

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0821

WFK
J. J. Kline, Jr.
OCT 29 2010

STATE OF LOUISIANA

VERSUS

JAMES SAMUELS

Judgment rendered: OCT 29 2010

On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Criminal Number: 464780; Division B
The Honorable Jerome J. Barbera, III, Judge Presiding

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BEFORE: KUHN, PETTIGREW AND KLINE, JJ.¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

The defendant, James Samuels, was charged by bill of information with three counts of armed robbery (counts one, two, and four) and one count of simple robbery (count five), violations of La. R.S. 14:64 and La. R.S. 14:65.² The defendant entered a plea of not guilty as to each count. After a trial by jury, the defendant was found guilty as charged on each count. The defendant was sentenced to thirty-five years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on counts one, two, and four (to be served concurrently) and to seven years imprisonment at hard labor on count five (to be served consecutively to the sentences imposed on counts one, two, and four).³ The defendant now appeals, assigning error as to the sufficiency of the evidence in support of the convictions, to the constitutionality of the non-unanimous verdicts, and to the constitutionality of the sentences. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On or about December 10, 2007, Sandra Franke was working as a gaming hostess at Raceland Truck Plaza and Casino. As a hostess, Franke carried money on her person in a pouch to service patrons by cashing their tickets as they remained at the casino machines. Franke approached a black male patron who signaled for her to cash out his gaming ticket for three dollars and fifty cents. Franke gave the patron three dollars and informed him that she had to retrieve coins from the bar. Franke was holding her cash pouch in her hand at the time. As she turned to walk towards the bar, she heard a noise and turned back toward the

² The bill of information originally charged the defendant with five counts of armed robbery, one count of simple robbery, and one count of aggravated flight from an officer. After several counts were nol-prossed and the original count six was renumbered to count five, the State proceeded to trial on the counts as provided above.

³ The minutes state that the trial court imposed the sentence on count five without the benefit of probation, parole, or suspension of sentence. However, the sentencing transcript reveals that the trial court did not impose these restrictions. When there is a discrepancy between the minutes and the transcript, the transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983).

patron. He pushed her to the floor, grabbed the cash that fell from her pouch to the floor, and ran out of the casino. Franke did not get a good look at the individual's face and could not identify him. Franke sustained injuries to the back of her head as a result of the push and fall.

On or about October 14, 2008, at approximately 7:47 p.m., a masked gunman entered Shop N' Gas in Raceland, Louisiana, pointed a gun at Catherine Bordlee, a store cashier, and ordered her to give him money. Bordlee described the gunman as a black male wearing a black knit mask revealing only his eyes. Bordlee opened the cash register and the gunman removed the cash from the register and inquired as to the location of the store's safe. Bordlee informed him that the safe was in the back of the store and gave him a bag of money. The gunman removed the money from the bag and exited the store.

On or about October 21, 2008, between 7:00 and 8:00 p.m., a masked gunman entered the Raceland Exxon Station in Lafourche Parish. The gunman pointed his weapon at Brittany Cordes, a station employee at the time. Cordes described the gunman as a black male wearing a ski mask and a black, hooded sweatshirt with a red South Pole emblem on the front of it. The gunman held the gun toward her face, and instructed her to open the cash register and place the drawer on the counter. The gunman held the gun over the counter and further instructed Cordes to get down as he removed over five hundred dollars from the drawer. Cordes was unable to positively identify or further describe the face of the masked gunman.

On or about November 14, 2008, a black male entered Cheap Smokes in Raceland, Louisiana, Lafourche Parish, and pointed a gun toward Kimberly Strother and Patricia Forbes, store cashiers at the time. The gunman was wearing a "tan, maybe goldish color hoodie" and "jogging pants." The gunman used one hand to hold the hood over his face, leaving his eyes in view, while using the other

