

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 KA 0203**

**STATE OF LOUISIANA**

**VERSUS**

**ROBERT LAVAR JENKINS**

Judgment Rendered: **JUN 17 2011**

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On Appeal from the 22nd Judicial District Court  
In and For the Parish of St. Tammany  
Trial Court No. 483740 "G"

Honorable William J. Crain, Judge Presiding

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**BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.**

*(Handwritten initials and signature)*

## **HUGHES, J.**

The defendant, Robert Lavar Jenkins, was charged by bill of information with armed robbery, a violation of LSA-R.S. 14:64. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant moved for a post-verdict judgment of acquittal and for a new trial. The trial court denied both motions. The state filed a multiple-offender bill of information, seeking to have the defendant adjudicated a habitual-felony offender and sentenced under LSA-R.S. 15:529.1. Following a hearing, the trial court found the defendant to be a fourth-felony habitual offender.<sup>1</sup> The defendant was sentenced to imprisonment for ninety-nine years at hard labor, without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, raising the following assignments of error:

1. The evidence was insufficient to prove the identification of the defendant beyond a reasonable doubt. The denial of the defendant's motion for post-verdict judgment of acquittal was erroneous.
2. The trial court's denial of the defendant's motion for a new trial was erroneous.

We affirm the conviction, habitual-felony offender adjudication, and sentence.

### **FACTS**

On the night of December 27, 2009, Louis Bordes (Bordes) received a telephone call from an individual named "Rico," indicating that he was interested in purchasing some speakers Bordes was offering for sale. According to Bordes, Rico also indicated that he wanted to purchase an ounce of marijuana. Bordes agreed to meet Rico at a vacant residence on East Avenue in St. Tammany Parish

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<sup>1</sup> The defendant's habitual offender status was based upon a 2002 guilty plea to possession of cocaine; a 2003 guilty plea to possession of cocaine, second offense possession of marijuana, and possession of cocaine within 1000 feet of a school; and a 2007 guilty plea to possession of cocaine with intent to distribute. (R. p. 43).

to complete the transaction.<sup>2</sup> During the call, Rico also asked Bordes if he would be able to provide change for a \$100 bill. Bordes responded affirmatively.

Shortly after Bordes and his girlfriend, Courtney Guillot, arrived at the agreed location, the individual Bordes recognized as Rico drove up in a GMC Yukon and parked behind Bordes's vehicle. Rico did not exit the vehicle. Instead, the passenger, a man with whom Bordes was not familiar, exited the vehicle and approached Bordes. Bordes opened the trunk of the vehicle to show the man the speakers. The man pulled out a semi-automatic pistol and demanded, "give me everything." Bordes complied, turning over his wallet, cellular phone, and approximately \$200 in cash. The gunman returned to the passenger seat of the vehicle and the driver drove away.

Bordes returned to his vehicle and used Ms. Guillot's cellular phone to contact the police and report the robbery. Bordes also followed the vehicle and recorded the license plate number. Bordes eventually discontinued his pursuit of the vehicle and drove to Speedy G's service station to wait for the police. Deputy Merrill Smith, Jr., of the St. Tammany Parish Sheriff's Office, was dispatched to Speedy G's to investigate the matter. Bordes provided Deputy Smith a detailed description of the perpetrator and the clothing he was wearing. He described the perpetrator as a large black male with braided hair and dark clothing (a dark hoodie and dark jeans). Bordes also explained that the perpetrator was wearing a white undershirt and used a blue bandana to partially cover his face.

Shortly thereafter, the defendant, who was present in the area and was wearing clothing that matched the description of the gunman provided by Bordes, was stopped for questioning.

Earlier, Deputy Smith had requested the dispatcher to contact Bordes's cellular phone provider to initiate a GPS track on the phone. The phone was

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<sup>2</sup> At trial, Bordes testified that his grandmother owned the residence where he met Rico. The residence was vacant because it was being remodeled after having been damaged by Hurricane Katrina.

tracked to a nearby address off of West Hall in St. Tammany Parish. Deputy Smith immediately reported to the area and located the phone lying outside on the ground.

Deputy Robert Edwards, of the St. Tammany Parish Sheriff's Office, and his canine partner, Flex, were dispatched to the area where the phone was found. Deputy Edwards arrived on the scene and immediately used canine tracking to attempt to locate the perpetrator. Searching for the most recent scent found on the cellular phone, the dog tracked directly to the area where the defendant was being questioned.

Meanwhile, Bordes was transported to the area where the defendant was located. Without exiting the police vehicle, Bordes immediately and unequivocally identified the defendant as the individual who robbed him.

At trial, the defendant presented a defense of misidentification. The defendant also urged an alibi, through testimony from his mother, niece, and girlfriend. The defendant's mother, Geraldine Jenkins, testified that the defendant was at home at the time the robbery was committed. She claimed that the defendant, who was approached for questioning approximately one hour after the offense allegedly occurred, had been at home for at least three hours prior to being stopped. Mia Jenkins, the defendant's niece, likewise testified that the defendant was at home approximately one hour before he was stopped for questioning.<sup>3</sup>

Jaquonya Lizana, the defendant's live-in girlfriend, testified that she arrived home from work at approximately 7:45 p.m. and that the defendant was there. According to Ms. Lizana, she and the defendant sat in the car and talked for approximately 45 minutes. After they became engaged in an argument, the defendant left to go walk one of their dogs. The defendant returned and left again to walk the other dog. Ms. Lizana testified that it would have been impossible for

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<sup>3</sup> During cross-examination, the credibility of both women was attacked with evidence of various prior felony convictions.

the defendant to commit the armed robbery approximately one hour before the time he was stopped for questioning, which is the time the offense allegedly occurred.

