NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 2366

STATE OF LOUISIANA

VERSUS

ELVIS McGARY

Judgment Rendered: MAY - 8 2009

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On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Tangipahoa
State of Louisiana
Docket No. 701675

Honorable Zorraine M. Waguespack, Judge Presiding

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

The defendant, Elvis McGary, was charged by bill of information with purse snatching, a violation of LSA-R.S. 14:65.1. (R. 5). The defendant entered a plea of not guilty. (R. 1). After a trial by jury, the defendant was found guilty as charged. (R. 3). The defendant was sentenced to twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. (R. 4). The trial court denied the defendant's motion for new trial and motion for post verdict judgment of acquittal. (R. 4). The defendant now appeals, arguing that the trial court erred in denying his motion for mistrial and that the evidence was insufficient to support the verdict. For the following reasons, we affirm the conviction, amend the sentence, and affirm the sentence as amended.

STATEMENT OF FACTS

On or about May 6, 2007, Jeanette Rushing (the victim) was in a grocery store parking lot in Ponchatoula, Louisiana, when she was pulled to the ground as someone snatched her purse from her shoulder. (R. 261-264). The contents of the purse included a wallet, checkbook, credit cards, and cash. (R. 264, 288). Gregory Starkey, Sr., a customer who was in the parking lot at the time of the incident, witnessed the purse snatching. The defendant was subsequently identified as the assailant.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that his trial was tainted when the deputy clerk read the incorrect bill of information to the jury. According to the defendant, the jury heard the name of a different victim from a separate case and concluded that the defendant had been accused of committing a crime on another occasion. The defendant argues that the jury was more inclined to convict him based on supposed bad behavior instead of the state's alleged incriminating evidence. The defendant further argues that the appropriate remedy to correct this error was to grant the motion for mistrial. The defendant notes that the trial court failed to grant the motion or admonish the jury to disregard the information. Although the defendant concedes that the error was committed unintentionally and without malice or ill will, defendant concludes that the error was not harmless, but prejudicial.

The trial court may grant a mistrial for certain inappropriate remarks that come within LSA-C.Cr.P. art. 770, which provides in pertinent part:

> 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:
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> * * *
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible[.]
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> * * *
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

Otherwise, an admonition to the jury may suffice, as provided in LSA-C.Cr.P. art. 771:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
>
> (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770[.]
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> * * *
>
> 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.

Mistrial is a drastic remedy and warranted only when substantial prejudice will otherwise result to the accused to deprive him of a fair trial. **State v. Booker**, 2002-1269, pp. 17-18 (La. App. 1 Cir. 2/14/03), 839 So.2d 455, 467, writ denied, 2003-1145 (La. 10/31/03), 857 So.2d 476. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518, p. 12 (La. 1/17/01), 776 So.2d 443, 454.

After speaking to the members of the jury, the trial court asked the clerk to read the bill of information and the following was stated by the deputy clerk of court:

> State of Louisiana, Parish of Tangipahoa, Twenty-First J.D.C. – Docket No. 701591, State of Louisiana versus Elvis McGary: On or about May the 2nd, Elvis McGary did violate, count one, R.S. 14:65.1, purse-snatching,

> by theft of personal property, having value contained within the purse or wallet in the immediate control of the victim, namely, Gail –

(R. 245-46). At that point, the assistant district attorney interrupted and stated, "No. Wait. You're reading the wrong docket number." (R. 246). The deputy clerk then read the correct bill of information and the defendant's plea. (R. 246). The trial court cited and read the appropriate statute, LSA-R.S. 14:65.1, and then provided a lengthy explanation of the trial procedure to the jury, including a discussion of the state's burden of proof and the presumption of innocence. (R. 247-250). After the trial court addressed the jury, the state gave its opening statement. (R. 251-253). The defense waived opening statement. (R. 253). The trial court took a recess for lunch and the members of the jury were escorted out of the courtroom. The court reconvened approximately one hour later. Before the trial court brought the members of the jury back into the courtroom, the defendant moved for a mistrial, noting that the clerk initially read from the incorrect bill of information. (R. 255-56). The defense attorney in part stated, "And I think that might prejudice the jury a little bit in knowing that there is also another charge of purse-snatching against another person." (R. 256). The defense attorney also argued that the fact that the first name of a different victim was read to the jury would put the idea into their minds that the defendant has another charge for purse-snatching and may cause them to conclude that the defendant must be guilty of the instant charge. (R. 258-59). In denying the motion for mistrial, the trial court stated that it believed the jurors were not prejudiced and further noted that the defendant failed to object at the time of the error. (R. 259).

