NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1284

STATE OF LOUISIANA

VERSUS

CHAUNCEY JERROD CHRISTOPHER

Judgment rendered February 11, 2011.

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 07-05-0003
Honorable Richard "Chip" Moore, Judge

* * * * * *

HONORABLE HILLAR C. MOORE, III
DISTRICT ATTORNEY
ADRIENNE WARD
JEANNE ROUGEAU
ASSISTANT DISTRICT ATTORNEYS
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

HOLLI HERRLE-CASTILLO
MARRERO, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
CHAUNCEY JERROD CHRISTOPHER

* * * * * *

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Higginbotham, J., dissents in part and assigns reasons.

PETTIGREW, J.

The defendant, Chauncey Jerrod Christopher, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64 (count 1); two counts of first degree robbery, violations of La. R.S. 14:64.1 (counts 2 and 3); and two counts of attempted simple robbery, violations of La. R.S. 14:65 and 14:27 (counts 4 and 5). The defendant pled not guilty to all charges. Following a jury trial, the defendant was found guilty as charged on all counts. For the armed robbery conviction (count 1), the defendant was sentenced to twenty-five years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. For the first degree robbery conviction (count 2), the defendant was sentenced to five years at hard labor without the benefit of parole, probation, or suspension of sentence. The five-year sentence was ordered to be served consecutively to the twenty-five-year sentence. For the other first degree robbery conviction (count 3), the defendant was sentenced to five years at hard labor without the benefit of parole, probation, or suspension of sentence. This five-year sentence (count 3) was ordered to run concurrently with the other sentences. For each of the two attempted simple robbery convictions (counts 4 and 5), the defendant was sentenced to three-and-one-half years at hard labor. These sentences were ordered to run concurrently with the other sentences. The defendant now appeals, designating three assignments of error. We affirm the convictions and sentences.

FACTS

In April and May 2005, there was a string of robberies or attempted robberies at the Bank One ATM machine on Government Street in Baton Rouge, Louisiana. On each occasion between about 7:00 p.m. and 9:30 p.m., the perpetrator, a black male, walked up to the victim while he or she was retrieving or about to retrieve money from the drive-through ATM machine and demanded money while claiming to have a gun. All the victims were alone in their vehicles. The perpetrator wore dark clothes and covered his face with likely a bandana or a T-shirt.

Each of the five victims testified at trial. Rene Vicknair (count 3 victim) testified that he was robbed on April 2, 2005. Vicknair stated the perpetrator had something covered with a handkerchief he claimed was a gun as he took $160 from Vicknair.

Vicknair thought he saw the perpetrator holding a multi-tool, which had a knife as one of the components. Josh Carroll (count 1 victim) testified that he was robbed on May 4, 2005. The perpetrator claimed to have a gun, but Carroll saw a folded knife in his hand. The perpetrator took $300. Roosevelt Turner (count 5 victim) testified that someone attempted to rob him on May 10, 2005. When the perpetrator approached Turner and told him he was being robbed, Turner feigned having a pistol on his car seat. The perpetrator reached in the car and, after a brief struggle, the perpetrator ran off. Steve Bartha (count 2 victim) testified that he was robbed on May 12, 2005. The perpetrator told him to give him his money or he would shoot him. Bartha gave him $35 from his wallet. The perpetrator then forced Bartha to insert his bank card and enter his code. The perpetrator withdrew $300.

Stacey Lane (count 4 victim) testified that the defendant attempted to rob her on May 16, 2005. Based on the series of robberies at this one location, Baton Rouge police set up a stakeout at the Bank One ATM machine. When the defendant approached Lane and told her to give him her money, the police closed in and apprehended the defendant.

The defendant was taken to the Mayflower police station and questioned by Detectives Paul Barbin and Larry Walters, both with the Baton Rouge Police Department. The defendant admitted to committing all four robberies or attempted robberies in May. However, the defendant denied having robbed Vicknair on April 2.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support the conviction for the first degree robbery of Rene Vicknair and the conviction for the armed robbery of Josh Carroll. Specifically, the defendant contends that regarding the Vicknair robbery, his identity as the perpetrator was not established by the State. Regarding the Carroll robbery, the defendant alleges that the State failed to prove he was armed with a dangerous weapon at the time of the robbery. The defendant does not contest the other three convictions.

