NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 2354

STATE OF LOUISIANA

VERSUS

WILLIAM MORRIS

Judgment Rendered: May 4, 2007.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 08-05-0120

The Honorable Louis Daniel, Judge Presiding

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William Morris

* * * * *

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

CARTER, C.J.

The defendant, William Charles Morris, was charged by bill of information with first degree robbery, a violation of LSA-R.S. 14:64.1. He pled not guilty. Following a jury trial, the defendant was found guilty as charged. Thereafter, the State filed a habitual offender bill of information alleging the defendant to be a third felony habitual offender.[1] The defendant filed motions for new trial and for post verdict judgment of acquittal, which were denied. Subsequently, following a hearing, the trial court adjudicated the defendant a second felony habitual offender. The defendant was sentenced to twenty-two (22) years at hard labor without benefit of probation, parole, or suspension of sentence. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

On July 19, 2005, the defendant entered Papa John's Pizza restaurant (Papa John's) on Florida Boulevard at about 10:30 p.m. and robbed Rebecca Broome, an assistant manager. According to the trial testimony of Broome, the defendant reached inside his coveralls and said that "this [is] a holdup." Broome saw something shiny and metallic in the defendant's hand but could not identify what it was. When Broome turned to run, the defendant told her to return or he would blow her head off. Broome gave the defendant $28.00 from the cash register. Broome acknowledged that she believed the defendant, based on his words and actions, had a dangerous weapon. She further testified that she was afraid the defendant would shoot her.

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[1] The bill of information was later amended to reflect defendant as a second habitual offender.

After the defendant left Papa John's, Officer Donnie Hallmark with the Baton Rouge Police Department saw the defendant running across Florida Boulevard. Officer Hallmark stopped the defendant and asked him why he was running. The defendant said that he was running from some people he did not want to have any business with and that he was heading home. Officer Hallmark let the defendant leave.

Unbeknown to Officer Hallmark, Broome had called 911. While Broome was on the phone with the 911 operator giving a description of the defendant, Broome observed the defendant cross Florida Boulevard and get stopped by Officer Hallmark. Shortly following Officer Hallmark's release of the defendant, Officer Hallmark received a radio transmission to be on the lookout for a suspect who had just robbed Papa John's in that area. The description was of a black male wearing a blue Dickies jumpsuit. Moments later, the defendant was apprehended and placed under arrest. Officer Hallmark placed the defendant in his police unit and took him back to Papa John's, where Broome identified him as the person who robbed her.

While in custody, the defendant stated that while he was running the money fell to the ground. The police recovered $18.00 in the area where the defendant was found. When the defendant was booked into the parish prison, there was a knife on his person.[2]

According to the testimony of Officer Hallmark, the defendant confessed to the robbery:

> Q. Did you ask him about his involvement in this robbery?
> A. I asked him if he had robbed the Pa Pa [sic] John's. He stated to me that he had and I asked him if he had any weapons on him and he said he did not.

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[2] According to Corporal Alvin Richard, the property room supervisor at the East Baton Rouge Parish Prison, the knife was destroyed pursuant to the Sheriff's Office policy.

Q. Did he indicate to you that he had advised the manager, Rebecca, in this case, that he had a gun, that he told her he had a gun?
A. Yes, sir; he did.
Q. So, he led her to believe he had a weapon? That was his statement to you?
A. That's correct.

ASSIGNMENTS OF ERROR NOS. 1 AND 3

In his first assignment of error, the defendant argues that the bill of information was fatally defective because it failed to name an individual as the victim of the first degree robbery. In his third assignment of error, the defendant argues that defense counsel's failure to object to the defective bill of information constituted ineffective assistance of counsel. We address these related assignments of error together.

The bill of information stated in pertinent part that the defendant committed the offense of "First Degree Robbery, violating Louisiana Revised Statutes 14:64.1, in that on or about July 19, 2005 the defendant robbed PA PA [sic] John's Pizza, while he led the victim to reasonably believe the defendant was armed with a dangerous weapon."

The defendant did not complain prior to or during trial of this defect in the bill of information. Where an accused has been fairly informed of the charge against him and has not been prejudiced by surprise or lack of notice, the technical sufficiency of the indictment may not be questioned after conviction, where: (1) no objection was raised to the indictment prior to the verdict; and (2) without unfairness, the accused may be protected against further prosecution for any offense or offenses charged by the indictment through examination of the pleadings and the evidence in the instant prosecution. **State v. James**, 305 So.2d 514, 516-517 (La. 1974); see **State v. Folse**, 623 So.2d 59, 64-65 (La. App. 1 Cir. 1993).

The bill of information clearly stated that the defendant was being charged with first degree robbery. The bill gave the date and the location of the robbery and provided that the victim believed the defendant was armed with a dangerous weapon. While the bill did list Papa John's Pizza as the victim of the robbery, the affidavit of probable cause filed prior to trial stated in pertinent part that, after entering Papa John's Pizza, the defendant "approached the clerk and advised them that he had a gun and that he was holding up the business and advised the clerk to give him all the money." Also, prior to trial, the State filed a 768 notice to defendant, which stated in pertinent part:

> The substance of the defendant's statements to law enforcement is contained within the initial offense report. The defendant's statements is [sic] as follows, "....he told me that he did go into Papa John's Pizza with the intentions to rob it. He also told me that he advised Broome he had a gun but he did not have one. He also told me that he [dropped] the money when he was running across the street".

