

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

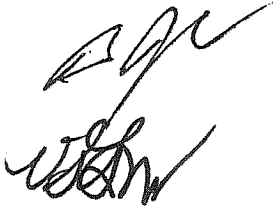
FIRST CIRCUIT

NO. 2006 KA 1858

STATE OF LOUISIANA

VERSUS

CLYISE WINDING



Judgment Rendered: March 23, 2007.

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On Appeal from the  
23rd Judicial District Court,  
in and for the Parish of Ascension  
State of Louisiana  
District Court No. 19,169

The Honorable Alvin Turner, Jr., Judge Presiding

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\* \* \* \* \*

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

*McDonald, J. concurs with reasons.*

## **CARTER, C.J.**

Clyise Winding, defendant, was charged by bill of information with one count of armed robbery; use of a firearm, a violation of LSA-R.S. 14:64.3.<sup>1</sup> Defendant pled not guilty, and a jury unanimously convicted defendant of armed robbery while using a firearm. The trial court sentenced defendant to serve thirty years at hard labor without benefit of probation, parole, or suspension of sentence. For the reasons that follow, we affirm defendant's conviction, vacate his sentence, and remand for resentencing.

### **FACTS**

On September 1, 2005, at approximately 11:47 p.m., Gonzales Police Department Officer Duane Carpenter was dispatched to the Popeye's Chicken restaurant located on Airline Highway in Gonzales in reference to an armed robbery. The dispatcher advised Officer Carpenter that two black males dressed in black pants and black long sleeve shirts with white bandanas over their faces had robbed employees of Popeye's. The two men fled on foot behind the restaurant towards New River Street. Officer Carpenter arrived at the Popeye's within thirty seconds of receiving the dispatch.

Upon arriving at the Popeye's, Officer Carpenter spoke with Arthur Johnson, the Popeye's employee who was robbed as he left the restaurant with the day's deposits. Johnson estimated he had \$5,000.00 in the bag that the two men stole. Johnson reiterated that the two men were armed, dressed in black, and wearing white bandanas. According to Johnson, one man was

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<sup>1</sup> The bill of information failed to include the statutory reference for armed robbery, LSA-R.S. 14:64. No objection was made to this technical error, nor is the issue raised on appeal. Moreover, at the inception of trial, the clerk of court read into the record that defendant was charged by bill of information with "armed robbery, Revised Statute 14:64." The omission of the citation for armed robbery from the bill of information was in no way prejudicial to defendant. See LSA-C.Cr.P. art. 464.

dark-skinned and the other was bright-skinned. Johnson stated that as he left the restaurant and locked it, the two men came toward him from the side of the building and robbed him at gunpoint. After giving the men the bag, Johnson got into his vehicle and called the police.<sup>2</sup>

After obtaining a description of the two robbers, Office Carpenter advised other arriving units to set up a perimeter. The two men had run behind Popeye's toward an open field, in the direction of a McDonald's restaurant. Officer Carpenter started walking towards the back of the Popeye's building, in the direction the men were seen fleeing. As he walked, Officer Carpenter noticed a black male squatting down in a yard, wearing all black clothing, and watching the other officers who were searching the area. As he got closer to this male, who would later be identified as defendant, Officer Carpenter announced his presence. Defendant jumped and fled.

Officer Carpenter gave chase and notified the other officers in the area that he was pursuing a suspect towards the Popeye's and gave a description of defendant's dark clothing. As defendant was fleeing, he was tearing off his clothing. Defendant ran behind a house and jumped into some bushes. Due to defendant's refusal to obey the police commands to come out of the bushes, he had to be pulled out. When pulled from the bushes, defendant had shed all of his clothing and was wearing only his boxer underwear.

At trial, Officer Carpenter estimated that he spotted defendant two to three minutes after arriving at the Popeye's. The police never recovered any

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<sup>2</sup> Another Popeye's employee was leaving the restaurant with Johnson at the time the incident occurred. She remained at the restaurant to give a written statement to the police but did not testify at trial.

firearms or the bank bag containing the money. The second robber was never captured.

After subduing defendant and advising him of his rights, defendant claimed that he was coming from his girlfriend's house; however, defendant refused to provide the police with his girlfriend's name or address. Officer Carpenter identified defendant as the individual who was taking off black clothing as he fled from the police.

