NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

NUMBER 2011 KA 1516

JJB

STATE OF LOUISIANA

VERSUS

JIMMY BLACKWELL, JR.

Judgment Rendered: May 2, 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 502,315

Honorable, Raymond S. Childress Judge

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Walter P. Reed, District Attorney Covington, LA and Kathryn W. Landry Baton Rouge, LA	Attorneys for State - Appellee
Frederick H. Kroenke, Jr. Baton Rouge, LA	Attorney for Defendant – Appellant Jimmy Blackwell, Jr.

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

JMc

McClendon, J. dissents and assigns reasons

WELCH, J.

The defendant, Jimmy Blackwell, Jr., was charged by bill of information with aggravated arson, a violation of La. R.S. 14:51. He pled not guilty and, following a jury trial, was found guilty as charged. The State subsequently filed a multiple offender bill and, following a hearing on the matter, the defendant was adjudicated a second-felony habitual offender. The trial court sentenced the defendant to ten years imprisonment at hard labor. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The defendant now appeals, designating one assignment of error. Finding the evidence insufficient, we reverse the conviction, habitual offender adjudication, and sentence.

FACTS

On November 25, 2010, Tammy DeSalvo was working as the assistant manager of Shoney's on Gause Boulevard in Slidell. It was Thanksgiving and Shoney's had a special holiday buffet. According to DeSalvo, some time around 6:30 p.m., while she was standing by the cash register near the front of the restaurant, the defendant entered the restaurant with a cigarette in his hand. DeSalvo informed the defendant that there was no smoking inside. The defendant discarded his cigarette outside, then walked to the men's restroom, which was down a hallway near the register. As the defendant passed DeSalvo, he told her that you can smoke in other states.

Thereafter, the defendant's fiancée, Hallie Petrolia, entered the restaurant. Petrolia questioned DeSalvo about the buffet and how to make a to-go order, and she asked to view the buffet. Petrolia went to look at the buffet, came back, and made a to-go order. DeSalvo gave her two boxes, asked if Petrolia wanted her free pie, then got a server to get the pie for Petrolia.

When Petrolia was finished filling her to-go boxes, she went to the register and paid DeSalvo with a debit card. The defendant exited the restroom and stood

by Petrolia as the transaction was completed. The defendant and Petrolia then left the restaurant. The defendant and Petrolia were renting a room at the Deluxe Motel on Gause Boulevard, across from Shoney's.

After the defendant and Petrolia left the restaurant, DeSalvo returned to work. DeSalvo went to the bar to check if the food was getting low. DeSalvo stated that a woman reported smelling smoke in front of the restaurant. DeSalvo stated that prior to making the report, the woman and a little girl had been heading toward the restrooms, but turned back around. DeSalvo went to the restroom area and opened the door to the men's restroom. She observed fire shooting out of the restroom trash can. She attempted to put the fire out with a coat rack to no avail. She told the customers to leave the restaurant and she called 911. The fire department arrived shortly thereafter and extinguished the fire.

DeSalvo told Slidell police officers at the scene that the defendant was the last person she saw coming out of the men's restroom. The police pulled Petrolia's receipt, which had her name on it from her debit card. The police went to the Deluxe Motel to attempt to locate the defendant. Upon finding the defendant and Petrolia, the police seized the defendant's "Saints" lighter from their motel room, and arrested the defendant for an active warrant for failure to appear in court. DeSalvo went to the motel and identified the defendant as the person she saw enter and leave the men's restroom at Shoney's.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends the State failed to prove the identity of the defendant as the person who started the fire in the men's restroom at Shoney's. As such, the trial court erred in denying the postverdict judgment of acquittal.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. 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 have found 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 La. C. Cr. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, 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. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

Aggravated arson is the intentional damaging by setting fire to any structure or movable whereby it is foreseeable that human life might be endangered. See La. R.S. 14:51. The defendant contends the State did not prove that he entered the restroom or that he intentionally started a fire therein. As such, a rational trier of fact should have found a reasonable hypothesis of innocence.

Our review of the testimony and physical evidence introduced at the trial indicate that DeSalvo observed the defendant enter Shoney's with a cigarette in his

hand. When she told the defendant he could not smoke inside the restaurant, he "flung" the cigarette out of the door. Seeming a "little irritated," to DeSalvo, the defendant told DeSalvo that you can smoke in Mississippi, then proceeded directly to the men's restroom. The restroom area was in the front area of Shoney's near the cash register. Customers had to walk past the register and down a hallway approximately 10-15 feet to reach the restrooms. That hallway provided the only means of entering and exiting the restrooms.