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 standard of review for the

sufficiency of the evidence to uphold a conviction is whether or not, 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, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the fact finder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992, pp. 5-6 (La. 11/29/06), 943 So.2d 1047, 1051.

The sole issue regarding the first degree robbery of Vicknair raised by the defendant is that Vicknair was unable to identify him as the person who robbed him. During questioning after he was apprehended, the defendant admitted to committing the four robberies or attempted robberies in May. However, he denied that he robbed Vicknair on April 2, 2005. The defendant maintained that he had only robbed (or attempted to rob) over a two-week period, which is consistent with the four crimes committed from May 4 to May 16.

Vicknair testified that the person who robbed him was a black male who had on dark clothing with a "bandanna type thing over his face and a shirt over his head." According to Officer Chad Kuber, with the Baton Rouge Police Department, he spoke to Vicknair after he was robbed. Vicknair told Officer Kuber the perpetrator was wearing black jeans, a black hooded sweatshirt, and a black bandana around his face. Some of the other victims who testified at trial also described the perpetrator as wearing a dark

hooded sweatshirt, but with white covering over his face. However, Lane, like Vicknair, testified the perpetrator wore a dark bandana on his face. Vicknair testified that he was unable to identify the perpetrator at the time of the robbery. When asked if he gave a physical description of the perpetrator to the police, Vicknair indicated that he did and testified as follows: "He was black, he was around my height, not much taller. He wasn't smaller than I was, just judging -- I was sitting in the car and he was hunched over, it was hard, and from then he was running." Vicknair testified that he was around 5' 6" or 5' 7". Vicknair also stated that he weighed about 165 pounds and that the person who robbed him was probably a little bit bigger than him. At the time the defendant was apprehended during his attempted robbery on May 16, 2005, the defendant was described in the police report as a black male who was 6' 3" and weighed 220 pounds. Regarding this discrepancy in height, however, Vicknair explained "someone crouched and bent over in my window is difficult to see how tall someone is."

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 which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that, based upon the evidence viewed in the light most favorable to the prosecution, the defendant was the person who robbed Vicknair. The defendant did not testify and presented no rebuttal testimony. See **Moten**, 510 So.2d at 61-62. Thus, given that Vicknair's robber, like the defendant in his other robberies and attempted robberies, dressed in dark clothes and wore a bandana over his face; that Vicknair's robber, like the defendant in his other robberies and attempted robberies, committed the crime at the same ATM, around the same time, and in virtually the identical manner; and that all five robberies and attempted robberies occurred in a less than seven week period, including the four robberies or attempted robberies the defendant admitted to, we find that the jury's rejection of the defense hypothesis of innocence, namely, the misidentification of the defendant as the person who robbed Vicknair, was reasonable. See **Moten**, 510 So.2d at 61.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the first degree robbery of Rene Vicknair. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

We now address the armed robbery conviction. "Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. R.S. 14:64(A). The defendant does not deny that he robbed Carroll. Instead, the defendant argues the State failed to prove he was armed with a dangerous weapon at the time of the robbery. The defendant notes in his brief that Carroll testified the defendant had what "looked like" a folded up knife. Carroll also testified the defendant threatened to shoot him if he did not give the defendant $300. According to the defendant, it would have been illogical to threaten to shoot Carroll if he in fact had a knife in his hand with which he could have threatened Carroll.