Tony Billiot, of the Gonzales Police Department, testified at trial that he was involved in setting up the perimeter near the Popeye's following the robbery dispatch. Officer Billiot positioned himself near New River Street and saw the defendant running and joined the pursuit. Defendant ignored several orders to stop by Officer Billiot. Officer Billiot confirmed that upon capture, defendant was wearing only boxer underwear.

Defendant did not testify at trial.

### **SUFFICIENCY OF THE EVIDENCE**

In his first assignment of error, defendant argues that the evidence was insufficient to support his conviction. Defendant specifically points to the state's failure to produce any clothing, bandanas, weapons, or money to tie him to this crime.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt and defendant's identity as the perpetrator. LSA-C.Cr.P. art. 821; **Jackson v. Virginia**, 443 U.S 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Moore**, 477 So.2d 1231, 1233 (La. App. 1 Cir. 1985), writs denied,

480 So.2d 739, 480 So.2d 741 (La. 1986). The **Jackson** standard of review, incorporated in LSA-C.Cr.P. 821B, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438, provides that the trier of fact must be satisfied that the overall evidence excluded every reasonable hypothesis of innocence. **State v. Montecino**, 04-0892 (La. App. 1 Cir. 2/11/05), 906 So.2d 450, 453, writ denied, 05-0717 (La. 6/3/05), 903 So.2d 456.

This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **Montecino**, 906 So.2d at 453.

In the present case, the victim of the crime, Johnson, could not identify either of the two men who robbed him at gunpoint on the night at issue. Johnson explained that their faces were covered with white bandanas. Johnson was able to provide a description of the clothing the two men were wearing at the time of the robbery.

The state also presented testimony that the two robbers, who were dressed in black and wearing white bandanas over their faces, fled in the same direction that defendant was observed crouching in some bushes, wearing black clothing, less than five minutes after the police were notified of the robbery. Defendant was clearly acting in a manner to avoid detection by the police. Once the police made defendant aware that they knew of his presence, not only did defendant flee, he began to shed his black pants and shirt. Defendant eventually had to be removed from a bushy area as he resisted the police. Flight and attempt to avoid apprehension are indicative

of consciousness of guilt and are circumstances from which a jury may infer guilt. **Moore**, 477 So.2d at 1234.

After being physically removed from the bushes where defendant was trying to evade capture, he told the police that he was coming from his girlfriend's house. Defendant later refused to identify his girlfriend or provide her address to the police.

In circumstantial evidence cases, the court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of events. Rather, this court, evaluating the evidence in the light most favorable to the prosecution, determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. **State v. Davis**, 92-1623 (La. 5/23/94), 637 So.2d 1012, 1020, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994).

Applying the appropriate standard of review, we find the evidence sufficiently supports defendant's conviction and negates the hypothesis of innocence offered, that defendant was returning from his girlfriend's house.

This assignment of error is without merit.

### **SENTENCE**

In defendant's second assignment of error, he argues the trial court imposed an unlawful sentence. The sentencing transcript reflects that the trial court sentenced defendant to a term of thirty years at hard labor, without the benefit of probation, parole, or suspension of sentence.

The penalty provision for armed robbery provides for a term of imprisonment between ten and ninety-nine years at hard labor, without benefit of parole, probation, or suspension of sentence. LSA-R.S. 14:64B.

At the time of this offense, the additional penalty provision for armed robbery involving a firearm used in the commission of the crime was imprisonment for an additional period of five years without benefit of parole, probation, or suspension of sentence, with the additional penalty to be served consecutively to the sentence imposed for armed robbery. Stated plainly, at the time of this offense, the penalty provision of LSA-R.S. 14:64.3 lacked the requirement that the sentence would be served at hard labor.<sup>3</sup>

In sentencing defendant, the trial court simply stated that defendant was to serve thirty years at hard labor without benefit of probation, parole, or suspension of sentence. Such a sentence was in error because according to the verdict of the jury, defendant should have been sentenced under both LSA-R.S. 14:64, requiring a sentence to be served at hard labor without benefit of probation, parole, or suspension of sentence, and LSA-R.S. 14:64.3, which would not be served at hard labor but would run consecutive to defendant's armed robbery sentence. Because the trial court erred in sentencing defendant to only one hard-labor sentence for both the conviction and the additional penalty of five years imprisonment, we vacate the single sentence and remand to the trial court for resentencing.

