NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0015

STATE OF LOUISIANA

VERSUS

ELIXE NOVER ESCOBAR-GALINDO

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 410192, Division "F"
Honorable Martin E. Coady, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered May 4, 2007

PARRO, J.

The defendant, Elixe Nover Escobar-Galindo, was charged by bill of information with two counts of attempted simple kidnapping, violations of LSA-R.S. 14:27 and 45, and pled not guilty on both counts.[1] Following a jury trial on count 1, he was found guilty as charged. He moved for a new trial and for a post-verdict judgment of acquittal, but the motions were denied. He was sentenced to two and one-half years of imprisonment at hard labor, with the court recommending that the defendant be denied diminution of sentence for good behavior. See LSA-C.Cr.P. art. 890.1(B). He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating two assignments of error. We affirm the conviction and sentence on count 1.

ASSIGNMENTS OF ERROR

1. The trial court committed manifest error when it accepted the jury's guilty verdict against the defendant despite the fact that the record reflected that the person who approached the victim spoke perfect English and did not use any force, intimidation, or enticement to get the victim into the van.

2. The trial court erred by permitting the state to use other crimes evidence against the defendant even though the state failed to give defense counsel proper notification that it would use other crimes evidence against the defendant at trial.

FACTUAL BACKGROUND

According to the trial testimony of the girl victim, M.S.,[2] she was standing alone at a school bus stop, waiting for her school bus on Wednesday, March 8, 2006,[3] when a man drove up to her and stated, "come on, get in the car. You need a ride." The victim indicated the man did not suggest that she get into the car, but rather "told"

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1 The instant appeal concerns only count 1. Following the defendant's conviction on count 1, the state entered a nolle prosequi as to count 2.

2 The victim is referenced only by her initials. See LSA-R.S. 46:1844(W).

3 At the time of her testimony, M.S. was twelve years old.

her to get in the car. The victim indicated the man "said it perfectly in English," but had an accent. The windows of the man's car were tinted, but he had his driver's-side window rolled down enough for the victim to see his face. The victim told the man "no," and he drove way from the victim "real slow," but then opened his door and "looked out." The victim was "really scared" and kicked off her shoes and ran back home to her mother. Before entering her home, she saw the man drive back to where she had been standing.

On Thursday, March 9, 2006, the victim saw the man's vehicle again after it exited the Motel 6 parking lot, but the vehicle did not stop. The victim indicated she was absolutely positive that the vehicle was the same one she had encountered on March 8, 2006. The victim reported the second incident to her mother when she arrived home from school. The victim's stepfather took the victim "next door" to the Motel 6 parking lot, and the victim pointed out "the exact same car" she had encountered at the bus stop and wrote down the vehicle's license plate number.

On Friday, March 10, 2006, the victim encountered the man again at her bus stop while she was waiting for her school bus with a friend. The victim saw the man's car exit the Motel 6 parking lot. The victim indicated, as her bus was coming around the corner, "[the man] stopped and he asked [the victim and her friend] if [the victim and her friend] needed a ride, to get in the car." The victim and her friend immediately turned to the victim's mother, who was parked nearby, and shouted, "[t]hat's him, that's him." The victim wrote down on her hand the license plate number of the vehicle the man was driving. The license plate number matched the license plate number the victim had recorded the previous night. The man drove off, and the victim's mother followed him, while alerting the police to her location.

The victim was not familiar with the word "entice." She indicated, however, that "lure" was "to tell somebody you've got like candy or something to try to get them in the car," and that the man had tried to lure her into his car on March 8 and March 10, 2006.

The victim's mother, S.O., also testified at trial. On a Wednesday in March of 2006, S.O. was in the bathtub when the victim came running to her from her school bus stop and told her that "a man had just tried to get [the victim] to get in the car with him." The victim was scared and crying. By the time S.O. went outside to look for the man, he had fled. The victim told S.O. that she thought she had seen the man's vehicle in the Motel 6 parking lot. As a result of the incident, S.O. began monitoring the victim at her bus stop.

Two days after the first incident, while S.O. sat in her vehicle monitoring the victim and her friend at the bus stop, the victim pointed to a vehicle coming down the road. The vehicle drove up to the victim and her friend and the driver rolled down his window about six inches. The girls began screaming, "that's him, that's him," and S.O. approached the man's vehicle in her vehicle.

The man "took off," and S.O. pursued the man's vehicle, while alerting the police with her cellular telephone. According to S.O., the man tried to "lose [S.O.]" or "to get [S.O.] back in an area." The man drove into the parking lot of a business and went to the rear of the parking lot. No other cars were in the area, and S.O. did not want to be alone with the man, so she waited at the exit to the parking lot. The man turned around in the parking lot and drove towards S.O., but used another exit to leave the parking lot. S.O. never lost sight of the man's vehicle between the time she began following the vehicle and the time when the police arrived to assist her. She identified in court the defendant as the man she had seen speaking to the victim and her friend at the bus stop, as the man she had seen in the parking lot of the business, and as the man she had seen in her rearview mirror when she exited the parking lot of the business.

