodaux, Louisiana	Counsel for Defendant-Appellant Kassim Nagi

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BEFORE: WHIPPLE, C.J., McDONALD,
AND CHUTZ, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

CHUTZ, J.

The defendant, Kassim M. Nagi, was charged by amended grand jury indictment on count one with a violation of La. R.S. 15:1353, racketeering, on count two with a violation of La. R.S. 14:230, money laundering, and on counts three and four with violations of La. R.S. 40:966(A)(1), distribution of synthetic cannabinoids and possession with intent to distribute synthetic cannabinoids, respectively.[1] The defendant pled not guilty as to each count, proceeded to trial by jury, and was found guilty as charged on each count. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The defendant was sentenced on counts one and two to thirty years imprisonment at hard labor on each count, and on counts three and four to fifteen years imprisonment at hard labor on each count. The trial court ordered that all sentences be served consecutively. The trial court denied the defendant's motion to reconsider

[1] Synthetic cannabinoids are a controlled dangerous substance pursuant to La. R.S. 40:964, Schedule I(F). The defendant was originally charged with two additional offenses, transactions involving proceeds from drug offenses and violation of Uniform Controlled Dangerous Substance Law in a drug-free zone, which were subsequently nol-prossed by the State.

sentence. The defendant now appeals, asserting error as to the sufficiency of the evidence, the admission of other crimes evidence, his right to present a defense, and the sentence imposed. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

In 2012, the Terrebonne Parish Sheriff's Office (TPSO) Narcotics Task Force began investigating Kee Food, Incorporated, a convenience store and Exxon gas station in Houma, Louisiana, based on information the task force received regarding the sale of synthetic cannabinoids. On June 12, 2012, Lieutenant Danielle Leboeuf, a TPSO narcotics agent at the time of the offenses, conducted an undercover transaction at Kee Food/Exxon to purchase synthetic cannabinoids. Before going to the store, Lieutenant Leboeuf and other agents met at the task force office and the lieutenant was equipped with video and audio devices. She then proceeded to the area, parked nearby, went on foot to the store (located at 6957 West Park Avenue on the corner of Park Avenue and Hollywood Road) and purchased a 4-gram packet of Bob Narly, suspected synthetic cannabinoids. Lawanda Deville Gasery, the cashier on duty at the time, completed the transaction. Lieutenant Leboeuf testified that the product was not in open view and that she could only see the product once Gasery handed it to her after reaching underneath the counter to retrieve it. After Lieutenant Leboeuf handed the cash payment to Gasery, she placed the cash into the cash register. Immediately

after the transaction took place, the lieutenant met with other agents at a predetermined location and released the product to an agent.[2]

After Lieutenant Leboeuf's controlled buy, the investigation continued. The task force determined that Kassim Nagi (the defendant) and Tawfiq Almansoob were affiliated with Kee Food, Incorporated. The task force further began a financial investigation of Kee Food, Incorporated, including the gathering of information in reference to accounts held at financial institutions in order to determine if the defendant was benefitting from the sale of the synthetic cannabinoids.

Agent Shelly Liner of the DEA Task Force began investigating convenience stores in Terrebonne Parish in December of 2012, targeting any store that sold synthetic cannabinoids, including Kee Food/Exxon. Beginning on February 8, 2013, Agent Liner conducted trash pulls and located old Kee Food/Exxon store receipts. The receipts were collected, photocopied, and then reviewed. Agent Liner further hired a confidential informant, Frank Adams, III, who conducted seven controlled buys of synthetic cannabinoids between January 15, 2013, and March 13, 2013.[3]

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[2] The substances recovered in this case were tested by the Louisiana State Police Crime Laboratory and the Drug Enforcement Administration Crime Laboratory and determined to contain synthetic cannabinoids.

[3] The parties stipulated that if called to testify, Frank Adams, III would testify he worked as a confidential informant for TPSO Narcotics Task Force starting in January of 2013 to March of 2013, and that while wearing hidden audio and video

On June 26, 2013, officers and agents of the TPSO Narcotics Task Force, the Louisiana State Police Narcotics Task Force, the Terrebonne Detective Bureau, and the Terrebonne Parish Uniformed Patrol Division conducted an unannounced show-up at Kee Foods/ Exxon. When the officers and agents arrived at the store, they arrested the clerk on duty at the time (Lawanda Deville Gasery), secured the area, executed a search warrant, and took photographs. During the search, a substance believed to consist of synthetic cannabinoids was located near the cash register and in the store office. Specifically, eight 2.5-gram packs of strawberry Kush were located next to the cash register (under a cabinet), the cabinet behind the counter contained 179 2.5-gram packs of strawberry Kush and ten 3.5-gram packs of Super Nova, the closet in the office contained 400 2.5 gram packs of strawberry Kush, and 29 packs of Passion Raspberry were located under the office desk. A metal container of twelve additional packs of Super Nova and one pack of strawberry Kush was located under the cash register. A large amount of U.S. currency (later determined to total approximately $95,000.00) was seized from the cash register, under the cash register, and in the office and turned over to Agent Leboeuf. A large amount of receipts and tax documents were also seized.

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equipment, he made undercover buys on specified dates from sales cashiers Gasery, Stacey Verdin, Fuad Towfik, and the defendant, and that the items purchased contained synthetic cannabinoids.

Also on June 26, 2013, the police executed a search warrant for the defendant's apartment in Houma. Approximately thirty-three additional pounds of suspected packets of synthetic cannabinoids were located in a storage closet. An arrest warrant for the defendant, who was present at his apartment when the police arrived, was also executed at that time. The defendant was informed of his **Miranda**[4] rights and signed a waiver of rights form. During a recorded interview, he admitted that the store sold synthetic cannabinoids, stating, "We put it out and we didn't know it's illegal." However, he repeatedly indicated that the sales were discontinued in August of 2012, vaguely referencing a Terrebonne Parish Council meeting in December of 2012 (presumably regarding synthetic narcotics sales by merchants). The defendant ultimately requested to call his attorney and the interview ceased.

SUFFICIENCY OF THE EVIDENCE

In assignments of error numbers one and two, the defendant claims a guilty verdict was precluded on each count based on the alleged lack of evidence and his mistake-of-fact defense. The defendant contends that he provided a sample of the products to his attorney, Rene Williams, Williams gave the sample to the TPSO, and the sample was returned to his attorney.[5]

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[4] **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

[5] While Williams did not testify, the parties stipulated that Williams practiced predominantly family and business law, had a professional relationship with the Nagi family since 2006, that

Thus, the defendant contends that his mistake-of-fact defense was supported by evidence showing that he believed the products he sold did not contain synthetic cannabinoids. The defendant further contends that the Tulane Drug Analysis Laboratory issued a report indicating that the products were free of illegal substances and that the TPSO advised Adam Chouest (the defendant's friend) that the products seemed to be legal. The defendant argues that his reliance upon the above listed representations precludes a finding that he had the requisite mental intent or *mens rea* to knowingly engage in an enterprise or pattern of racketeering, knowingly launder money, or knowingly possess with intent to distribute synthetic cannabinoids. Reiterating that a sample was given to the police and the Tulane lab, the defendant avers that no reasonable person who seeks to violate the law would purposefully expose his activity to law enforcement or have the substance tested for legality. The defendant claims that he took reasonable and affirmative steps to ensure that he was following the law.