to brandish the weapon. He ordered Strother to get on the floor and Forbes to give him money and open the safe. The gunman exited with around four or five thousand dollars.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant argues that the evidence is insufficient to support the convictions. The defendant contends that the convictions were based solely on his confession to the police, claiming that there were no witnesses or physical evidence directly linking him to the robberies. The defendant contends that the statement was obtained during a three-hour questioning and detention period. The defendant further contends that the detectives used leading questions and suggested answers on several instances when the defendant gave incorrect information. The defendant also specifically notes that his confession included several facts that were inconsistent with the actual facts of the case. For example, the defendant notes that his statement indicates that he used a pipe with his sleeve pulled down over it as a weapon in the Cheap Smokes robbery and notes that the victims and the video for that robbery, however, indicate that a gun was used. Regarding the same robbery, the defendant notes that his statement indicates that he took between twenty-five and twenty-six hundred dollars while the victims stated approximately five thousand dollars was stolen. The defendant concludes that his confession is unreliable.

The standard of review for sufficiency of the evidence to support 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 and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. Code Crim. P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). When analyzing

circumstantial evidence, La. 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. 1st 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. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

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. **State v. Holts**, 525 So.2d 1241, 1244 (La. App. 1st Cir. 1988). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Andrews**, 94-0842, p. 7 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453.

Louisiana Revised Statutes 14:65A provides: "Simple 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, but not armed with a dangerous weapon." Louisiana Revised Statutes 14:64A provides: "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." A "dangerous weapon" "includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." La. R.S. 14:2(3). A gun used in connection with, and at the scene of a robbery, is as a matter of law a "dangerous weapon." **State v. Refuge**, 300 So.2d 489, 491-92 (La. 1974).

Detective Nicholas Pepper, of the Lafourche Parish Sheriff's Office, was in the area travelling on U.S. Highway 90 at the time of the December 10, 2007 robbery at Raceland Truck Plaza and Casino. When the officers arrived at the scene, the perpetrator was gone. They spoke to the injured victim, Franke, and viewed surveillance footage that was consistent with Franke's rendition of the facts and showed the perpetrator as he lost his shoes while fleeing the scene. The officers recovered and placed the black, size eight, unlaced Nike-Air tennis shoes, into evidence. Detective Pepper testified that the shoe size was consistent with his observation of the size of the defendant's feet, noting that the defendant's feet were small considering his stature.

Regarding the October 14, 2008 armed robbery at Shop N' Gas in Raceland, Louisiana, Bordlee testified that the gunman's voice was familiar. When asked, during cross-examination, if she could unequivocally identify the defendant as the perpetrator, Bordlee testified as follows,

Positively I can say it was him when I saw him in that lineup in the thing, because, when he was talking, my body started trembling and when he walked through that door over there when he came out that thing, my body was shaking like a leaf.

Bordlee confirmed that she did not positively identify the perpetrator during a lineup, adding, "I thought it might be him but I wasn't positive." Detective Pepper testified that surveillance footage for the Raceland Ag Center, located just north of the Shop N' Gas on La. Highway 308, allowed the officers to observe a dark-colored, four-door sedan in the area of the robbery at the time it occurred.

The robbery at Raceland Exxon (also known as Ray's Exxon), located on the same corner as the Shop N' Gas, took place seven days later, October 21, on the same day of the week and at approximately the same time of day as the October 14 Shop N' Gas robbery. The officers again obtained surveillance footage for the area at the time of the robbery and noted the presence of a vehicle believed to be the

same vehicle observed in the area during the Shop N' Gas robbery. The officers used both videos to fully identify the vehicle as a blue 2001 to 2003 Chevy Impala. The officers began focusing on vehicles matching this description and collecting their license plate numbers as they investigated the robberies. The officers also noted that both robberies occurred on Tuesdays and planned to conduct surveillance at several convenience stores in the area on the subsequent Tuesday.

On October 27, 2008, while patrolling the area the day before the planned convenience store surveillance operation, the officers observed a dark blue Chevy Impala with three occupants travelling on Williams Street. The occupants looked at the police unit and avoided further eye contact. Detective Pepper obtained the license plate for the vehicle and it was registered in the name of Heather Barabin at 592 St. Louis Street. Barabin was the defendant's girlfriend at the time. The officers drove to the residence and the defendant was sitting outside with two other males, and the blue Impala was in the driveway. The defendant was wearing a black South Pole sweatshirt. The officers parked nearby and waited for back-up units to arrive before approaching the residence. As they hovered near the residence, the officers observed the defendant remove the sweatshirt, although it was 55 degrees outside. The officers asked the defendant to go to the Sheriff's office for questioning and the defendant complied. The defendant was given and waived his rights but did not make any incriminating statements at that time and was free to go.

