NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

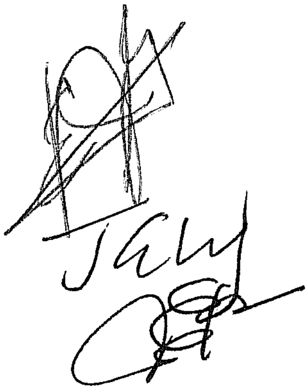
FIRST CIRCUIT

NO. 2006 KA 2134

STATE OF LOUISIANA

VERSUS

FLOYD HARRIS, JR.



Judgment Rendered: May 4, 2007

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Case No. 11-03-0275

The Honorable Richard Anderson, Judge Presiding

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Doug Moreau **District Attorney** **Jeanne Rougeau** **Assistant District Attorney** **Baton Rouge, Louisiana**	**Counsel for Appellant** **State of Louisiana**
Holli Herrle-Castillo **Marrero, Louisiana**	**Counsel for Defendant/Appellant** **Floyd Harris, Jr.**

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

The defendant, Floyd Harris, Jr., was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged. He was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. He now appeals, designating one assignment of error. We affirm the conviction and sentence.

ASSIGNMENT OF ERROR

1. The evidence is insufficient to uphold the conviction.

FACTS

On November 13, 2001, the victim, Vanessa Boney, suffered a fatal gunshot wound from an assault rifle during an attempted armed robbery. Prior to the incident, the victim, Harold Ross, Kentrell Ross, and Lionel Nicholas had traveled from Donaldsonville to Baton Rouge to purchase marijuana.

Nicholas gave the following account of the incident. During the early afternoon of November 13, 2001, he, the victim, Harold Ross, and Kentrell Ross (the friends) smoked two "blunts" of marijuana and drank approximately a case of beer. Nicholas testified he was not intoxicated at the time of the incident. During the night, the friends drove to Baton Rouge so Harold Ross could purchase some marijuana to share with the friends.

At the location of the drug deal, Nicholas saw a "bright guy," with a "red rag" around his neck, later identified as Michael Pealer; a chubby guy, later identified as John "Big John" McClendon, in a Ford Expedition; and Kentrell Ross's cousin, Carlos "Doody" Quire. Nicholas, Kentrell Ross, and Carlos Quire went to the store together. When they returned, McClendon had left, supposedly to get the marijuana. Nicholas got into Harold Ross's car behind the victim, who was in the driver's seat, and behind Harold Ross who

was in the passenger's seat. Suddenly, a man with an AK-47 assault rifle pointed the weapon at Nicholas and demanded he disclose who had the money. Nicholas told the man he did not have any money. Pealer, now wearing the red rag as a mask, also pointed a gun at Nicholas's face. Pealer threw a gun to Carlos Quire. Carlos Quire told Kentrell Ross "to go around the house and shut the f--- up and be quiet." Harold Ross told the gunmen that Kentrell Ross had the money. The gunmen pointed their guns at Kentrell Ross and demanded, "Who got money?" Kentrell Ross denied he had the money, and the victim started the car and tried to drive off. The gunman with the AK-47 then fatally shot the victim. According to Nicholas, the gunman with the AK-47 did not have his face covered during the incident. Nicholas identified the defendant in court as that gunman. Nicholas stated, "Bro, with that big-a-- gun in my face, that was the first thing I look at, his face, to see who he was to remember his face in case I see him somewhere else. He ain't going to run down on me like that." When asked if he had any doubt in his identification of the defendant, Nicholas replied, "None at all. I ain't going to never [*sic*] forget that face. The dude killed my boy's girl. That was messed up, for real." Nicholas conceded that it was dark at the time he saw the defendant's face, but added that streetlights were on. He answered affirmatively when asked if he could see the defendant's face well enough to identify him. When asked how sure he was that the defendant was the person who put the AK-47 in his face, Nicholas replied, "Man, I'm 150 percent, 151 percent. For real. That's the guy that put that gun [in] my face and shot Vanessa."

Nicholas selected Pealer's and Carlos Quire's photographs from six-person photo arrays shortly after the incident. Approximately one and one-half years after the incident, Nicholas was shown a six-person photo array

containing the defendant's photograph. He selected the defendant's photograph as depicting the gunman who had the AK-47.

On cross-examination, Nicholas indicated, following the incident, he had described the defendant as 5'10" tall and a little darker than himself. Nicholas also indicated he saw the defendant's mouth while it was open, and the defendant did not have "golds" in his mouth. The defense had the defendant smile for the jury, revealing he had gold in his teeth.

Harold Ross also testified at trial. He selected Pealer's photograph from a six-person photo array shortly after the incident, but was unable to select Carlos Quire's photograph from a similar photo array. Harold Ross indicated the friends smoked two blunts of marijuana and drank a "12 pack" on the day of the incident. He also indicated the gunman with the AK-47 did not have his face covered during the incident. Harold Ross conceded he did not get a good enough look at the gunman with the AK-47 to be able to identify him. He indicated he described the gunman with the AK-47 as being approximately 5'10" tall and weighing approximately 160 lbs. or 170 lbs.

Kentrell Ross also testified at trial. He selected Pealer's and Carlos Quire's photographs from six-person photo arrays shortly after the incident. According to Kentrell Ross, the gunman with the AK-47 had his face covered during the incident.

On November 14, 2001, Michael Pealer turned himself in to the police. Pealer confessed to participating in the incident. He indicated he knew the gunman with the AK-47 only as "Boobie." He described the gunman as having gold teeth. Pealer took the police to 2136 Missouri Street, the last address he had seen the gunman. Police investigation associated Xavier "Troy" Harris with the address. Pealer did not, however, select Xavier Harris's photograph as the gunman with the AK-47 from a six-person photo

array. Pealer did indicate that Xavier Harris's photograph "kind of look[ed] like" the gunman with the AK-47 and "maybe could be his brother." Subsequently, Pealer advised the police that he had learned that the real name of the gunman with the AK-47 was "Floyd Harris."