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in 2012, Williams contacted the TPSO Narcotics Division regarding unspecified products that were seized from Kee Food/Exxon, that those products were returned to Williams, that one packet of each product was kept for testing, and that Williams never heard back from the TPSO regarding any tests. We note that during his recorded interview, the defendant indicated that his attorney contacted the TPSO regarding the seizure of bath salts. The defendant did not state that the synthetic cannabinoids at issue herein were tested. When asked whether any tests were performed on the synthetic cannabinoids to determine their legality, the defendant replied, "Well that's the company [. . .](inaudible) bring it they need to get that done."

Regarding the conviction of racketeering on count one, the defendant relies on the holding in **State v. Touchet**, 99-1416 (La. App. 3d Cir. 4/5/00), 759 So.2d 194, wherein the court found that the State failed to prove that the defendant was involved in an ongoing criminal enterprise that existed separate and apart from the pattern of activity at issue. Similarly, the defendant herein contends that the State failed to prove an enterprise existed and failed to prove separate racketeering activity. The defendant specifically argues that the State failed to prove that he and the cashiers associated together for the common purpose of engaging in a course of conduct. He claims that he and the cashiers were not co-members of an enterprise or an independent entity functioning as a continuing unit. The defendant argues that he was guilty of selling synthetic cannabinoids at worst.

As to the conviction on count two of money laundering, the defendant contends that the evidence is insufficient to demonstrate the elements of the offense. He specifically reiterates his argument that he never believed the products he was selling were illegal. Noting that the State seized cash and credit card receipts from the business, the defendant claims that the State made no effort to differentiate between proceeds from synthetic cannabinoids and other store items. He argues that there was no evidence to demonstrate the profits related to his facilitation of the sale of synthetic cannabinoids or to demonstrate how the jury arrived at the figure of $590,000.00. He further argues that there is no evidence in this case that he sought to

conceal the proceeds from the sales in the store, noting that proceeds were stored in legitimate, transparent ways. The defendant cites the holding in **United State** [sic] **v. Santos**, 553 U.S. 507, 515-17, 128 S.Ct. 2020, 2026-27, 170 L.Ed.2d 912 (2008), wherein the court concluded that to adopt a receipts definition of "proceeds" would create a "merger problem."

Finally, the defendant argues that his convictions of distribution and possession of a controlled dangerous substance must also fall because the State failed to present sufficient evidence to demonstrate that he had knowledge the items were illegal. He notes that the basic element of these offenses is the requisite guilty knowledge. Claiming that the defense of mistake of fact negates *mens rea* or intent, the defendant argues that there is no evidence to show that he actively intended to distribute illegal synthetic cannabinoids or possessed it with intent to distribute.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. In conducting this review, we also must be expressly mindful of

Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. See La. R.S. 15:438; **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24. However, a defendant's mere presence at the scene is not enough to "concern" him in the crime. Only those persons who knowingly participate in the planning or execution of a crime may be said to be "concerned" in its commission, thus making them liable as principals. A principal may be connected only to those crimes for which he has the requisite mental state. **State v. Neal**, 2000-0674 (La. 6/29/01), 796 So.2d 649, 659, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v.**

Richardson, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Marshall**, 2004-3139 (La. 11/29/06), 943 So.2d 362, 369, cert. denied, 552 U.S. 905, 128 S.Ct. 239, 169 L.Ed.2d 179 (2007). It is the trier of fact who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

Racketeering:

The Louisiana Racketeering Act is contained in La. R.S. 15:1351-1356. The activities prohibited by the act are set forth in La. R.S. 15:1353, and provide in pertinent part, as follows:

> B. It is unlawful for any person, through a pattern of racketeering activity, knowingly to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or immovable property.
>
> C. It is unlawful for any person employed by, or associated with, any enterprise knowingly to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

"Racketeering activity" means committing, attempting to commit, conspiring to commit, or soliciting,

coercing, or intimidating another person to commit any crime that is punishable under the Uniform Controlled Dangerous Substances Act, which would include La. R.S. 40:966(A). La. R.S. 15:1352(A)(11). An "enterprise" is defined as "any individual, sole proprietorship, partnership, corporation or other legal entity, or any unchartered association, or group of individuals associated in fact and includes unlawful, as well as lawful enterprises and governmental as well as other entities." La. R.S. 15:1352(B). The term "pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, principals, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurs after August 21, 1992 and that the last of such incidents occurs within five years after the prior incident of racketeering. La. R.S. 15:1352(C).

We note that there is limited jurisprudence regarding the Louisiana Racketeering Act. In **Touchet**, cited by the defendant herein on appeal, the Louisiana Third Circuit Court of Appeal noted that the Louisiana Drug Racketeering Statutes are modeled after the federal "RICO" legislation. In that regard, the court turned to federal interpretations for guidance in explaining the components of the state statute. The court, in **Touchet**, 759 So.2d at 197, stated as follows:

> The enterprise is an entity . . . a group of persons associated together for a common purpose of engaging in a course of conduct.

> The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by participants in the enterprise. . . . The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government. . . . [quoting **United States v. Turkette**, 452 U.S. 576, 583, 101 S.Ct. 2524, 1528-29, 69 L.Ed.2d 246 (1981)].
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> * * *
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> [A]n enterprise must be either a legal entity or an association-in-fact. Further, an association-in-fact enterprise must: (1) have an existence separate and apart from the pattern of racketeering, (2) be an ongoing organization, and (3) have members functioning as a continuing unit as shown by a decision-making structure.

(Citations omitted.)

In **Touchet**, the State presented the "enterprise" as the group of co-defendants organized to transport marijuana. The separate "racketeering activity" consisted of the defendant's acts of selling the marijuana. As the court noted, they were essentially the same

activity. Thus, the court found that the drug conspiracy was not an enterprise because the organization's existence was for the sole purpose of engaging in racketeering activity (*i.e.*, distribution of controlled substances). On that basis, the court reversed the racketeering conviction therein. **Touchet**, 759 So.2d at 199-201.