On November 14, 2008, the officers received a call regarding an armed robbery in progress at Cheap Smokes. Captain Dean Savoie, of the Lafourche Parish Sheriff's Office, was in an unmarked unit on Louisiana Highway 1, about 75 feet from Cheap Smokes, at the time of the call and had just observed an individual wearing a hood over his head run out of the store, enter a tan-colored vehicle with a temporary tag, and head northbound on Highway 1 towards

Raceland. Captain Savoie provided this information to the units in the Raceland area, and a patrol unit spotted the suspect and pursued it as Captain Savoie got stuck in traffic in his unmarked unit. Detective Pepper and Detective Guillermo Munive were driving near Cheap Smokes at the time and pulled into the parking lot just after the perpetrator left.

Deputy Ronnie Verdin, Jr., of the Lafourche Parish Sheriff's Office, Patrol Division, was dispatched to the robbery and received information from Captain Savoie. Deputy Verdin pursued the suspect vehicle at high speed (up to nearly 100 miles per hour), observing the suspect lose control of the vehicle at times. The vehicle drove into a Raceland community and hit a trailer on St. Phillip Street. The driver exited and abandoned the vehicle on foot. Deputy Verdin attempted to pursue the suspect on foot but lost him. The abandoned vehicle was a Pontiac Bonneville registered in the name of Kent Bell at 587 St. Louis Street, a couple of blocks away from the location of the wreck and abandonment. Germaine Samuels, the defendant's mother, arrived at the scene of the wreck and informed the police that the registered owner of the vehicle, Kent Bell, was her fiancé. She further informed the police that the vehicle was stolen and that the defendant must have taken it without permission. She did not see the defendant take the car and had not seen him that day. The defendant had previously used the vehicle. Although Samuels testified that she did not provide the police with a description of the defendant's attire on that day, according to the collective testimony of Deputy Keniyelle Frank and Detective Pepper, she stated that he was wearing a tan sweatshirt, consistent with the description of the perpetrator's attire.

The defendant became the prime suspect for all four robberies, and the police apprehended him on November 21, 2008. After being advised of and waiving his rights, the defendant provided a recorded statement. The defendant confessed to committing the robberies in question, providing specific details. As

to the December 10, 2007 robbery at Raceland Truck Plaza and Casino, the defendant stated that he went in and sat down near a machine and "a woman passed with the moneybag and I just jacked the moneybag and ran." When asked if the moneybag was tied around the victim's waist, the defendant stated, "She like had it in her hand getting ready to tie it on her waist." The defendant stated that he lost his "shoe" while running away and that he wore an eight and one-half shoe size. When asked what kind of shoes he lost, the defendant described them as black Nikes.

Regarding the October 14, 2008 robbery of Shop N' Gas, the defendant stated that he used his girlfriend's vehicle, a blue Impala, and confirmed that he parked near the Raceland Ag Center. The defendant stated that he was wearing a black "hoodie" and a mask over his face. The defendant said he used a pipe to commit the robbery, stating that he pointed it and demanded money. The defendant stated that one store attendant, a female, was present at the time, explaining that she took the cash drawer out of the register, sat it on the counter, removed about four or five hundred dollars, and gave it to the defendant.

The defendant stated that he used the blue Impala to commit the robbery on October 21, 2008, at Ray's Exxon. The defendant stated that he wore a black jacket. When asked if it was a black hoodie with writing on it, the defendant stated "Yeah, a black hoodie" and initially stated that the writing was "Jabot" but when prompted as to whether it was Jabot or South Pole, stated, "Yeah, South Pole, South Pole." The defendant stated that he obtained about four hundred dollars from that particular robbery.

