NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0057

STATE OF LOUISIANA

VERSUS

JARROD JOHNSON

Judgment rendered June 8, 2007.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 16093
Honorable Ralph Tureau, Judge

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JARROD JOHNSON

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. dissents and assigns reasons.

PETTIGREW, J.

The defendant, Jarrod Johnson, was charged by bill of information with simple robbery, a violation of La. R.S. 14:65. He pled not guilty. Following a trial by jury, he was found guilty as charged. The defendant moved for post-verdict judgment of acquittal. The trial court denied the motion. The defendant was sentenced to three years imprisonment at hard labor. The defendant now appeals, challenging the sufficiency of the evidence in support of his conviction. We affirm the defendant's conviction and sentence.

FACTS

At approximately 7:30 a.m. on March 4, 2003, Winston Walters, the owner of a convenience store in Donaldsonville, Louisiana, opened his store for business. Approximately five to ten minutes later, an individual subsequently identified as the defendant entered the store. The defendant approached the register and indicated that he wanted to purchase a package of Black and Mild cigars. The defendant gave Walters $3.00 for his purchase. Walters opened the register and gave the defendant change to complete the purchase. When Walters turned around to get the package of cigars, he left the register drawer open. The defendant reached over and grabbed all of the $10.00 and $5.00 bills from the register. The defendant fled, taking approximately $60.00 in cash. The defendant did not verbally threaten Walters during the encounter. Walters observed that the perpetrator drove away in a white vehicle. He recorded a portion of the license plate and immediately summoned the police.

The defendant was later apprehended after he rode back past the store in a vehicle matching the description provided by Walters. After being advised of his **Miranda** rights, the defendant provided a taped statement wherein he admitted going into the convenience store and taking money from the register.

At trial, the defendant stipulated to his identity as the individual who participated in this act at the convenience store.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant submits that the State failed to present sufficient evidence to support his conviction of simple robbery. Specifically, the defendant argues that the State failed to prove the requisite element of force and/or intimidation. Thus, he asserts the evidence presented supports only a conviction of misdemeanor theft.

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, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1855, pp. 3-4 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 159.

The **Jackson** standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases 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 inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Booker**, 2002-1269, p. 4 (La. App. 1 Cir. 2/14/03), 839 So.2d 455, 459, writ denied, 2003-1145 (La. 10/31/03), 857 So.2d 476.

Louisiana Revised Statutes 14:65(A) defines simple robbery as:

> 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.

In **State v. Mason**, 403 So.2d 701, 704 (La. 1981), the Louisiana Supreme Court offered an indirect interpretation of the element of "force or intimidation" in the simple robbery statute by comparing the offense with that of theft:

> By providing a more severe grade of theft for those instances in which a thief uses force or intimidation to accomplish his goals, the legislature apparently sought to emphasize the increased risk of danger to human life posed when a theft is carried out in face of the victim's opposition.

See also **State v. Johnson**, 411 So.2d 439, 441 (La. 1982); compare **State v. Florant**, 602 So.2d 338, 340-341 (La. App. 4 Cir.), writ denied, 605 So.2d 1147 (La. 1992). Resistance by the victim and the use of physical force by the perpetrator are not necessary to complete a simple robbery. In **State v. Robinson**, 97-269 (La. App. 5 Cir. 5/27/98), 713 So.2d 828, writ denied, 98-1770 (La. 11/6/98), 727 So.2d 444, the fifth circuit upheld the defendant's simple robbery conviction under facts similar to those herein. In that case, the defendant took money from a cashier at the drive-up window of a fast-food restaurant. The evidence did not show that the defendant used threatening words or gestures, or that he used physical force against the victim. The victim testified, however, that the defendant's demeanor caused him concern, and that he was intimidated by the street slang the defendant used. The victim stated that the defendant's behavior was like that of "someone that isn't playing." **State v. Robinson**, 97-269 at 5, 713 So.2d at 830.

Applying the **Jackson** standard to the instant case, we find that the State proved each of the essential elements of the offense, including the use of force or intimidation, beyond a reasonable doubt. While the evidence does not show that defendant used any threatening words or gestures, Walters was, by his own account, intimidated by defendant. Walters testified that he turned around and faced the defendant as he "forcefully" removed the money from the separate compartments in the register. Walters further explained that the defendant's actions and his demeanor caused him concern. Walters testified he had been robbed twice before and was afraid.

Consequently, Walters stated he did not interfere or attempt to prevent the defendant from taking the money. He just backed up and looked at the defendant. Walters did not attempt to call for help until after the defendant left the store.

Considering the foregoing testimonial evidence, it is clear that the State proved beyond a reasonable doubt the taking of something of value (cash) that was in the immediate control of another, by use of intimidation. Thus, the evidence is sufficient to support the defendant's conviction of simple robbery.

Furthermore, we find the defendant's reliance on the Fifth Circuit's decision in **U.S. v. Brown**, 437 F.3d 450, 452 (5 Cir.), cert. denied, ___ U.S. ___, 126 S.Ct. 2310, 164 L.Ed.2d 830 (2006), to be misplaced. The Fifth Circuit's ruling in **Brown**, which deals with whether the offense of simple robbery is a "violent felony" for purposes of the Armed Career Criminal Act[1] ("ACCA"), has no bearing on the elements of the offense as defined in La. R.S. 14:65(A). While the sentencing provisions of the ACCA may require force or threats of force, it is well settled that the offense of simple robbery can be proven by use of intimidation in the absence of actual force or threats of force or violence. See **State v. Jones**, 2000-190, pp. 5-8 (La. App. 5 Cir. 7/25/00), 767 So.2d 808, 810-811, writs denied, 2000-2449, 2000-2493 (La. 6/22/01), 794 So.2d 782, 783. This assignment of error lacks merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

[1] 18 U.S.C.A. § 924(e)(1).

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DOWNING, J., dissents and assigns reasons

I dissent because, employing the **Jackson**[1] standard, no rational trier of fact could reasonably conclude that the state proved the defendant, Mr. Jarrod Johnson, used force or intimidation in committing the theft at issue. Winston Walters, the store clerk, testified that he "was intimidated a little bit because . . . [he] had been robbed twice already." This statement does not suggest that Mr. Johnson employed intimidation to accomplish the theft, nor does anything else in the record. When asked what he meant when he said Mr. Johnson "forcefully" reached into the register and grabbed the money, Mr. Walters explained, "Well, he grabbed it." Walters further explained, "I mean he is committing a theft, he's taking some money as quickly as he can."

As the majority discusses, 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, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. **Id.** And an essential element of the crime of simple robbery is that a defendant "use force or intimidation," the proof of which is missing here.

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[1] **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In **State v. Bedford**, 01-2298, p. 3 (La. 1/28/03), 838 So.2d 758, 760, the supreme court instructed, "A criminal statute requires a genuine construction according to the plain meaning of its language because '[c]ourts are not empowered to extend the terms of a criminal provision to cover conduct which is not included within the definition of the crime.' (Citation omitted.)." Since the record contains no evidence that Mr. Johnson used force or intimidation in accomplishing the theft, his conviction for simple robbery should not stand. The conviction should be reversed and the sentence vacated.