Pealer also testified at trial. On November 13, 2001, he rode with McClendon to get some food and on the way back to Carlos Quire's house, Carlos Quire asked them to come upstairs. Carlos told them that his cousin from Donaldsonville was coming with three other people to buy $3,200 of drugs, and Carlos was going to meet the friends on Indiana Street.

Pealer indicated he drove to Indiana Street. After the friends arrived, they spoke to Carlos Quire and McClendon, and then McClendon drove Pealer to 2136 Missouri Street. McClendon knocked on the door and asked for "Troy," the defendant's brother. After McClendon learned that Troy was not home, he asked for "Boobie." After speaking to Boobie, McClendon called Carlos Quire and asked him to have his sister, Carla, drive Pealer's car to Missouri Street.

According to Pealer, Carla Quire arrived with Pealer's car, and stated, "the gun was under the front seat." The defendant then exited the Missouri Street house with an assault rifle and sat down in the passenger seat of Pealer's car. McClendon remained on Missouri Street while Pealer drove the defendant to Indiana Street.

According to Pealer, when he arrived on Indiana Street with the defendant, Carlos Quire and Kentrell Ross ran away. Pealer went to the passenger side of the friends' vehicle, and the defendant went to the driver's side of the friends' vehicle. Pealer and the defendant both demanded money from the friends in the vehicle. The victim said she did not have any money and tried to drive away. The defendant jumped back and shot the victim.

Pealer indicated the defendant had a green bandanna during the incident, but Pealer could not remember whether or not the defendant had the bandanna on his face during the incident.

According to Pealer, after the shooting, Pealer and the defendant ran to Pealer's car and drove back to Missouri Street. The defendant "took" the guns and dropped Pealer off at McClendon's house. McClendon drove Pealer around and, at approximately 4:00 a.m., took Pealer to some apartments in Tigerland, where Pealer fell asleep. Pealer indicated his mother paged him and was worried about him. McClendon took Pealer to a house and told him, if Pealer was called in for questioning, he should tell the police that he had stayed with his girlfriend in Tigerland.

When questioned by the police, Pealer initially indicated he had been in Tigerland with Sheila Jackson. According to Pealer, however, after his mother cried, told him that someone had been hurt "real bad," and told him to tell the truth, he told the truth.

Pealer indicated he did not learn "Boobie's" real name until after the incident, but he took the police to 2136 Missouri Street, the address where he had picked up Boobie. Pealer indicated he described Boobie as being approximately thirty years old, as having gold in his mouth, a tattoo of a woman on his chest, and a tattoo of a heart with "Charlene" on one arm, a tattoo of a rose on the other arm. Pealer indicated he had first seen Boobie at a "get-together" at McClendon's house prior to the night of the incident.

Pealer conceded when he was first shown a photo array of six photographs, including the defendant's photograph, he selected the defendant's photograph only after he had selected a photograph of someone other than the defendant as the gunman with the AK-47, and after the detective had stated "that wasn't him." Pealer, however, identified the defendant in

court as "the shooter" and was "positive" of his identification and "a hundred percent sure."

Pealer indicated he had been permitted to plead guilty to manslaughter and attempted armed robbery and had entered into a deal with the State to provide truthful testimony in exchange for a cap of thirty years on his sentence.

The defense had the defendant display his chest, revealing he had a tattoo of a skeleton on his chest and a large tattoo on his back.

Baton Rouge City Police Sergeant Ike Vavasseur testified that police investigation indicated the defendant had used the name "Boobie."

Charlene Ranelle Richardson testified she and the defendant dated between 2000 and 2001 and, during that time, he lived on Missouri Street, had gold teeth, and had the nickname "Boobie." Richardson's arm was tattooed with the word "Boobie[.]" She also indicated the defendant had a tattoo on his chest and "Charlene" tattooed on his arm.[1] She did not recall the defendant having a tattoo on his back when she dated him.

The State introduced into evidence a copy of the defendant's driver's license issued on August 5, 2002. The license listed the defendant's date of birth as March 21, 1972, his height as 5'11", his weight as 180 lbs., and his address as 2136 Missouri Street.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues the State failed to negate the reasonable probability that he was misidentified as the shooter. He argues the shooter had his face covered; the attempted robbery happened quickly; it was very dark outside, with only a single streetlight several houses

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[1] The State had the defendant display his arms to the jury.

down to illuminate the area; neither of the individuals who identified the defendant correctly described him prior to making identifications; one of the individuals identified someone else before identifying the defendant; and the identifications occurred over one and one-half years after the shooting. The defendant does not challenge the sufficiency of the evidence to prove that the victim was killed as the result of a second degree murder.[2]

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, pp. 2-3 (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, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

After viewing the entire record of evidence received at trial, we find that the State proved each element of second degree murder and negated any reasonable probability of misidentification beyond a reasonable doubt. The

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[2] Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm or when the offender is engaged in the perpetration, or attempted perpetration, of armed robbery. La. R.S. 14:30.1(A)(1) & (2)(a).

defense attacked the credibility of the State's identification witnesses at trial and argued the identification testimony should be rejected for the same reasons now urged on appeal. The jury, however, accepted the testimony offered by these witnesses. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *State v. Lofton*, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

This assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks that this court 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 La. Code Crim. P. art. 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. *State v. Price*, 05-2514 (La.App. 1st Cir. 12/28/06), ___ So.2d ___.

DECREE

The defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.