After the defendant entered Shoney's, his fiancée, Petrolia, approached DeSalvo, who was standing at the cash register, to inquire about the holiday buffet. Petrolia left to view the buffet and returned to order a to-go dinner. DeSalvo got Petrolia two boxes and found a server to get Petrolia's free pie. As DeSalvo was checking out Petrolia at the register, the defendant exited the restroom and stood beside Petrolia as she paid for the meals. The defendant and Petrolia then left the restaurant. Thereafter, DeSalvo stated that she returned to work and went to check on the buffet. While checking on the buffet, she was informed by a customer that she could smell smoke in the front of the restaurant. When DeSalvo opened the door to the men's restroom, she observed the trash can engulfed in flames. She told all the customers to leave the restaurant because the restroom was on fire. According to DeSalvo, the defendant was the last person to go into the restroom before the fire started. When asked how busy the Shoney's had been from the time she began her shift to the time of the fire, DeSalvo acknowledged that there had been a steady flow of customers in the restaurant, and that at the time the defendant came in, there were four or five tables of customers in the restaurant.

The restaurant receipt shows that Petrolia had paid for the food at 6:36 p.m. Officer Rodney West, Jr., with the Slidell Police Department, testified at trial that he received the dispatch call for arson at 6:55 p.m. DeSalvo testified that it was, at most, ten minutes from the time the defendant left until she and the customers were

outside in the parking lot because of the fire in the restaurant.

Officer West testified that he was unable to determine how the fire had started. He stated that someone from the fire department advised that it appeared that someone had taken rolls of toilet paper out of the stall, placed them in the trash can, and set them on fire. Officer West further testified that he did not see matches or cigarettes in the restroom, and he did not smell any kind of accelerant like gasoline or kerosene. Detective Mario Arthur, with the Slidell Police Department, also investigated the fire at Shoney's, and he did not determine what had started the fire. He testified at trial that a fire investigator advised him that more likely than not someone had lit something on fire in the trash can and that large rolls of toilet paper or tissue paper in the trash can were lit on fire.

In testifying for the defense at trial, Petrolia stated that the defendant did not go to the restroom, and that the defendant never walks inside of a building with a cigarette. She explained that shortly after she entered Shoney's, the defendant joined her after talking on the phone outside, and remained with her during her entire stay in the restaurant.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61

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

The testimony and scant physical evidence introduced at trial in the instant matter convinces us that a rational factfinder could not have concluded that the evidence excluded the reasonable hypothesis that the defendant was not the person who started the fire. Further, a rational factfinder could not have concluded that the evidence excluded the reasonable hypothesis that the fire was accidentally started.

The State's evidence regarding how the fire started consisted exclusively of uncorroborated hearsay testimony elicited from Officer West and Detective Arthur. It is not clear from their testimony who they talked to from the fire department. In any event, the uncorroborated hearsay testimony adduced at trial without objection from the defendant, regarding the origin of the fire, was that it was *possibly* started in the trash can; that *more than likely* someone lit something on fire in the trash can; and it *appeared as if* somebody took rolls of toilet paper, placed them in the trash can, and set them on fire. The State did not call any expert witnesses, such as a fire marshal or fire expert, to testify about how the fire was started. While firefighters theorized the rolls of toilet paper were placed in the trash can and lit on fire, there was no testimony or physical evidence indicating the defendant placed those rolls in the trash can. Moreover, since there was no evidence at trial to establish beyond a reasonable doubt the origin of the fire, there existed the possibility, never negated by the State, that a cigarette ember (or any number of slow-burning objects) left by an employee or other patron started the fire.

DeSalvo's testimony that she saw only the defendant enter and leave the restroom during the time the fire had started by no means established that the defendant was the only person who entered the restroom around the time the fire had started. It is possible that patrons could have gone in and out of the restroom unseen by DeSalvo. DeSalvo's own testimony established that her shift was on

Thanksgiving evening and that there was a steady flow of customers. The only time DeSalvo had been in the men's restroom that day prior to the fire was at shift-change between 2:00 p.m. and 2:30 p.m. Further, DeSalvo's own words revealed that, around the time the fire had started, she was busy performing her duties as assistant manager rather than standing at or near the men's restroom observing who went in and came out. For instance, when DeSalvo testified on direct examination that the defendant walked straight to the restroom, she was asked what she did after that. The following colloquy then took place:

> A. Well, a lady walked in. So I started talking to her. She wanted to know about the buffet, you know, and a to-go order, how to make a to-go order. I told her she can get the buffet, or she can order out of the menu. She asked if she can go look at it. I told her yes.
>
> She went and looked at it. Came back. Asked for boxes. Gave her two boxes. Asked if she wanted her free pumpkin pie. She said yes. I got a server to get it. She went and fixed the food. Came back. Checked her out.
>
> Q. When she was checking out, what happened?
>
> A. The gentleman that went in to the bathroom came out. Stood beside her. Gave her a kiss. She handed me the credit card. I swiped it. Gave her back a receipt with the pen. She signed it. They gave me the receipt. I said thank you. They walked out. And I started going back to work.
>
> Q. Okay. Going back to work, what does that entail?
>
> A. I went back to the bar, you know, to check to see if any of the food was getting low. Make sure everything was still good to go. I had still other customers eating in there.
>
> Q. From that position, could you observe the alcove entrance that leads to the men's and women's room?
>
> A. You can see everything in the restaurant. You can't literally see the men's and the lady's restroom. But you can see the area that you got to walk in, past the register, straight from the door. But you know what is back there. There's only two bathrooms.