In comparison, in **State v. Sarrio**, 2001-0543 (La. App. 5th Cir. 11/27/01), 803 So.2d 212, 226-29, writ denied, 2002-0358 (La. 2/7/03), 836 So.2d 86, the Louisiana Fifth Circuit Court of Appeal upheld a racketeering conviction, finding that the case was factually distinguishable from **Touchet**. The court noted in **Sarrio** that in addition to the testimony of the undercover officer and his surveillance team, which illustrated the various drug transactions, the testimony of the principals to the operation at issue therein gave insight into the workings of the organization itself. Specifically, William Chauncey was a cab driver who became a courier for the head of the operation, Roy Sarrio. Chauncey, who initially transported people for Sarrio, later transported packages of marijuana for him in return for money. The court found that based on the evidence therein it was clear that there was an enterprise that was separate and apart from the pattern of racketeering activity. **Sarrio**, 803 So.2d at 226-27.

In a discussion comparing **Touchet** and **Sarrio**, in **Johnson v. Cain**, 347 Fed.Appx. 89, 91 (5th Cir. 2009), cert. denied, 559 U.S. 995, 130 S.Ct. 1744, 176 L.Ed.2d 218 (2010), the United States Court of Appeals for the Fifth Circuit noted that the **Sarrio** court

seemingly applied a more lenient interpretation of the law.[6] Specifically, the federal court stated, "Although purporting to apply a 'separate and apart' requirement, the **Sarrio** court as a practical matter found that the State had proven a violation of the statute even though the enterprise existed for no other purpose than drug dealing." **Johnson**, 347 Fed.Appx. at 92. The court noted that the Louisiana state courts could have interpreted Louisiana's racketeering statute as not requiring that the enterprise have a purpose separate and apart from the racketeering activity. **Johnson**, 347 Fed.Appx. at 93. In conducting a *de novo* review of the defendant's sufficiency of the evidence claim, the district court in **Johnson** found that the evidence presented by the State supported the jury's finding of guilt under either interpretation (the more lenient **Sarrio** interpretation or the more stringent **Touchet** interpretation). **Johnson**, 347 Fed.Appx. at 92. In affirming the judgment of the district court on a petition for a writ of habeas corpus, the federal appellate court found that the evidence introduced at Johnson's trial indisputably met the more lenient interpretation of an "enterprise." **Johnson**, 347 Fed.Appx. at 92-93. In the instant case, as later detailed herein, we find that the evidence presented by the State supports the

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[6] The **Johnson** court, 347 Fed.Appx. at 92 n.3, noted that the apparent division among Louisiana's courts of appeal mirrors a similar split among the federal circuits applying RICO. See **Odom v. Microsoft Corporation**, 486 F.3d 541, 550-51 (9th Cir. 2007) (detailing the disagreement among federal courts on the issue), cert. denied, 552 U.S. 985, 128 S.Ct. 464, 169 L.Ed.2d 325 (2007).

jury's finding of guilt under either interpretation of Louisiana's racketeering statute.

Money Laundering:

Louisiana's money laundering statute provides that it is unlawful for any person knowingly to conduct, supervise, or facilitate a financial transaction involving proceeds known to be derived from criminal activity, when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or the control of proceeds known to be derived from such violation. La. R.S. 14:230(B)(1). Whoever commits the crime of money laundering when the value of the funds is one hundred thousand dollars or more, shall be imprisoned at hard labor for not less than five years nor more than ninety-nine and may be fined not more than fifty thousand dollars. La. R.S. 14:230(E)(4) (prior to amendment by 2017 La. Acts, No. 281, § 1). Under La. R.S. 14:230(A)(4), "proceeds" means "funds acquired or derived directly or indirectly from or produced or realized through an act."

Because Louisiana's money laundering statute closely resembles 18 U.S.C. § 1956(a)(1)(B)(i), the federal jurisprudence interpreting the latter statute is highly instructive. **State v. Dudley**, 2006-1087 (La. App. 1st Cir. 9/19/07), 984 So.2d 11, 24, writ not considered, 2008-1285 (La. 11/20/09), 25 So.3d 783. Under federal law, 18 U.S.C. § 1956(a)(1)(B)(i) criminalizes conduct designed to conceal or disguise the source of proceeds of specified unlawful activity even if the

defendant does not conceal his own identity in the process. See **United States v. Hall**, 434 F.3d 42, 50-51 (1st Cir. 2006). Factors helpful in determining whether a transaction was designed to conceal include: statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on the practices of criminals. **United States v. Magluta**, 418 F.3d 1166, 1176 (11th Cir. 2005), cert. denied, 548 U.S. 903, 126 S.Ct. 2966, 165 L.Ed.2d 949 (2006).

While Louisiana's money laundering statute closely resembles the federal statute, we note that the Louisiana legislature has designated money laundering as a crime of general intent.[7] In contrast, the federal money laundering statute exacts a higher burden of proof by requiring that a transaction was conducted with specific intent to promote the carrying on of unlawful activity. **State v. Lemoine**, 2015-1120 (La.

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[7] General criminal intent "is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act." La. R.S. 14:10(2). Specific criminal 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." La. R.S. 14:10(1).

5/3/17), 222 So.3d 688, 692 (*per curiam*). The Louisiana Supreme Court in **Lemoine** rejected the notion that the Louisiana money laundering statute is susceptible to the "merger problem," concluding that the statute is not drafted in such a way that the evidence necessary to prove the underlying or primary crime is sufficient to also prove a more serious secondary offense. **Lemoine**, 222 So.3d at 693. As the court in **Lemoine** further noted, money launderers often mix the fruit of their crimes with legitimately-acquired assets, assuming detection of the dirty funds will be more difficult as a result. The Louisiana money laundering law places no burden on the State to trace dirty money after it has been commingled with clean money. The law only requires the State to prove that dirty money constituted a portion of the commingled funds that were maintained or deployed for a criminal purpose. **Lemoine**, 222 So.3d at 694-95 (further holding that "even accepting that the evidence in this case showed the dirty money made up less than six percent of the balance of defendant's business account, the [S]tate carried its burden of proof in this regard.").

Distribution/Possession with Intent to Distribute:

Louisiana Revised Statutes 40:966(A)(1) provides, in pertinent part, that it shall be unlawful for any person knowingly or intentionally to distribute a controlled dangerous substance classified in Schedule I, which includes synthetic cannabinoids. See La. R.S. 40:964(F). A defendant is guilty of distribution when

he transfers possession or control of a controlled dangerous substance to intended recipients. See La. R.S. 40:961(14); see **State v. Cummings**, 95-1377 (La. 2/28/96), 668 So.2d 1132, 1135. Only general criminal intent is required. Such intent is established by mere proof of voluntary distribution. Transfer of possession or control is not limited to an actual physical transfer between the culpable parties. Rather, distribution may be accomplished by the imposition of a third party. **State v. Chatman**, 599 So.2d 335, 345 (La. App. 1st Cir. 1992).

The crime of possession with intent to distribute synthetic cannabinoids requires proof that the defendant knowingly and intentionally possessed the drug and that he did so with the specific intent to distribute it. See La. R.S. 40:966(A)(1); **State v. Kelly**, 2001-0321 (La. App. 5th Cir. 10/17/01), 800 So.2d 978, 982, writ denied, 2001-3266 (La. 11/1/02), 828 So.2d 565. A determination of whether there is possession sufficient to convict depends on the peculiar facts of each case. One need not physically possess the controlled dangerous substance to violate the prohibition against possession; constructive possession is sufficient. A person not in physical possession of the drug is considered to be in constructive possession of a drug when the drug is under that person's dominion and control. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute constructive possession include: (1) his knowledge that illegal drugs were in the area; (2) his relationship with the person, if any, found to be in actual possession; (3)

his access to the area where the drugs were found; (4) evidence of recent drug use by the defendant; and (5) his physical proximity to the drugs. **State v. Gordon**, 93-1922 (La. App. 1st Cir. 11/10/94), 646 So.2d 995, 1002.

It is well settled that the mere presence in an area where drugs are located or the mere association with one possessing drugs does not constitute constructive possession. **State v. Toups**, 2001-1875 (La. 10/15/02), 833 So.2d 910, 913. Nonetheless, a person found in the area of the contraband can be considered in constructive possession if the illegal substance is subject to his dominion and control. **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983). A person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. **Gordon**, 646 So.2d at 1002.

In order to prove the element of intent to distribute, the State must prove the defendant's specific intent to possess in order to distribute. **Gordon**, 646 So.2d at 1003; **State v. Malveo**, 2011-1308, p. 2 (La. App. 1st Cir. 3/23/12) (unpublished), writ denied, 2012-0984 (La. 10/8/12), 98 So.3d 849. Specific intent is a state of mind. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Thus, specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from the circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. See La. R.S. 14:10; **Gordon**, 646 So.2d at 1003; **State v.**

Buchanon, 95-0625 (La. App. 1st Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent is an ultimate legal conclusion to be resolved by the factfinder. **Buchanon**, 673 So.2d at 665. In cases where the intent to distribute a controlled dangerous substance is an issue, a court may look to various facts: (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 that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as bags or scales, evidencing an intent to distribute. **State v. House**, 325 So.2d 222, 225 (La. 1975).

We note that, on appeal, the defendant does not challenge the finding that he distributed and possessed synthetic cannabinoids, but rather claims that he lacked the requisite guilty knowledge. Guilty knowledge is an essential element of the crime of possession. **State v. Edwards**, 354 So.2d 1322, 1327 (La. 1978). Guilty knowledge and intent, though questions of fact, need not be proven as fact, but may be inferred from the circumstances. **Edwards**, 354 So.2d at 1327.

Mistake of fact is a defense where the reasonable ignorance of fact or mistake of fact precludes the presence of any mental element required in that crime. La. R.S. 14:16; see **State v. Converse**, 529 So.2d 459, 465 (La. App. 1st Cir.), writ denied, 533 So.2d 355 (La.

1988). Whether an accused knows a substance he possesses is a narcotic drug may be proved by direct or circumstantial evidence. However, the question of sufficiency of the evidence is a question of fact for the factfinder. **State v. Perique**, 340 So.2d 1369, 1376 (La. 1976); **State v. Humphreys**, 319 So.2d 344, 344 (La. 1975). The factfinder may draw reasonable inferences to support conclusions as to guilty knowledge based upon evidence presented at trial. See **Edwards**, 354 So.2d at 1327; **State v. Tasker**, 448 So.2d 1311, 1315 (La. App. 1st Cir.), writ denied, 450 So.2d 644 (La. 1984).

The three cashier clerks who worked at Kee Food/Exxon at the time of the investigation, Fuad Towfik (also known as "Fred"), Lawanda Deville Gasery, and Stacey Verdin, testified in this case.[8] Towfik was the store cashier overnight from 6:00 p.m. to 6:00 a.m., Gasery worked from 6:00 a.m. to 2:00 p.m., and Verdin worked from 1:00 p.m. to 8:00 p.m., and each of them testified that they were hired and supervised by the defendant. Further, all three employees indicated that they sold synthetic cannabinoids on a regular basis, but only to individuals who they considered as regular customers. They indicated that they were instructed by the defendant to sell the products and that the defendant was present during some of those sales. Towfik, Gasery, and Verdin confirmed that the synthetic

[8] Prior to trial, Verdin's testimony was perpetuated, including cross examination, in anticipation of her being unavailable on the trial date due to a medical hardship. The audio and video recorded testimony was played for the jury.

cannabinoids were kept underneath and on the side of the register and were not in view of the customers. According to their testimony, two brands of synthetic cannabinoids were being sold during their employment: Kush for $23.04 ($25.00 with tax) and Super Nova for $36.87 ($40.00 with tax). No other items were sold for those exact sale prices.

Each of the clerks indicated that they did not feel comfortable selling the synthetic cannabinoids. Gasery indicated that she told the defendant that she did not feel comfortable selling the products because the customers were sometimes outraged, and she was concerned for her safety. Gasery further stated that she felt, based on statements by the defendant, that she would lose her job if she did not sell the products at issue. Verdin stated that the defendant pressured her into selling the products by calling her "chicken" and telling her that he would have to hire someone else to complete the sales who was "stronger" than her. Towfik explained that if the store ever ran out of synthetic cannabinoids, they would call the defendant, who would then replenish the products. The synthetic cannabinoids were the only store products that were kept out of public view or display. Unlike other products sold by the store, the clerks never had to sign for the synthetic cannabinoids upon delivery, and never saw the distributors of those products

Agent Joseph Renfro, an evidence custodian of the TPSO Narcotics Task Force at the time of the case, identified the main ingredients listed on the back of the packs of Kush, as well as additional label language

including the following, "Lab certified. This product contains no prohibited chemicals or materials. This product is legal for sale in all 50 states as of September 1st, 2011." Agent Renfro confirmed that the products appeared to be professionally packaged with a freshness seal and a barcode. The Super Nova packages were similarly packaged and contained language attesting to its purported legality such as, "Lab certified legal," "does not contain JWH 18, JWH 73, JWH 200, CP 47, CP 497, HU 210, or any other chemical and/or plant ingredients prohibited by state or federal law," and "Cannabinoid free." Agent Renfro did not notice any language on the packages to indicate FDA or USDA approval, there was no specification as to what laboratory certified the products, and the products were not labeled with the manufacturer's name. The labels further contained usage warnings. Agent Renfro agreed that the packaging could have been ordered and heat sealed.

Agent Liner viewed the collected receipts in light of interviews conducted with Gasery, Verdin, Towfik, and the controlled purchases. She specifically looked at the receipts dated from January 13, 2013, to June 26, 2013. She identified the $23.04 ($25.00 with tax), $36.87 ($40.00 with tax), and $46.08[9] ($50.00 with tax) sales. During that time period, there was a little over $350,000.00 in credit card receipts for such sales. From January 2012 to December 2012, there were slightly over $400,000.00 in credit card receipts. Thus, from the

[9] The sales for $46.08 were for two packs of Kush.

receipts collected, there was a total of over $750,000.00 in such credit card receipts. Agent Liner noted that the cash sales receipts were limited, and that most of them were collected on the day of the enforcement action, June 26, 2013.