Slidell Police Department Sergeant Brian Marquette also testified at trial. Along with other police officers, Sergeant Marquette responded to S.O.'s call for help. The defendant spoke in broken English and produced a Texas identification card in the name of "Alejandro Zambrano." When the police attempted to verify the identification, they learned the identification was for a female. The defendant also

had a fraudulent social security card. The vehicle he was driving was registered to Hien T. Nguyen in Houston, Texas. The police learned the defendant's true identity after checking his fingerprints with the FBI.

Slidell Police Department Detective Stan Rabalais also testified at trial. He transported the defendant from the traffic stop to the location of the victim at Slidell Junior High School. Detective Rabalais decided to do a "show-up" line-up because the defendant had been captured within the hour, and Detective Rabalais wanted to see if the victim could positively identify the suspect. Detective Rabalais indicated he did not force or coerce the victim to make an identification and did not suggest to her that the person presented to her was the same person she had complained about. The victim identified the defendant as the man she had encountered at her bus stop on March 8 and March 10, 2006, and was "positive" about her identification.

The victim also identified the defendant in court as the man she had encountered at her bus stop on March 8 and March 10, 2006. The victim indicated the police did not suggest that the person they were showing her was "the man that did it," but rather she knew "it was the guy" when the police showed him to her.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number one, the defendant argues that although the victim testified her assailant spoke English and that he came from the Motel 6 parking lot, where a number of Spanish-speaking people were living following Hurricane Katrina, he is a Spanish-speaking Honduran who uses broken English. The defendant also argues the victim's identification of him was suggestive because he was the only person presented to the victim for identification. Lastly, the defendant argues the state failed to prove the would-be kidnapper "enticed, manipulated, or [used force]" in attempting to apprehend the victim.

Initially, we note the defendant failed to preserve his challenge to the "show-up" line-up. The defense filed various pre-trial motions, including a motion to suppress identification, but prior to any hearing being set for the motions, withdrew "any outstanding motions" at the beginning of trial. It is ordinarily incumbent on the

proponent of a motion to move for a hearing date on that motion. Otherwise, it may be considered that the motion has been abandoned. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 437. Failure to file a motion to suppress evidence in accordance with LSA-C.Cr.P. art. 703 prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress. LSA-C.Cr.P. art. 703(F). Moreover, while one-on-one confrontations between a suspect and victim are not favored by the law, they are permissible when justified by the overall circumstances. This procedure is generally permitted when the accused is apprehended within a short time after the commission of the offense and is returned to the crime scene for an on-the-spot identification. Such a prompt in-the-field identification, under appropriate circumstances, promotes accuracy and expedites the release of innocent suspects. **State v. Thomas**, 589 So.2d 555, 563 (La. App. 1st Cir. 1991).

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. 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, in order to convict," every reasonable hypothesis of innocence is excluded. Where the key issue is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the state is required to negate any reasonable probability of misidentification. Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486-87, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that

evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

Simple kidnapping is the intentional taking, enticing, or decoying away, for an unlawful purpose, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody. LSA-R.S. 14:45(A)(2). The state, in order to satisfy its burden of proof by sufficient evidence, need not establish the exact nature of the defendant's intent or purpose, but rather need only negate the existence of any lawful purpose. **State v. Gill**, 441 So.2d 1204, 1207 (La. 1983).

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. LSA-R.S. 14:27(A).

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." LSA-R.S. 14:10(1). 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. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

After a thorough review of the record, we are convinced that the evidence, viewed in the light most favorable to the state, proved beyond a reasonable doubt,

and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted simple kidnapping and the defendant's identity as the perpetrator of that offense. The verdict rendered in this case indicates the jury accepted the victim's testimony that the defendant repeatedly attempted to lure or entice her into the vehicle he was driving. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, **State ex rel. Johnson v. State**, 00-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. The victim specifically testified the defendant "told," rather than suggested, she get into the vehicle. Further, when the victim's mother pursued the defendant, he drove his vehicle to evade her or to take her to a remote area. When finally apprehended by the police, the defendant attempted to hide his true identity by presenting false identification papers. Purposeful misrepresentation reasonably raises the inference of a guilty mind. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 85. Given these facts, the jury reasonably concluded that the evidence presented by the state negated the existence of any lawful purpose for the defendant's actions. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In assignment of error number two, the defendant argues that during trial, the state presented inadmissible evidence against him concerning his presenting false identification, which put his character on trial.

The defendant's challenge to the alleged other crimes evidence was not preserved for review. The defendant failed to contemporaneously object to the

challenged evidence. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. LSA-C.Cr.P. art. 841; LSA-C.E. art. 103(A)(1). Accordingly, this assignment of error is without merit.

CONVICTION AND SENTENCE ON COUNT 1 AFFIRMED.