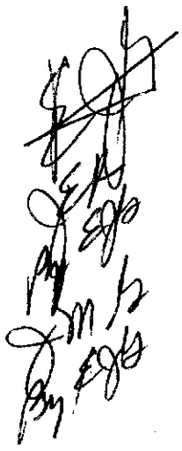
NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0920



STATE OF LOUISIANA

VERSUS

KENNETH B. JACKSON

Judgment Rendered: October 31, 2008

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 421896

The Honorable Martin E. Coady, Judge Presiding

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Walter P. Reed
District Attorney
Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Prentice L. White
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Kenneth B. Jackson

* * * * * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GAIDRY, J.

The defendant, Kenneth B. Jackson, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. The defendant pled not guilty and, following a jury trial, he was found guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1. The defendant was sentenced to thirty years at hard labor without benefit of parole, probation, or suspension of sentence. The State filed a multiple offender bill of information, and following a hearing, the defendant was adjudicated a fourth or subsequent felony habitual offender. The defendant's prior thirty-year sentence was vacated, and he was resentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, asserting two assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

Lisa Alexander, the victim, owns American Iron Kennels and breeds dogs. The defendant, who identified himself as "Byron," contacted Lisa on her cell phone to discuss purchasing pit bull puppies. Since Lisa never brought potential buyers to her home for safety concerns, she agreed to meet the defendant at the St. Tammany Parish Hospital parking lot to show him her puppies. On September 30, 2006, she met the defendant in the parking lot, where he looked at several puppies. The defendant wanted two puppies, which would cost $1,800. Since the defendant did not have enough money, he told Lisa he would meet with her again with the entire amount of money she required, and that he would bring his girlfriend with him to look at the puppies when they met again.

The defendant contacted Lisa again on the morning of October 2, 2006, and they agreed to meet in the Target parking lot about 10:00 a.m. in St. Tammany Parish. Lisa arrived at the parking lot and waited in her car with her six-week old son and six puppies in a crate. At about 10:45 a.m., the defendant approached Lisa's car on foot. Lisa got out of her car with her son and placed the crate of puppies on the ground. She offered to take the puppies out of the crate, but the defendant told her to leave them in. Suddenly, the defendant told Lisa that he was not paying "for no Goddamn dog," grabbed her cell phone in her purse with one hand and the crate of dogs with the other hand, and ran.

Lisa got back in her car with her son and followed the defendant across the parking lot. The defendant placed the crate of puppies on the back seat of his girlfriend's car.[1] As Lisa drove toward the back of the car to get the license plate number, the defendant went toward the front of his girlfriend's car and pulled out something that looked like a handgun. Lisa could see only the handle of the object because a piece of cloth was draped over the top of it. The defendant rushed toward Lisa with the object in his hand. Frightened because she thought the defendant was armed, Lisa sped away, having gotten only part of the license plate number.

When the defendant and his accomplice left the parking lot and drove down the road, Lisa got behind them to get the rest of the license plate number. She called 911. She gave the 911 operator the license plate number. She also told the operator that she had brought six of her dogs for the defendant to look at, but he stole her dogs, pulled a gun on her in the Target parking lot and then left. Lisa also gave a written police statement, wherein she stated in part:

[1] The defendant's girlfriend was not with him. The car was being driven by an unidentified male.

> "Byron" threw the crate of puppies in the car (back seat) and went in the passenger side for a second and came out pointing what appeared to be gun [sic] (it was covered with a piece of cloth on top but I could see the barrel he was holding in the palm of his left hand - it looked like a small handgun).

During her testimony at trial, Lisa explained that she meant that the defendant was holding the grip or the handle of the gun instead of the barrel. The defendant was not immediately apprehended. Two weeks later, Lisa identified the defendant in a photographic lineup. About three weeks after the robbery, the defendant was arrested at his mother's house in Mississippi. Lisa identified the defendant in court as the person who robbed her. The defendant gave a statement to Detective Steve Gaudet with the St. Tammany Parish Sheriff's Office. Detective Gaudet testified at trial that the defendant told him that he snatched Lisa's cell phone and grabbed the cage of puppies, and ran back to the car, but he did not have a gun. The defendant also told Detective Gaudet that the person driving his girlfriend's car was Steven Shiloh. However, no such person was ever located. No gun was recovered. Lisa never got her dogs back. The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was insufficient to support the conviction for first degree robbery. Specifically, the defendant contends the State failed to prove the "force or intimidation" element of the crime of first degree robbery.