We note initially we find nothing illogical about the defendant suggesting he would shoot Carroll when he possessed only a knife. Perhaps the defendant felt Carroll would be more apt to give up his money if he were being threatened with a gun rather than with a folded knife. In any event, Carroll was consistent throughout his testimony that the defendant had a knife in his hand as he robbed Carroll. For example, Carroll described the knife in the following colloquy on direct examination:

> Q. Tell me a little bit about that. When did you see what you thought was a knife or a pocket knife?
>
> A. Well, it was essentially as soon as -- as soon as he showed up, you know, the first thing that he did before he even said anything was stick his hand in my face, kind of from behind like this (demonstrating) with what I would say was -- what appeared to me to be a folded-up, I guess, knife, maybe about -- the stock of it was about that long (indicating).
>
> Q. When you say the stock of it, what do you mean?
>
> A. It's a pocket knife, so the actual part where the blade folds in. The blade was not extended, it was folded in.

Q. And what size do you think it was from what you could see?

A. I'd say maybe about three and a half inches.

Q. Do you feel, Mr. Carroll, that you saw the object long enough to be certain that it was a knife of some sort?

A. I was pretty positive at the time.

Q. Are you positive now, today?

A. I still believe so, yes, ma'am.

Carroll further testified that he was threatened with what he thought was a knife and that he felt forced or coerced to give up his money. For purposes of the armed robbery statute, a knife, folded blade or not, is a dangerous weapon. See **State v. Gallien**, 613 So.2d 1145, 1147 (La. App. 5 Cir. 1993). Considering the guilty verdict, the jury clearly found credible Carroll's testimony regarding the defendant holding a knife in his hand while demanding money from Carroll. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

After a thorough review of the record, we find the evidence supports the jury's guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the armed robbery of Josh Carroll. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 and 3

In his second assignment of error, the defendant argues the twenty-five-year sentence for the armed robbery conviction is excessive. In his third assignment of error,

the defendant argues the trial court should not have ordered the five-year sentence (count 2) for the first degree robbery conviction to run consecutively to the twenty-five-year armed robbery sentence (count 1).

A thorough review of the record indicates that defendant's counsel did not make a written or oral motion to reconsider sentence. Under La. Code Crim. P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having these assignments of error reviewed. **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). See also **State v. Felder**, 2000-2887, p. 10 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

Moreover, if we were to consider the claim regarding consecutive sentences, we would find it baseless. Louisiana Code of Criminal Procedure article 883 provides that sentences imposed for offenses not arising from the same act or transaction, or constituting parts of a common scheme or plan, should be served consecutively unless the trial court expressly directs otherwise. It is within the sentencing court's discretion to order that sentences run consecutively, rather than concurrently. The five-year sentence (count 2) and the twenty-five-year sentence (count 1) in this case were imposed for offenses that occurred days apart, did not arise from the same act or transaction, and involved different victims. Accordingly, the trial court properly imposed consecutive sentences. These assignments of error are without merit.

REVIEW FOR ERROR

The defendant asks this court to examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without

inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES AFFIRMED.

STATE OF LOUISIANA

VERSUS

CHAUNCEY JERROD CHRISTOPHER

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1284

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J., DISSENTS IN PART AND ASSIGNS REASONS.

HIGGINBOTHAM, J., dissenting in part.

Although I agree with the majority in all other respects, I respectfully disagree with the determination that there was sufficient evidence to convict the defendant of first degree robbery of Rene Vicknair. Mr. Vicknair was unable to positively identify the defendant in or out of court as the person who robbed him and there were discrepancies in his description of the appearance of the man who robbed him and the appearance of the defendant. Further, during questioning after defendant was apprehended he admitted to the other crimes, but adamantly denied robbing Mr. Vicknair on April 2, 2005. Defendant maintained that he only robbed (or attempted to rob) over a two-week period, which is consistent with the four crimes committed from May 4 to May 16. Therefore, I find the jury's rejection of the defendant's hypothesis of innocence, namely the misidentification of him as the person who robbed Vicknair, was not reasonable. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). See also **State v. Mussall**, 523 So.2d 1305, 1311-1312 (La. 1988). The evidence did not negate a reasonable probability of misidentification and did not support the jury's guilty verdict. Viewing the evidence in the light most favorable to the State, any rational trier of fact could not have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of this count of first degree robbery. See LSA-C.Cr.P. art 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660-661.

For these reasons, I respectfully dissent in part.