In addition to the evidence seized from the store, pursuant to a warrant, Lieutenant Lebouef also obtained bank records from Coastal Commerce Bank for Kee Food Incorporated and SouthLa, LLC, another business entity that was tied to the defendant, and defendant's personal savings and checking accounts. While admittedly not an expert in the field, Lieutenant Lebouef worked in banking areas such as new accounts, loans, and fraud prior to law enforcement and, therefore, had experience in reviewing bank records. Kee Food Incorporated had two bank accounts. Almansoob was an authorized user on one of those accounts, while the defendant was an authorized user on both accounts. The defendant and Mohamed Nagi were authorized users on the SouthLa, LLC account. The Coastal Commerce Bank generated cashier's checks in the name of the Terrebonne Parish District Attorney for the seizure of approximately $29,580.00 from one of the Kee Food Incorporated accounts, $12,131.62 from the other Kee Food Incorporated account, and $348,302.92 from the SouthLa, LLC account. Over one thousand dollars was seized from a joint savings account owned by the defendant and his father, Mohamed Nagi, and $11,283.83 from the defendant's personal checking account.

The bank records also included documentation of significant sums of money debited from certain accounts. A $10,000.00.00 [sic] cashier's check, dated June 21, 2012, was purchased by the defendant and made payable to Abdulqawi Nagi, and three $10,000.00 cashier's checks were purchased by the defendant (two on June 21, 2012, and one on January 30, 2013) and made payable to his father, Mohamed Nagi. Each of the cashier's checks was deposited into a JP Morgan Chase Bank account in Frankfurt, Germany to be credited to the Bank of Yemen. The bank records also reflected transfers among the accounts for significant amounts of money, including a transfer for $200,000.00 from a Kee Food Incorporated account to the SouthLa, LLC account by the defendant on May 31, 2013, and a transfer by the defendant to the Kee Food Incorporated account on that same date for $300,000.00 from an account under the name "Lucky Stop." On June 3, 2013, $300,000.00 was credited to the SouthLa, LLC account.

Currency was also seized from the safety deposit box connected with the defendant's personal checking account. The defendant was the "sole renter" and only "authorized signer(s)" for the safety deposit box. Based on a machine count, a total of $590,005.00 dollars was seized from the safety deposit box. When that amount was combined with the over $400,000.00 in funds seized from the various bank accounts, the grand total of seized assets was approximately $992,000.00. According to the 2012 tax records for Kee Food, Incorporated, in 2012, Kee Food/Exxon paid its employees a

total of $62,163.00 in wages, its business income was $15,334.00, and it claimed $8,449.00 in cash assets. On his personal 2012 income tax return, the defendant reported $64,400.00 as income.

The jury heard the defense's arguments that the defendant was unaware of the illegality of the products being sold. As noted, the defendant claimed in his recorded statement that he initially believed that it was legal to sell the products, and that he discontinued the sales in August 2012 after learning otherwise. However, the undercover sales that took place in 2013 (including a March 13, 2013 sale made by the defendant himself to Adams consisting of nineteen packs of Super Nova in exchange for five hundred dollars) were uncontested and stipulated to by the parties. Considering this discrepancy, the jury could have concluded that the defendant was lying, indicating guilty knowledge. See **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984). Further, the jury heard and obviously credited testimony that the defendant stored the synthetic cannabinoids out of public view and would sometimes need to reassure his cashiers to sell them to certain individuals with whom they were unfamiliar. Evidently, the jury did not believe the defendant's version of the facts or that his claimed ignorance or mistake of fact, if believed, was reasonable. All of the other store merchandise was on display and readily observable to customers. From the fact that the objects were hidden, any rational trier of fact could have inferred that the defendant concealed them because of the guilty

knowledge that possessing and selling the products was illegal.

Regarding the defendant's claims of insufficient evidence not related to his defense of mistake of fact, we find that the jury could have reasonably concluded that the State proved the elements of the offenses. Herein, as a convenience store and gas station, Kee Food/Exxon engaged in lawful as well as unlawful activity. The jury could have reasonably concluded that the State proved the existence of a separate enterprise for the purposes of racketeering. The cashiers, as instructed and even sometimes pressured by the defendant, sold the synthetic cannabinoids despite their personal misgivings, placed the cash in the cash register with non-related funds after each sale, and kept credit card receipts. They consistently rang the items up for the amount assigned by the defendant and routinely called the defendant if the store ran out of one of the products while they were on duty. The evidence included a significantly large number of acts of racketeering committed by the participants in the enterprise. Thus, the State presented evidence of an ongoing organization wherein the defendant, his employees, and his associates functioned as a continuing unit in the sales of synthetic cannabinoids. Further, the same organization existed for the purpose of conducting routine convenience and gas store business. Under these circumstances, the State proved the existence of a functioning "enterprise," as well as the defendant's control and participation in the enterprise.

The evidence further showed that the defendant commingled proceeds from legal transactions with the proceeds from the illegal transactions, and each of the clerks consistently testified that there was secrecy surrounding the sales of the synthetic cannabinoids. Thus, regarding the conviction of money laundering, we find that the jury could have reasonably concluded that the State proved that the defendant conducted and supervised financial transactions designed to conceal the nature of proceeds derived from the sales of synthetic cannabinoids. Further, considering the testimony of the store clerks, Agent Liner, and Lieutenant Lebouef regarding the seized bank records, cash, receipts, and income tax documents, the jury could have reasonably concluded that the dirty money constituted a portion of the commingled funds that were maintained or deployed for a criminal purpose. As noted above, the State was not required to trace the dirty money. The jury concluded that $590,000.00 of funds were laundered in this case, well above the minimum statutorily required amount of $100,000.00, for the sentence imposed. See La. R.S. 14:230(E)(4). Approximately $992,000.00 in assets were recovered in this case, including the $590,005.00 dollars [sic] that was seized from the defendant's safety deposit box and the over $400,000.00 that was seized from the bank accounts. However, according to 2012 tax records, the business income for Kee Food, Incorporated was only $15,334.00 and the defendant's personal income was $64,400.00. Accordingly, we cannot say that the jury's determination was unreasonable based on the evidence presented herein. See **Ordodi**, 946 So.2d at 662.

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*). A court of appeal impinges on a factfinder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was not unreasonably rejected by the factfinder. See **State v. Mire**, 2014-2295 (La. 1/27/16), ___ So.3d ___, ___ (*per curiam*). As we find that the jury reasonably rejected the defendant's defense of mistake of fact, a finding of *mens rea* or intent was not negated in this case. Therefore, any rational trier of fact could have found that the defendant knowingly and intentionally possessed synthetic cannabinoids and that he did so with the specific intent to distribute them. After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of racketeering, money laundering, the distribution of synthetic cannabinoids, and possession with intent to distribute synthetic cannabinoids. Thus, assignments of error numbers one and two lack merit.