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 or not, 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 also La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207, p. 10 (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, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. The testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Orgeron*, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

Louisiana Revised Statutes 14:64.1(A) provides:

> First degree 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, when the offender leads the victim to reasonably believe he is armed with a dangerous weapon.

Louisiana Revised Statutes 14:64.1(A), which has both objective and subjective components, requires the State to prove that the offender induced a subjective belief in the victim that he was armed with a dangerous weapon, and that the victim's belief was objectively reasonable under the circumstances. A conviction for first degree robbery may be supported by

direct testimony from the victim that she believed the defendant was armed. See *State v. Fortune*, 608 So.2d 148, 149 (La. 1992) (per curiam).

During Lisa's and the defendant's brief conversation about the puppies in the Target parking lot, and at the moment the defendant grabbed the crate of puppies and ran, Lisa did not see a gun on the defendant. In his brief, the defendant asserts that "all of the robbery statutes require the existence of force or intimidation *at the time* the offense is committed." Since Lisa was not intimidated by the defendant at the time of the taking of the puppies, according to the defendant, the jury should have returned a guilty verdict of theft.

The defendant's assertion regarding when the force or intimidation must occur is erroneous. The use of force or intimidation does not have to occur before, or contemporaneous with, the taking. The force or intimidation element of robbery is satisfied by evidence that force or intimidation directly related to the taking occurred in the course of completing the crime. *State v. Meyers*, 620 So.2d 1160, 1162-63 (La. 1993).

A rational trier of fact could have reasonably concluded that the puppies taken by the defendant were in the immediate control of Lisa. Further, a rational trier of fact could have concluded beyond a reasonable doubt that the defendant used force or intimidation to retain possession of the puppies without paying for them and to effect an escape from the scene. This intimidation was directed at Lisa immediately after the taking of the puppies, and a rational juror could have concluded that the intimidation occurred in the course of the defendant's committing a robbery. See *Meyers*, 620 So.2d at 1163.

Lisa testified that when the defendant ran away with her puppies, she got into her car and followed him across the parking lot. She observed the

defendant place the puppies in the backseat of a car. She drove to the back of the car to get the license plate number. The defendant then went to the front door and pulled out something that looked like a gun. She could see only what appeared to be the handle of the gun because a cloth was draped over the top of the object. The defendant then rushed toward her with the object. Lisa testified that she felt extremely intimidated at this time. She further testified that she felt the defendant was armed with a dangerous weapon and that her life was in jeopardy. While the object the defendant held in his hand was not clearly discernible, Lisa perceived it to be a handgun that could harm her. No weapon need ever be seen by the victim, or witnesses, or recovered by the police for the trier of fact to be justified in finding that the defendant was armed with a dangerous weapon. *State v. Page*, 02-689, p. 16 (La. App. 5 Cir. 1/28/03), 837 So.2d 165, 176, writ denied, 2003-0951 (La. 11/7/03), 857 So.2d 517. While the jury did not find sufficient evidence of an armed robbery, there was sufficient evidence for the jury to find the element of intimidation with what Lisa reasonably believed was a dangerous weapon. See *State v. Boyance*, 2005-1068, pp. 8-9 (La. App. 3d Cir. 3/1/06), 924 So.2d 437, 442, writ denied, 2006-1285 (La. 11/22/06), 942 So.2d 553.

After a thorough review of the record, we find the evidence supports the guilty verdict. We are 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 the responsive offense of first degree robbery.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the State did not prove that he was a fourth or subsequent felony habitual offender at the habitual offender hearing. Specifically, the defendant contends that the guilty pleas of his predicate convictions were not knowingly and voluntarily made. As such, the trial court's adjudication of him as a fourth or subsequent felony habitual offender was reversible error.

In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must inform the defendant that by pleading guilty he waives: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront his accuser.[2] The judge must also ascertain that the accused understands what the plea connotes and its consequences. If the defendant denies the allegations of the bill of information, the State has the initial burden to prove the existence of the prior guilty plea and that the defendant was represented by counsel when it was taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. To meet this requirement, the State may rely on a contemporaneous record of the guilty plea proceeding, *i.e.*, either the transcript of the plea or the minute entry. *State v. Henry*, 2000-2250, p. 8 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. While a colloquy between the judge and defendant is the preferred method of proof of a free

[2] See *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

and voluntary waiver, the colloquy is not indispensable when the record contains some other affirmative showing of proper waiver. *State v. Carson*, 527 So.2d 1018, 1020 (La. App. 1st Cir. 1988). See *State v. Shelton*, 621 So.2d 769 (La. 1993). Everything that appears in the entire record concerning the predicate, as well as the trial judge's opportunity to observe the defendant's appearance, demeanor, and responses in court, should be considered in determining whether or not a knowing and intelligent waiver of rights occurred. *Boykin* only requires that a defendant be informed of the three rights enumerated above. The jurisprudence has been unwilling to extend the scope of *Boykin* to include advising the defendant of any other rights which he may have. *State v. Henry*, 2000-2250 at pp. 8-9, 788 So.2d at 541.