The defendant did not testify at the trial. Through the alibi witnesses, the defendant attempted to establish that it was impossible for him to have committed the armed robbery.

### SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant argues that the evidence presented at the trial of this matter was insufficient to support the armed robbery conviction. Specifically, the defendant asserts that the state failed to prove his identity as the perpetrator of the armed robbery beyond a reasonable doubt.<sup>4</sup> He asserts that the victim's identification, which was based solely upon the defendant's clothing and his presence in the area, was unreliable. The defendant further asserts that the canine tracking was not reliable because it is likely the dog traveled to the area near the police vehicle seeking warmth from the running engine. Thus, the defendant argues that the state failed to negate every reasonable probability of misidentification.

The standard for appellate review of the sufficiency of evidence is "whether, after 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). (Emphasis added.) See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821(B), is an objective standard for testing the overall evidence, both direct and

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<sup>4</sup> Since the defendant has only alleged that the state failed to prove that he was the perpetrator of the crime, we need not address the sufficiency of the evidence with respect to the statutory elements of armed robbery.

circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that in order to convict, the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Hendon**, 94-0516 (La. App. 1st Cir. 4/7/95), 654 So.2d 447, 449. When the key issue in a case 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 in order to meet its burden of proof. **State v. Millien**, 02-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 509. However, positive identification by only one witness may be sufficient to support a defendant's conviction. **State v. Coates**, 00-1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1225.

In the instant case, the facts and circumstances surrounding the commission of the offense are essentially undisputed. The defendant does not contest that the offense was committed. Rather, he only challenges the sufficiency of the evidence of his identity as the perpetrator.

At trial, Bordes positively identified the defendant as the individual who held him at gunpoint and took his personal belongings. Bordes also testified that he positively identified the defendant as the gunman shortly after the incident occurred. Bordes testified that he was absolutely certain in his identification. As previously noted, positive identification by only one witness may be sufficient to support a defendant's conviction. See **State v. Coates**, 774 So.2d at 1225.

After reviewing the trial testimony and evidence, we conclude that there was sufficient evidence for the jury to find that the defendant's identity as the person who robbed Bordes at gunpoint was established beyond a reasonable doubt. It is the function of the jury to determine which witnesses are credible. See **State v. Davis**, 00-2685 (La. App. 1 Cir. 11/9/01), 818 So.2d 76. It is obvious from the verdict rendered that the jury found Bordes credible, accepted his unequivocal identification of the defendant as the perpetrator, and rejected the testimony of the

defense witnesses and the defendant's theory of mistaken identity. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. **State v. Williams**, 02-0065 (La. App. 1st Cir. 6/21/02), 822 So.2d 764, 768, writ denied, 03-0926 (La. 4/8/04), 870 So.2d 263. Furthermore, Bordes's identification was corroborated by the canine's positive track to the defendant as a match to the scent found on the abandoned cellular phone, and also by the fact that the defendant physically matched the description originally provided by Bordes. The testimony established that shortly after the robbery, the defendant was found in the area clad in a dark-colored, hooded jacket and dark jeans. He also had a braided hairstyle. In reviewing the evidence presented, we cannot say that the jury's determination was irrational under the facts and circumstances presented. See State v. Ordodi, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. 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 fact finder. See State v. Calloway, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Viewing the evidence in the light most favorable to the state, we are convinced that any rational trier of fact could have concluded, beyond a reasonable doubt, that the evidence was sufficient to negate any reasonable probability of misidentification, and to prove that the defendant was the perpetrator of the armed robbery. This assignment of error lacks merit.

#### **DENIAL OF MOTION FOR NEW TRIAL**

In his second assignment of error, the defendant contends that the trial court erred in denying his motion for a new trial, which was based upon LSA-C.Cr.P. art. 851(1). The defendant argues that the trial court, weighing the evidence as the thirteenth juror, should have granted the motion for a new trial.

Article 851(1) states, in pertinent part, as follows:

The court, on motion of the defendant, shall grant a new trial whenever:

(1) The verdict is contrary to the law and the evidence[.]

Under LSA-C.Cr.P. art. 851, the trial court, in ruling on a motion for new trial, can only consider the weight of the evidence, not its sufficiency, and must conduct a factual review of the evidence as a thirteenth juror. See State v. Steward, 95-1693 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1014; State v. Morris, 96-1008 (La. App. 1st Cir. 3/27/97), 691 So.2d 792, 799, writ denied, 97-1077 (La. 10/13/97), 703 So.2d 609. An appellate court, on the other hand, is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases, that determination resting solely within the discretion of the trier of fact. See Steward, 681 So.2d at 1014. Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See LSA-C.Cr.P. art. 858. See also State v. Guillory, 10-1231 (La. 10/8/10), 45 So.3d 612, 615.

In the instant case, the defendant has made no showing that an error of law was committed in this case. Accordingly, the denial of the defendant's motion for new trial based upon LSA-C.Cr.P. art. 851(1) is not subject to review on appeal. See State v. Hampton, 98-0331 (La. 4/23/99), 750 So.2d 867, 879-80, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). The constitutional issue of sufficiency of the evidence in this case was treated in the previous assignment of error. This assignment of error lacks merit.

**CONVICTION, HABITUAL-FELONY OFFENDER  
ADJUDICATION, AND SENTENCE AFFIRMED.**