Louisiana Code of Criminal Procedure article 841 provides that an irregularity or error cannot be availed of after a verdict unless it was objected to at the time of its occurrence. In the instant case, as noted by the trial court, the defendant's objection was not timely. Thus, the defendant is precluded from raising this issue on appeal. See **State v. Sepulvado**, 359 So.2d 137, 140 (La. 1978).[1] This assignment of error is meritless.

[1] As to the argument that an admonition should have been given, we note that the defendant did not request an admonishment.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant avers that the evidence presented herein was insufficient to support the verdict. The defendant notes that his brother also was charged in this incident and that he ultimately pled guilty. The defendant also notes that there was no physical evidence to link him to the offense, and argues that the officers should have considered that perhaps his brother committed this offense with another person. Further, the defendant contends that his arrest was not immediate because no one positively identified him as the person who stole the victim's purse. Thus, the defendant concludes that he was arrested based only on his criminal record.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Louisiana Legislature in enacting LSA-C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown**, 2003-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006). The **Jackson** standard of review 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 excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a 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. 1 Cir.), writ denied, 514 So.2d 126 (La.1987).

Where 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. **State v. Robins**, 2004-1953, p. 6 (La. App. 1 Cir. 5/6/05), 915 So.2d 896, 899. An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Azema**, 633 So.2d 723, 727 (La. App. 1 Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460; **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1 Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Higgins**, 2003-1980, p. 6 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

Louisiana R.S. 14:65.1A defines purse snatching as "the theft of anything of value contained within a purse or wallet at the time of the theft, from the person of another or which is in the immediate control of another, by use of force, intimidation, or by snatching, but not armed with a dangerous weapon."

Herein, the victim testified that as she bent over to unload her groceries she felt something pulling her back. She fell to the ground and realized someone was pulling her purse, which was wrapped around her shoulder. She tried to hold on to the purse but was ultimately overtaken. (R. 264). She hollered, "He stole my purse." The victim further testified that she did not see the perpetrator's face, only his hands and feet. Although she assumed that he did so, she did not actually see the assailant get in a truck after he took her purse. She stated that she was still trying to get off the ground and noted that the truck took off very quickly. (R. 264-267). The victim remembered that the truck was dark colored. (R. 267).

Gregory Starkey, Sr., was loading his groceries into his truck at the time of the offense. (R. 269). Starkey heard a commotion, turned, and saw a man "jerk a purse off this lady's shoulder and pull her to the ground." (R. 269). Starkey specified that the

assailant entered the passenger side of the vehicle with the purse and they left the parking lot. Starkey got into his truck and followed the perpetrator. Starkey testified that he followed two males in a black Ford truck. (R. 269-70). Starkey got the license plate number from the vehicle and used his cellular telephone to call 911 for connection to the Ponchatoula Police Department. (R. 270). As Starkey pursued the assailants, they drove to U.S. Highway 51 and traveled south along railroad tracks. Starkey continued to follow them as they approached an intersection and began travelling north on Interstate Highway 55. Starkey noted that it was not a high-speed chase, specifying that the perpetrators observed the speed limit and traffic lights and signs. Starkey testified that he never lost sight of the vehicle. When they began travelling east on I-12, the police, who were still communicating with Starkey via his cellular telephone, approached and began to pursue the vehicle designated by Starkey. Starkey had followed the vehicle for approximately ten minutes before the police arrived. (R. 272). Starkey observed the individual who took the purse run into the woods after the police stopped the truck. According to Starkey, the man did not have the purse when he fled into the woods with the police giving chase. (R. 273). Starkey went to the police station to check on the victim and give a statement.

Starkey testified that he was about fifteen yards away from the crime at the time of its commission and that he was able to get a good look at the assailant. (R. 272). Starkey identified the defendant in court as the person who forcefully snatched the victim's purse from her shoulder. (R. 272). On cross-examination, Starkey confirmed that his statement described the assailant as a middle-aged black male. (R. 274-75). Starkey stated that he was able to further observe the assailant's face in the side mirror of the truck. (R. 275). He stated that he will never forget the incident.