#### **COMMENTS BY TRIAL COURT**

In his final assignment of error, defendant argues that the trial court erred in treating defendant's post-trial exercise of his Fifth Amendment right to remain silent and against self-incrimination as an aggravating factor.

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<sup>3</sup> The penalty provision of LSA-R.S. 14:64.3 was amended by 2006 La. Acts No. 208, § 1, and now provides for a sentence to be served at hard labor.

Having previously vacated defendant's sentence, this assignment of error is pretermitted.

**CONVICTION AFFIRMED; SENTENCE VACATED;  
REMANDED FOR RESENTENCING.**



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McDONALD, J., Concurring:

I respectfully concur with the majority's decision to vacate the single 30 year sentence and remand for resentencing. However, I do not believe the additional five year sentence must be served without hard labor. I fully understand and appreciate the view of the majority as it is consistent with the prior decisions of this court in *State v. Williams*, 815 So.2d 378 (La. App. 1<sup>st</sup> Cir. 3/28/02) and the decision of the Third Circuit in *State v. Wardsworth*, 904 So.2d 65, 2004-1572 , (La.App. 3 Cir.,2005). However, I believe the *Williams* and *Wardsworth* courts reached the wrong conclusion. While these two cases interpret the term "imprisoned" to mean "without hard labor" none of the other circuits find problems with imposing a sentence at "hard labor" under this statute.<sup>1</sup>

La. R.S. 14:3 controls the interpretation of the articles in the Criminal Code. It states:

The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, **all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context**, and with reference to the purpose of the provision. (Emphasis added).

Legislative intent is the fundamental question in all cases of statutory interpretation, and rules of statutory construction are designed to ascertain

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<sup>1</sup>State v. Urdite, App. 2 Cir.2004, 877 So.2d 216, 38,423 (La.App. 2 Cir. 6/23/04), writ denied 888 So.2d 229, 2004-1866 (La. 11/24/04); State v. Williams, App. 2 Cir.2001, 781 So.2d 682, 34,370 (La.App. 2 Cir. 2/28/01); State v. Lewis, App. 4 Cir.2004, 876 So.2d 912, 2003-1234 (La.App. 4 Cir. 6/2/04), writ denied 888 So.2d 229, 2004-1855 (La. 11/24/04); State v. Walker, App. 5 Cir.2001, 789 So.2d 86, 01-51 (La.App. 5 Cir. 5/30/01), writ denied 815 So.2d 834, 2001-1922 (La. 5/10/02); State v. Hartwell, App. 5 Cir.2004, 866 So.2d 899, 03-1214 (La.App. 5 Cir. 1/27/04), writ denied 876 So.2d 832, 2004-0448 (La. 6/25/04).

and enforce the intent of the statute. *State v. Campbell*, 2003-3035, (La.7/6/04), 877 So.2d 112, 117; *State v. Peters* 2005-2069 (La.App. 1 Cir. 5/5/06), 935 So.2d 201, 203-204. It is presumed that the legislature enacts each statute with deliberation and with full knowledge of all existing laws on the same subject. Thus, legislative language is interpreted by the courts on the assumption that the legislature was aware of existing statutes, rules of construction, and judicial decisions interpreting those statutes. It is further presumed that the legislative branch intends to achieve a consistent body of law.*Id.*

La. R.S. 14:64.3 is a sentence enhancement statute. It does not provide for a separate crime. Arguably it may be interpreted in two different ways. The first is that given it by the *Williams* and *Wardsworth* courts. They are correct that it provides for imprisonment and does not provide for hard labor. The second interpretation is to consider it a sentence enhancement statute. I believe this to be the better view and more consistent with the purpose of the provision and consistent with its context in relation to the armed robbery statute. This enhancement statute only applies to armed robbery. It does not apply to any other criminal statute. It provides that the sentence shall be served consecutively to the sentence imposed by R.S. 14:64, the armed robbery statute. Since it enhances the penalty for armed robbery, its proper context is that it is intended to be served in the same way as the penalty for armed robbery. This is the only common sense interpretation. The word “imprisoned” is not meant to be interpreted as providing the manner in which the sentence is to be served, but is intended to be synonymous with the term “incarcerated” or “confined”. Any other interpretation does not do justice to the basic idea of statute interpretation and fails to consider its proper context. For these reasons I believe the sentencing provision of LSA-

R.S. 14:64.3 allows for imprisonment at hard labor and I respectfully concur.

I agree with the opinion in all other respects.