OTHER CRIMES EVIDENCE

In assignment of error number three, the defendant argues the trial court erred in not granting a mistrial based on the admission of other crimes evidence. The defendant contends that in response to direct questioning by the State, Agent Liner alleged that the "Tulane Drug Analysis Laboratory" report ("lab report document") relied upon and introduced into evidence by the defendant in support of his mistake of fact defense was fabricated. The defendant notes that the State had ample opportunity before trial to either verify or discredit the lab report document, but did not do so. According to the defendant, the State instead elicited testimony through Liner suggesting that the defendant committed the crime of obstruction of justice by creating a falsified lab report that was ultimately admitted into evidence. The defendant contends Liner had no evidence that the lab report document was fabricated, although Liner insisted that any person with an Adobe program could create or alter such a document. Further, the defendant notes that the State was allowed to introduce into evidence, over defense objection, a "false" document created by Liner that resembled the lab report document introduced by the defendant.

The defendant argues the State's questions were specifically directed to elicit testimony that the defendant may have created a false lab report document. He notes that the State knew he intended to assert mistake of fact as his only defense. The defendant argues Liner's testimony suggesting that the defendant could

have created the lab report document he relied upon, as well as the admission of the similar document created by Liner, was extremely prejudicial and may have caused the jury to discredit his entire defense. Thus, he contends this evidence did not constitute harmless error.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403. A trial judge's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion. **State v. Freeman**, 2007-0470 (La. App. 1st Cir. 9/14/07), 970 So.2d 621, 625, writ denied, 2007-2129 (La. 3/14/08), 977 So.2d 930.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to

> introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. **State v. Pierre**, 2012-0125 (La. App. 1st Cir. 9/21/12), 111 So.3d 64, 68, writ denied, 2012-2227 (La. 4/1/13), 110 So.3d 139. However, La. Code Evid. art. 404(B)(1) authorizes the admission of evidence of other crimes, wrongs, or acts when the evidence "relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." Evidence of other crimes forms part of the *res gestae* when said crimes are related and intertwined with the charged offense to such an extent that the State could not have accurately presented its case without reference to it. Integral act (*res gestae*) evidence in Louisiana incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. **State v. Odenbaugh**, 2010-0268 (La. 12/6/11), 82 So.3d 215, 251, cert. denied, 568 U.S. 829, 133 S.Ct. 410, 184 L.Ed.2d 51 (2012).

Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to another crime committed or alleged to have been committed by the defendant as to

which evidence would not be admissible. La. Code Crim. P. article 770(2). Louisiana Code of Criminal Procedure article 771 requires the trial judge to admonish the jury to disregard a comment made within the hearing of the jury that is irrelevant, immaterial, or prejudicial to the defendant or the State, when an admonishment is requested by the defendant or the State. In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial. La. Code Crim. P. art. 771. Mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. The determination of 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 on appeal absent an abuse of that discretion. **Pierre**, 111 So.3d at 68. Further, although Article 770 is couched in mandatory terms, it is "a rule for trial procedure." **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So. 2d 94, 101. Thus, the introduction of inadmissible "other crimes" evidence results in a trial error subject to harmless-error analysis on appeal. **Odenbaugh**, 82 So.3d at 251. Trial error is harmless where the verdict rendered is "surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

Herein, prior to the objected-to testimony and motion for mistrial, defense counsel referred to the lab report document during his cross-examination of State

witness Lawanda Deville Gasery. Specifically, defense counsel asked Gasery if the defendant showed her lab reports for the products sold indicating that they tested negative for the listed chemicals. Gasery confirmed that the defendant had shown her such a document. The defendant did not object when the State, on redirect, elicited testimony from Gasery that she did not know where the laboratory testing was conducted or whether the defendant created the document himself, and that she remained uncomfortable selling the products after viewing the document.

The defendant's objection and motion for mistrial came later during the State's questioning of Agent Liner. Specifically, Liner was asked about the Adobe document he discovered on the defendant's cell phone that appeared to be similar to the lab report document relied upon by the defendant. Liner confirmed that he was able to make changes to the Adobe document and alter the product listed on the document. The State introduced two documents created by Liner from the original Adobe document found on the defendant's cell phone, which appeared similar to the lab report document relied upon by the defendant, although Liner altered the product names. The trial court denied the defendant's motion, noting that a mistrial is a drastic remedy that was not warranted under the circumstances.

We agree with the trial court's ruling in this case. We first note that the defendant opened the door for the evidence at issue. See **State v. Taylor**, 2001-1638 (La. 1/14/03), 838 So.2d 729, 746, cert. denied, 540 U.S.

1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004) (where the Louisiana Supreme Court held that the defendant opened the door to evidence regarding his gun ownership, noting in part that the subject of firearms originated in defense counsel's opening statement in which he announced the defendant had no previous knowledge of the use of firearms); see also **State v. Harvey**, 26,613 (La. App. 2d Cir. 1/25/95), 649 So.2d 783, 787, writs denied, 95-0430 & 95-0625 (La. 6/30/95), 657 So.2d 1026, 1028 (where, despite the defendant's challenge under La. Code Evid. art. 404(A), the court ruled that the State may lay a foundation to refute a self-defense theory after the defense "opened the door" in its opening statement). Moreover, under the rule of narrative completeness incorporated in the doctrine of *res gestae*, "the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." **Taylor**, 838 So.2d at 743, quoting **Old Chief v. United States**, 519 U.S. 172, 188, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997). The testimony at issue herein was an integral part of the State's case, necessary to complete the narrative.

Nonetheless, as noted, even a determination that other crimes evidence was improperly admitted at trial would not end our inquiry. We note that the evidence in question was cumulative to similar testimony elicited from Gasery. Further, there was overwhelming testimony regarding the acts committed by the

defendant. Based on our review of the record, we find that the guilty verdicts returned in this case were surely unattributable to any erroneously admitted evidence of extraneous other crimes. Thus, the trial court did not err in denying the motion for mistrial. For these reasons, assignment of error number three lacks merit.