Thus, after the defendant went to the restroom, DeSalvo spoke to Petrolia. DeSalvo then apparently spoke to a server about helping Petrolia. After the defendant and Petrolia left, DeSalvo went "back to work," which included going to

the bar and checking on the food. It is not at all clear from this testimony that DeSalvo could be certain the defendant was the only person who had gone in the men's restroom before the fire started.

We have carefully reviewed the entire record and conclude the jury did not act rationally in finding the defendant guilty of aggravated arson. The evidence introduced at trial did not establish beyond a reasonable doubt how the fire was started or, if the fire was intentionally started, who started it. While we are mindful not to substitute our judgment of what we think the verdict should be for that of the jury, we must conclude the jury engaged in impermissible speculation in determining the defendant's guilt. See **Mussall**, 523 So.2d at 1311. Under the facts of this case, we conclude that any rational trier of fact, after viewing all of the evidence as favorably to the prosecution as a rational factfinder can, would necessarily have a reasonable doubt as to the defendant's guilt. No rational trier of fact could have found the essential elements of the crime of aggravated arson beyond a reasonable doubt. Furthermore, no rational trier of fact could have found that, under these circumstances, the defendant, to the exclusion of everyone else, was the person who started the fire in the restroom. See **Mussall**, 523 So.2d at 1311-12.

Accordingly, the defendant's conviction, habitual offender adjudication, and sentence are reversed, and the defendant is ordered released.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE REVERSED; DEFENDANT ORDERED RELEASED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1516

STATE OF LOUISIANA

VERSUS

JIMMY BLACKWELL, JR.

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McCLENDON, J., dissents and assigns reasons.

I dissent and would affirm the defendant's conviction, habitual offender adjudication, and sentence for the following reasons.

Testimony and physical evidence introduced at the trial established that Tammy DeSalvo observed the defendant enter Shoney's with a cigarette in his hand. When she told the defendant he could not smoke inside the restaurant, he "flung" the cigarette out of the door. Seemingly a "little irritated," the defendant told DeSalvo that you can smoke in Mississippi, then proceeded directly to the men's restroom. The restroom area was in the front area of Shoney's near the cash register. Hallie Petrolia, the defendant's fiancée, then entered Shoney's, spoke to DeSalvo about the buffet and got two buffet dinners to go. As DeSalvo was checking out Petrolia's food at the register, the defendant exited the restroom and stood beside Petrolia as she paid for the meals. The defendant and Petrolia then left the restaurant. Shortly thereafter, DeSalvo was informed by a customer that she could smell smoke in the restroom area. When DeSalvo opened the door to the men's restroom, she observed the trash can engulfed in flames. She told all the customers to leave the restaurant because the bathroom was on fire. According to DeSalvo, the defendant was the last person in the restroom before the fire started.

DeSalvo testified that it was, at most, ten minutes from the time the defendant left until she and the customers were outside in the parking lot because of the fire in the restaurant. Further, as conceded by the majority, Petrolia paid for the food at 6:36

p.m. and Officer Rodney West, Jr., with the Slidell Police Department, testified that he received the dispatch call for arson at 6:55 p.m. Thus, very little time expired to allow other patrons to go in and out of the men's restroom.

Officer West testified that someone from the fire department informed him that the fire likely started in the bathroom trash can. The fire department official advised Officer West that it appeared someone had taken rolls of toilet paper from the stall, placed them into the trash can, and set them on fire. Officer West further testified that he did not see matches or cigarettes in the restroom, and he did not smell any kind of accelerant like gasoline or kerosene. Detective Mario Arthur, with the Slidell Police Department, also investigated the fire at Shoney's. He testified at trial that a fire investigator advised him that the fire had started in the bathroom, possibly in the trash can. It was more than likely that someone had lit rolls of toilet paper in the trash can on fire.[1]

In testifying for the defense at trial, Petrolia stated that the defendant did not go the bathroom, and that the defendant never walks inside of a building with a cigarette. She explained that shortly after she entered Shoney's, the defendant joined her after talking on the phone outside, and remained with her during her entire stay in the restaurant.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury heard the testimony and viewed the other evidence presented to it at trial and found the defendant guilty. The jury's verdict reflected the reasonable conclusion that, based upon the evidence viewed in the light most favorable to the prosecution, the defendant entered the men's restroom and set fire to toilet paper in the trash can. The assistant manager saw the defendant, and only the defendant, enter and leave the restroom during the time the fire had started; and very shortly after

[1] The majority's statement that the fire could have ignited due to a cigarette ember or other slow burning object, ignores the testimony of Officer West that the fire department reported that someone had taken rolls of toilet paper from the stalls and placed them in the trash can.

the defendant left the restroom, the assistant manager discovered a fire in the trash can therein. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. See **Moten**, 510 So.2d at 61.

It is also clear the jury believed DeSalvo's version of events over Petrolia's version of events. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La.App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La.App. 1 Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 03-1980 (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).

After a thorough review of the record, I find that the evidence negates any reasonable probability of misidentification and supports the jury's unanimous verdict. I am convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of aggravated arson. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).