Officer Morris Mashon of the Ponchatoula Police Department had been dispatched to the scene because of a reported purse snatching. Officer Mashon was advised by dispatch that the vehicle in question was getting on the interstate. (R. 286). At that time, he and another officer were also approaching the interstate. Officer Mashon identified the vehicle, a black Ford pickup truck, confirmed the reported license plate number, and signaled for the driver to stop. They gave chase for about two to three

miles before the vehicle stopped. At that point, the passenger jumped out of the vehicle, slung a purse to the ground, and fled into a wooded area. The officers pursued the individual. (R. 286). As he avoided a fence and a tree, the assailant turned toward Officer Mashon. At this point, the officer was able to get a good look at the individual's face. (R. 287). The officer identified the defendant in court as the individual who abandoned the purse before fleeing into the woods and escaping. (R. 287). The officers recovered the purse and it was returned to the victim. The victim's money was still in the purse, but other items were missing. (R. 287-88). The defendant was arrested a few days later. (R. 287).

During cross-examination, Officer Mashon confirmed that his police report did not state that the perpetrator turned around during the chase. (R. 289-90). Officer Mashon also testified that the driver of the truck, whose identity was not disclosed, was apprehended that day. (R. 291). Officer Mashon testified that the defendant was the last person of several that he gave chase to prior to the trial. (R. 293). The defense did not present any witnesses.

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 in order to carry its burden of proof. **State v. Smith**, 430 So.2d 31, 45 (La.1983); **State v. Long**, 408 So.2d 1221, 1227 (La.1982). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Hayes**, 94-2021, p. 4 (La. App. 1 Cir. 11/9/95), 665 So.2d 92, 94, writ denied, 95-3112 (La. 4/18/97), 692 So.2d 440.

We find that the state's evidence negated any reasonable probability that the defendant was not properly identified as the assailant. Starkey had the opportunity to observe the incident without interruption. Specifically, Starkey had a clear look at the assailant as the offense took place, observed him get into the vehicle on the passenger side, and continued to observe the assailant as he pursued him in assistance of the police. Starkey positively identified the assailant as the defendant. Furthermore, Officer Mashon testified that he got a clear look at the individual who fled into the woods from the passenger side of the vehicle identified by Starkey. Officer Mashon also positively

identified the defendant. The guilty verdict returned in this case indicates that the jury believed the testimony of the state's witnesses.

After a careful review of the record, we believe that a rational trier of fact, viewing all of the evidence in the light most favorable to the prosecution, could have concluded that the state proved beyond a reasonable doubt that the defendant was guilty of purse snatching and that the state negated every reasonable probability of misidentification. This assignment of error is without merit.

REVIEW FOR ERROR

As mandated by LSA-C.Cr.P. art. 920, a review for error has been made of the record in this case, and a sentencing error under art. 920(2) has been discovered. The defendant herein was convicted of purse snatching, a violation of LSA-R.S. 14:65.1. The purse snatching statute provides for a sentence of not less than two years and not more than twenty years of imprisonment, with or without hard labor. The statute does not authorize the trial judge to impose any part of the sentence without benefit of parole. Nevertheless, the minutes and the sentencing transcript contained in the record before us reflect that the trial judge ordered that the twenty-year, hard-labor sentence be served without benefit of parole. (R. 4, 146). Thus, it is clear from the record that the trial judge deviated from the statutory penalty provided for the offense and gave the defendant an illegally severe sentence.

We note that neither the defendant nor the state has raised this issue on appeal. However, in accordance with the provisions of LSA-C.Cr.P. art. 882(A), we amend the sentence to delete the parole restriction. As the defendant received the maximum sentence, discretion is not involved in the correction of this illegal parole restriction by simply deleting it. This matter is remanded to the trial court with instructions to correct the minutes and commitment order, if necessary, to reflect this amendment to the sentence. See **State v. Miller**, 96-2040, p. 3 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459.

CONVICTION AFFIRMED, SENTENCE AFFIRMED AS AMENDED, AND REMANDED WITH INSTRUCTIONS.