EXCESSIVE SENTENCE

In assignment of error number four, the defendant contends that the sentences imposed by the trial court are unconstitutionally excessive. He notes that due to the consecutive nature of the sentences, he will be serving a ninety-year sentence. In assignment of error number five, the defendant argues that because there was no justification for the imposition of consecutive sentences and because the trial court did not articulate reasons for doing so, it erred in imposing consecutive, unconstitutionally excessive sentences. He argues that despite the trial court's assertion at sentencing, there is no evidence that synthetic cannabinoids constitute a horrible poison. The defendant further argues that the trial court's analysis based upon the assumed financial gain to the defendant was wholly incorrect. He claims that the $590,000.00 figure stated in the jury verdict form as the amount that the defendant earned from selling synthetic cannabinoids was not supported by the evidence.[10] He specifically contends that there was

[10] This same argument as to count two was addressed in connection with the defendant's challenge of the sufficiency of the evidence and will not be revisited in addressing the defendant's excessive sentence assignment of error.

no proof as to how much of the cash seized by the State was derived from the synthetic cannabinoids sales. The defendant contends that the trial court failed to consider his lack of past criminal behavior as a mitigating circumstance and contends that there was no undue risk that he would commit another crime during a suspended sentence or probation. He contends that the sentences serve no purpose other than to punish him for the conceived notions of the trial court that synthetic cannabinoids sales and usage is a problem in Terrebonne Parish.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454.

The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth

the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. The articulation of the factual basis for a sentence is the goal of La. Code Crim. P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (*per curiam*).

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. See La. Code Crim. P. art. 883; **State v. Riles**, 2006-1039 (La. App. 1st Cir. 2/14/07), 959 So.2d 950, 956, writ denied, 2007-0695 (La. 11/2/07), 966 So.2d 599. However, even if

convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified where an offender poses an unusual risk to public safety. **State v. Breland**, 97-2880 (La. App. 1st Cir. 11/6/98), 722 So.2d 51, 53.

In this case, as admitted by the defendant, the trial court stated its reasons for imposing the sentences. The trial judge noted its consideration of the factors set forth in La. Code Crim. P. art. 894.1, as well as aggravating circumstances present in this case. The trial court considered the serious nature of the offenses, including the harm to the public and the amount of financial gain involved in the instant case.

While the defendant challenges this assertion on appeal, we find that the trial court was reasonable in considering that the defendant was "selling this horrible 'poison' to many unsuspecting citizens" in Terrebonne Parish. We find the trial court's considerations reasonable in light of the record. The record clearly shows a course of repeated criminal conduct by the defendant and the defendant's disregard for others in his pursuit for financial gain.

Moreover, despite the defendant's contention that these offenses were part of a common scheme, these acts by the defendant did not necessarily arise out of a single course of criminal conduct. See La. Code Crim. P. art. 883. The crimes all occurred during many episodes, and there were countless victims, including

society at large and the family members of the users of the drugs distributed by the defendant. Finally, La. Code Crim. P. art. 883 specifically excludes from its scope sentences which the court expressly directs to be served consecutively. Herein, the trial court expressly directed that the sentences were to be served consecutively with other sentences. As such, those sentences are outside the scope of La. Code Crim. P. art. 883. See **State v. Palmer**, 97-0174 (La. App. 1st Cir. 12/29/97), 706 So.2d 156, 160. The trial court did not abuse its discretion in ordering the sentences to be served consecutively. We note that while the sentences were imposed consecutively, the defendant received mid-range or lower-range sentences on each count.[11] We find that the sentences were within the discretion of the trial court, in light of the facts and circumstances of this case. Assignments of error numbers four and five are without merit.

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[11] On count one, the trial court imposed thirty years imprisonment at hard labor, while the defendant faced a fine of not more than one million dollars, or imprisonment at hard labor for not more than fifty years, or both. La. R.S. 15:1354(A). On count two, the trial court imposed thirty years imprisonment at hard labor, while the defendant faced imprisonment at hard labor for not less than five years nor more than ninety-nine years, and a fine of not more than fifty thousand dollars. La. R.S. 14:230(E)(4) (prior to amendment by 2017 La. Acts, No. 281, § 1). On counts three and four, the trial court imposed fifteen years imprisonment at hard labor, while the defendant faced a term of imprisonment at hard labor for not less than five nor more than thirty years, and a fine of not more than fifty thousand dollars on each count. La. R.S. 40:966(B)(3) (prior to amendment by 2017 La. Acts, No. 281, § 2).

RIGHT TO PRESENT A DEFENSE

In assignment of error number six, the defendant argues that the trial court violated his constitutional right to present a defense in not allowing him to present testimony by Verdin and Chouest regarding his defense of mistake of fact. Described by the defendant as integral to his defense of mistake of fact, the defendant contends that their testimony consisted of evidence that he reasonably relied on the Tulane lab report document and that he took reasonable prudent steps to ensure he was operating within the confines of the law. The defendant notes that he was Verdin's employer, that Verdin was a State witness, and claims that her testimony regarding the actions he took to verify the products did not contain illegal substances was extremely relevant. He notes that Chouest was a confidant and helped him assimilate into the area and take steps to ensure that the law was being followed. The defendant contends that the credibility of Chouest's proffered testimony was a matter for the jury to decide.

A defendant has a constitutional right to present a defense.[12] U.S. Const. amend. VI; La. Const. art. I, § 16; **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198, 201. As the Supreme Court found in **Chambers v. Mississippi**, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), few rights are more fundamental than that of an accused to present witnesses

[12] Constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value can be admitted. **State v. Governor**, 331 So.2d 443, 449 (La. 1976).

in his own defense. A defendant has the right to present any and all relevant[13] evidence bearing on his innocence, unless prohibited by our federal and state constitutions, by law or by jurisprudence. **State v. Ludwig**, 423 So.2d 1073, 1077 (La. 1982); S**tate v. Vaughn**, 431 So.2d 358, 370, nn.3-7 (La. 1982) (on rehearing); **State v. Patch**, 470 So.2d 585, 588 (La. App. 1st Cir.), writ denied, 475 So.2d 358 (La. 1985). It is well settled that evidentiary rules may not supersede the fundamental right to present a defense. **Van Winkle**, 658 So.2d at 202.

We recognize that a criminal defendant has a constitutional right to present a defense and due process affords him the right of full confrontation and cross-examination of the State's witnesses. **State v. Hall**, 2002-1701 (La. App. 4th Cir. 6/25/03), 851 So.2d 330, 333, writ denied, 2003-2305 (La. 2/6/04), 865 So.2d 738. The right to present a defense does not mandate that the trial court permit the introduction of irrelevant evidence or evidence that has little probative value so that it is substantially outweighed by other legitimate considerations in the administration of justice. **State v. Shaw**, 2000-1051 (La. App. 5th Cir. 2/14/01), 785 So.2d 34, 45, writ denied, 2001-0969 (La. 2/8/02), 807 So.2d 861 (citing **Ludwig**, 423 So.2d at 1079). The determination of the evidence's relevancy lies within the trial judge's discretion, and this ruling will not be

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[13] Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." La. Code Evid. art. 401.

disturbed in the absence of an abuse of discretion. **State v. Winfrey**, 97-427 (La. App. 5th Cir. 10/28/97), 703 So.2d 63, 76, writ denied, 98-0264 (La. 6/19/98), 719 So.2d 481.