See **State v. Woods**, 97-0800 (La. App. 1 Cir. 6/29/98), 713 So.2d 1231, 1242-1243, writ denied, 98-3041 (La. 4/1/99), 741 So.2d 1281. (The bill of information listed the bank as the victim of an armed robbery, but during the preliminary examination, two tellers testified they were the victims of the armed robbery.)

We find there was no surprise or lack of notice as to the identity of the individual allegedly robbed by the defendant. The defendant has shown no prejudice as a result of the technical insufficiency of the bill of information. **State v. Cross**, 461 So.2d 1246, 1249 (La. App. 1 Cir. 1984). We also find the defendant fails to establish an ineffective assistance of counsel claim.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1 Cir. 1985). In making the determination of whether the specific error resulted in an unreliable sentence, the inquiry must be directed to whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See **Morgan**, 472 So.2d at 937. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. See **State v. Robinson**, 471 So.2d 1035, 1038-1039 (La. App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

As discussed, the defendant was not prejudiced as a result of the technical insufficiency of the bill of information. Accordingly, defense counsel's failure to object to the bill of information, even if constituting deficient performance, did not prejudice the defendant. His claim of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the trial court erred in denying his motions for new trial and for post verdict judgment of acquittal. Specifically, the defendant contends that the victim's identification of him was fatally flawed.

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, 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 LSA-C.Cr.P. art. 821; **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1 Cir. 1984). Where the key issue raised by the defense is defendant's identification as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Walker**, 94-0587 (La. App. 1 Cir. 4/7/95), 654 So.2d 451, 454, writs denied, 95-1124, 95-1125 (La. 9/22/95), 660 So.2d 470.

Broome testified at trial that the defendant entered Papa John's twice, the first time about 9:45 p.m. and again about 10:30 p.m. The defendant was wearing a blue Dickies jumpsuit. Broome was familiar with this type of jumpsuit because her father used to wear a similar jumpsuit for his job at Exxon. The first time the defendant entered, he asked about prices and about ordering a pizza. The second time he entered, the defendant again asked about ordering a pizza. He placed an order, and Broome told him the price of the pizza. The defendant then robbed Broome. When the defendant left with the money, Broome called 911. While Broome was still on the

phone with the 911 operator, Broome saw the defendant cross Florida Boulevard and make contact with a Baton Rouge police unit. About fifteen to twenty minutes later, Officer Hallmark brought the defendant back to Papa John's to see if Broome could make a positive identification.

The defendant contends that when he was brought back to Papa John's, he was not taken out of the police unit. Further, the window of the unit was rolled up, and Broome, out of fear, stayed away from the car when she identified him. According to the defendant, given Broome's emotional state, the identification of the defendant as the robber was a "virtual certainty" because of the short period of time between the robbery and the identification.

Officer Hallmark testified that he did not think it would have made a difference whether the defendant was taken out of the police unit. The back window of his unit was rolled down and, when Broome came out, she could clearly see the defendant and positively identified him. On direct examination, Broome testified that she did not walk up to the police unit when she identified the defendant but, rather, "stayed back a little" because she was terrified. On cross-examination, Broome testified about the certainty of her identification of the defendant as the robber:

Q. Okay. And you are telling us that you are absolutely sure that this man sitting next to me is the man that robbed you?
A. Yes.
Q. How do you know that?
A. I saw him for months after it in my dreams.
Q. He looks the same today as he did then?
A. No.
Q. No possibility, you are telling us, that you might be mistaken as to this man's identity?
A. None.
Q. A hundred ten percent certain; is that right?
A. Yes.

Q. No chance that you could be making a mistake on that identification?
A. No, sir.

The defendant testified at trial that, although he did enter Papa John's, leave, and then enter again, he did not rob Broome.

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.

The testimony at trial established that over an approximately forty-five minute period, the defendant entered Papa John's on two separate occasions and spoke with Broome. Following the robbery, Broome observed the defendant cross Florida Boulevard and get stopped by Officer Hallmark. Within minutes, the defendant was brought back to Papa John's and identified by Broome as the person who robbed her. Broome identified the defendant in court and said there was no possibility she was mistaken about the identification. The jury's decision to accept the testimony of Broome was rational and will not be overturned by this court. See **Walker**, 654 So.2d at 454. The trial court did not err in denying the defendant's motion for post verdict judgment of acquittal.

The defendant also argues that the trial court erred in denying his motion for a new trial. Specifically, the defendant contends that he was

entitled to a new trial pursuant to LSA-C.Cr.P. art. 851(1) and (5). Louisiana Code of Criminal Procedure article 851 provides in pertinent part:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> (1) The verdict is contrary to the law and the evidence;
> ....
> (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

The defendant's contention that the jury verdict was contrary to the law and the evidence has been addressed; the evidence was sufficient to sustain the defendant's conviction of first degree robbery. Also, the granting or denial of a new trial based on Article 851(5) is not subject to review by an appellate court. **State v. Spears**, 504 So.2d 974, 978-979 (La. App. 1 Cir.), writ denied, 507 So.2d 225 (La. 1987). Accordingly, the trial court did not err in denying the defendant's motion for a new trial.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.