At the habitual offender hearing, the State introduced into evidence Exhibits three through six, which were certified copies of bills of information, minute entries, and guilty plea forms of four of the predicate convictions alleged in the habitual offender bill of information. For the defendant's 1999 guilty plea to possession of cocaine (24th JDC, Jefferson Parish, docket number 98-6975), the State submitted the guilty plea minute entry, which states that the defendant was represented by counsel, that the court advised the defendant of his right to a trial by judge/jury, his right to confront his accusers, and his right against self-incrimination, and that the defendant waived these rights. Along with the minute entry, the State also submitted a "Waiver of Rights - Plea of Guilty Multiple Offender" form initialed and signed by the defendant and signed by the defendant's counsel and the judge; and a "Waiver of Constitutional Rights Plea of Guilty" form listing the *Boykin* rights the defendant waived. The defendant initialed each

right he was waiving and signed the form. The form was also signed by the defendant's counsel and the judge. The judge also dated both forms.

For the defendant's 1992 guilty plea to simple burglary of an inhabited dwelling (24th JDC, Jefferson Parish, docket number 92-1419), the State submitted the guilty plea minute entry, which states that the defendant was represented by counsel, that the court advised the defendant of his rights and that the defendant waived these rights. Along with the minute entry, the State also submitted a "Defendant's Acknowledgement of Constitutional Rights and Waiver of Rights on Entry of a Plea of Guilty" form listing the *Boykin* rights the defendant waived. The defendant and his counsel signed the form. The judge signed and dated the form.

For the defendant's 1989 guilty plea to unauthorized entry of an inhabited dwelling (24th JDC, Jefferson Parish, docket number 88-1403), the State submitted the guilty plea minute entry, which states that the defendant was represented by counsel, that the "court advised the defendant of his rights, including his right to a trial by jury, his right to confront his accusers and his right against self-incrimination," and that the defendant acknowledged he understood and waived these rights. Along with the minute entry, the State also submitted a "Defendant's Acknowledgement of Constitutional Rights and Waiver of Rights on Entry of a Plea of Guilty" form listing the *Boykin* rights the defendant waived. The defendant initialed each right he was waiving and signed the form. The defendant's counsel signed the form, and the judge signed and dated the form.

For the defendant's 1983 guilty plea to armed robbery (24th JDC, Jefferson Parish, docket number 83-1792), the State submitted the guilty plea minute entry, which states that the defendant was represented by counsel, that the "Court advised the defendant of all of his rights, including

his right to a trial by jury, his right to confront his accusers and his right against self-incrimination," and that the defendant acknowledged he understood and waived these rights. Along with the minute entry, the State also submitted a "Defendant's Acknowledgement of Constitutional Rights and Waiver of Rights on Entry of a Plea of Guilty" form listing the *Boykin* rights the defendant waived. The defendant and his counsel signed the form. The judge signed and dated the form.

Following the State's introduction of its evidence at the hearing, the defendant objected that the State did not prove his pleas were freely and voluntarily given. In *Shelton*, the Supreme Court held that once the State carries its initial burden at an habitual offender hearing of proving the existence of a defendant's prior guilty pleas and his representation by counsel or waiver of counsel, the burden shifts to the defendant "to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea." *Shelton*, 621 So.2d at 779. See *State v. Clesi*, 2007-0564, pp. 1-2 (La. 11/2/07), 967 So.2d 488, 489 (per curiam). The State in the instant matter clearly carried its burden of proving the existence of the defendant's guilty pleas, that they were freely and voluntarily given, and that the defendant was represented by counsel. The defendant's objection at the hearing did not constitute "affirmative evidence" of a defect in any of his prior guilty pleas. *Clesi*, 2007-0564 at p. 2, 967 So.2d at 490. Accordingly, the State proved the defendant's four predicate convictions, and the trial court correctly adjudicated the defendant a fourth or subsequent felony habitual offender. This assignment of error is without merit.

DECREE

For the above reasons, the defendant's conviction, habitual offender adjudication, and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.