This court has reviewed the proffered testimony by Verdin and Chouest and finds that their potential testimony would have offered little if any support to the defendant's mistake of fact defense. While Verdin confirmed that she went to the district attorney's office with the defendant in 2009, she denied that the defendant was seeking to verify that the products did not contain illegal substances. She specifically stated, "That was for whenever they took the products from them in 2009 . . . That wasn't to make sure that it was okay to sell." She stated that she did not participate in the conversation that took place at the district attorney's office and that she was not present if and when any products were later returned to the defendant.[14] We further note that Verdin had no knowledge regarding the list of substances on the document showed to her by the defendant and had no idea how or who created the document. She responded positively when asked if seeing the document put her at ease, but testified that she still did not want to sell the products in question because she knew it was illegal to do so. She explained that she still knew that selling the synthetic cannabinoids was illegal because they were only allowed to sell it to certain customers and because it was

[14] As noted, during his pretrial interview the defendant indicated that his attorney contacted the TPSO regarding the seizure of bath salts, as opposed to synthetic cannabinoids.

kept out of public view.[15] Chouest could not state whom he spoke with in law enforcement regarding the document. He simply indicated that he called the task force and that whomever answered the phone told him the drugs were okay to sell, and he, in turn, relayed that information to the defendant. This hearsay testimony was highly unreliable.

The trial court is vested with broad discretion in determining whether evidence is relevant or, even if relevant, has such little probative value that it is substantially outweighed by other considerations. See La. Code Evid. art. 403; **State v. Coleman**, 2014-0402 (La. 2/26/16), 188 So.3d 174, 200, cert. denied, ___ U.S. ___, 137 S.Ct. 153, 196 L.Ed.2d 116 (2016). A trial court's determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. See **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992). We find no abuse of discretion in the trial court's decision not to allow the defendant to further question Verdin or call Chouest for the intended purposes. Moreover, we note that the defendant herein was allowed to present evidence in support of his mistake of fact claim, included documentation purportedly attesting to the legality of certain substances, testimony that the documentation had been shown to the store cashiers, and the joint stipulation indicating that the defendant consulted with his attorney regarding certain

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[15] As noted, Verdin's perpetuated testimony was played for the jury at trial and only a portion of her testimony was ruled inadmissible.

products. Considering the foregoing, we find that assignment of error number six lacks merit.

CONVICTIONS AND SENTENCES AFFIRMED.

APPENDIX B

STATE OF LOUISIANA	*	**32nd JUDICIAL DISTRICT COURT**
VERSUS #664,039	*	**PARISH OF TERREBONNE**
KASSIM M. NAGI	*	**STATE OF LOUISIANA**

POST TRIAL MOTIONS & SENTENCING

TRANSCRIPT OF THE POST TRIAL MOTIONS AND SENTENCING, IN THE ABOVE ENTITLED AND NUMBERED MATTER, ON DECEMBER 1, 2016, BEFORE HONORABLE RANDALL BETHANCOURT

APPEARANCES:

Mr. Jason Dagate
Assistant District Attorney
Houma, LA

Mr. Gregg Graffagnino
Attorney at Law
Houma, LA
and
Mr. Jeffrey Weiner
Ms. Annabelle Nahra
Law Office of Jeffrey Weiner Miami, Florida
(Representing Mr. Nagi)

* * *

[64] BY THE COURT:

And then today Mr. Weiner, appropriately, you called my attention to the fact, 'well, also Judge you have to look at it the other way too. You don't know the whole story about the defendant, his whole life and so forth'; and that was called to light.

However, I've got to tell you this. The defendant was convicted of four extremely serious felony charges. Each one – each one could result in at least thirty years in the State Penitentiary at hard labor – [65] each one, and we are talking four – pretty harsh. Louisiana considers these four infractions pretty severe, pretty big crimes.

Now, I'm going to go over each one and I too, because it is my duty, looked at the factors, the sentencing factors that is contained in Louisiana Code of Criminal Procedures Article 894.1.

Okay, I'm going to go over a couple of them, that were not brought out today. For example, number 2, 'the offender knew, or should have known that the victims of the offense were particularly vulnerable or incapable of resistance because of youth, age, disability, health, addictions.' You know, what are we doing? We are selling a very harmful product to perhaps unsuspecting Terrebonne Parish citizens.

Number 5, the offender knowingly created a risk of death, or great bodily harm, to more than one person. You don't have to be a rocket scientist to understand

that this 'bath salt', this 'fake marijuana', this 'poison' is in fact poison.

Number 14, in this case after all, it was all about money, money, money, money, money, money – money, money, money – big money – hundreds of thousands of dollars tossed around, million dollars – a lot of money on selling 'poison'. [66] Huh, number 15, the offense was a controlled dangerous substance and the offender sustained substantial income, or resources from on-going drug activities. Well, from my recollection of the evidence, there was a ton of cash; ton of money made in selling illegal – I was pretty shocked myself. For some little convenience store to take in that kind of money and set aside, by the way, so we can keep track of it – and here in Terrebonne Parish, selling this horrible 'poison' to many unsuspecting citizens.

So, yes I do think this is a big deal. I do think this is very serious.

All right, the defendant was convicted of Count 1, Racketeering. Again, the case was all about money. The law pursuant to Louisiana Revised Statute 15:1354(A) says that the defendant could get zero to fifty years at hard labor, and pay a fine in the amount of a million dollars, or both. The Court will sentence the defendant to thirty years at hard labor.

Count 2, Money Laundering – you remember the hundreds of thousands of dollars that were laundered in the eyes of the jury. Louisiana Revised Statute 14:230(E)(4), says that the defendant could get a fine of zero to fifty thousand dollars; or five to ninety-nine

years at hard labor. The Court will sentence – is sentencing the [67] defendant to thirty years at hard labor, consecutive to Count 1.

Count 3, Distribution of a C.D.S. I, Synthetic Cannabinoids. Louisiana Revised Statute 40:966(B)(3) carries a sentence from five to thirty years at hard labor. It is the Court's sentence that the defendant shall serve fifteen years at hard labor, consecutive to Counts 1 and 2. And finally, Count 4, Possession with Intent to Distribute a C.D.S. I, Synthetic Cannabinoids, carries a sentence of five to thirty years. The Court imposes a fifteen year sentence at hard labor, consecutive to Counts 1, 2, 3, and 4.

* * *

APPENDIX C

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA NO. 2018-K-0739

VS.

KASSIM M. NAGI

– – – – – –

IN RE: Kassim M. Nagi; – Defendant; Applying For Writ of Certiorari and/or Review, Parish of Terrebonne, 32nd Judicial District Court Div. E, No. 664039; to the Court of Appeal, First Circuit, No. 2017 KA 1257;

– – – – – –

March 25, 2019

Denied.

SJC
BJJ
GGG
MRC
JDH
JTG

WEIMER, J., recused.