Regarding the November 14, 2008 robbery at Cheap Smokes, the defendant stated that he used his mother's vehicle, a Pontiac Bonneville, and wore a beige hooded sweater. The defendant stated, "I went in the store with my hood on pulled tight and demanded the money" adding that the female attendant gave him twenty-

five to twenty-six hundred dollars. The defendant stated that a police car approached him as he travelled down the highway after he left Cheap Smokes. He stated that he started driving fast and turned down St. Patrick Street and ran into a trailer after losing control of the vehicle. The defendant stated that he jumped out of the vehicle and ran.

While there were some self-serving inconsistencies in the defendant's confession, including the claim that he used a pipe instead of a gun and collected lesser amounts of money than the victims indicated, the defendant's confession included detailed information regarding the robberies in question that was consistent with the information provided by the witnesses. The facts that were known by the defendant supported his confession as the perpetrator of the offenses. For example, the defendant specifically indicated that Franke was holding her money pouch at the time that he "jacked" it and ran.

We conclude that the defendant's confession was highly reliable based on the level of detail, without any significant prompting or inconsistencies. Further, there was additional testimony regarding the vehicles used, the attire worn, and the shoes left at the scene of the Raceland Truck Plaza and Casino robbery that linked the defendant to the robberies. Specifically, the defendant not only admitted to wearing a South Pole sweatshirt but was also observed by the police wearing such a shirt on a later date. With the exception of the Raceland Truck Plaza and Casino simple robbery offense, the victims unequivocally testified that the defendant used a gun in the commission of the remaining armed robberies.

Any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found proof beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, of the essential elements of the offenses and the defendant's identity as the perpetrator of those offenses. An appellate court errs by substituting its appreciation of the evidence and credibility

of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Thus, assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant notes that pursuant to La. Code Crim. P. art. 782 he was convicted by a jury concurrence of eleven of twelve on each count. The defendant argues that Article 782 violates the United States Constitution Sixth Amendment right to a jury trial when considered in combination with the Fourteenth Amendment right to due process of law. The defendant concludes that the non-unanimous verdicts are particularly problematic in this case considering the nature of the evidence of guilt and should be declared invalid.

Louisiana Constitution article I, section 17A and La. Code Crim. P. art. 782A provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

The defendant in part relies on **Andres v. United States**, 333 U.S. 740, 748, 68 S.Ct. 880, 884, 92 L.Ed. 1055 (1948), wherein the Supreme Court recognized the Sixth Amendment guarantees a right to a unanimous jury verdict in federal criminal trials. However, in its subsequent pronouncement on the unanimous jury question, in the companion cases of **Johnson v. Louisiana**, 406 U.S. 356, 359-60, 92 S.Ct. 1620, 1623-24, 32 L.Ed.2d 152 (1972), and **Apodaca v. Oregon**, 406

U.S. at 406, 92 S.Ct. at 1630, the Court specifically held that while the Sixth Amendment requires a unanimous verdict in a federal criminal trial, the Sixth Amendment, applicable to the states through the Fourteenth Amendment under **Duncan v. Louisiana**, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), does not impose a similar requirement on state criminal proceedings. The other Supreme Court decisions relied upon by the defendant, **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), do not address the issue of the constitutionality of a non-unanimous jury verdict. Rather, they address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. These decisions stand for the proposition that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See **Apprendi v. New Jersey**, 530 U.S. at 490, 120 S.Ct. at 2362-63. Nothing in these decisions suggests that the jury's verdict must be unanimous for a defendant's sentence to be increased. Moreover, this court and our supreme court have previously rejected the argument raised in this assignment of error. See **State v. Bertrand**, 2008-2215, pp. 6-8 (La. 3/17/09), 6 So.3d 738, 742-43 and **State v. Smith**, 2006-0820, p. 24 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352.

Louisiana Constitution article I, section 17A and La. Code Crim. P. art. 782A are not unconstitutional and, hence, not in violation of the defendant's Sixth Amendment right to trial by jury or due process rights. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant contends that the trial court imposed excessive sentences. However, a review of the record indicates that defense counsel did not file or make a motion to reconsider sentence. Under La. Code Crim. P. arts. 881.1E and 881.2A(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 this assignment of error reviewed. **State v. Duncan**, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). See also State v. Felder, 2000-2887, p. 10 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

DECREE

For the foregoing reasons, we affirm the convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED