NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

SHAWN LACOUR

NO. 01-KA-602

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 99-5954, DIVISION "O"
THE HONORABLE ROSS P. LADART, JUDGE PRESIDING

JANUARY 15, 2002

SOL GOTHARD
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard and James L. Cannella

PAUL D. CONNICK, JR.
District Attorney
TERRY M. BOUDREAUX
CHURITA H. HANSELL
VINCENT PACIERA, JR.
Assistant District Attorneys
24th Judicial District
Parish of Jefferson
Courthouse Annex Building
Gretna, Louisiana 70053
Attorneys for Plaintiff/Appellee

EDWARD K. BAUMAN
Louisiana Appellate Project
P. O. Box 1641
Lake Charles, Louisiana 70602
Attorney for Defendant/Appellant

AFFIRMED AND REMANDED

Defendant, Shawn Lacour, was convicted of two counts of armed robbery in violation of LSA-R.S. 14:64, three counts of aggravated burglary in violation of LSA-R.S. 14:60, one count of aggravated rape in violation of LSA-R.S. 14:42, and one count of sexual battery in violation of LSA-R.S. 14:43.1, and sentenced as follows: 30 years for each of the three aggravated burglary convictions; 99 years without the benefit of parole, probation or suspension of sentence for each of the two armed robbery convictions; life imprisonment without the benefit of parole, probation or suspension of sentence for the aggravated rape conviction; and, 10 years without benefit of parole, probation or suspension of sentence for the sexual battery conviction. The sentences were ordered to run consecutively with the exception of counts

four and five, aggravated burglary and aggravated rape, which were to run concurrent with each other, and counts six and seven, armed robbery and sexual battery, which were to run concurrent with each other. Defendant now appeals his conviction.

FACTS

Defendant was charged and convicted of seven crimes stemming from five separate incidents that occurred over a two-week period between April 26, 1999 and May 11, 1999.

Shortly after 10:00 p.m., on April 26, 1999, Carl Landry and Sharon Meyers were in their home on Boutall Street in Metairie when defendant and another black male kicked in the front door, entered their home, and put a gun to Mr. Landry's head. Ms. Meyers attempted to run but was stopped by defendant. The other black male, who was armed and wearing a bandana over his face, took money from Mr. Landry's pocket and then forced Ms. Meyers to walk from room to room while he demanded jewelry and other valuables.

Mr. Landry and Ms. Meyers were subsequently placed in the bathtub while the perpetrators continued to rummage through the house. At one point, the perpetrators removed Mr. Landry from the bathtub and made him open a safe located in the house. After the house became quiet, Mr. Landry and Ms. Meyers got out of the bathtub. They discovered all the phones had been cut and the portable phone had been taken. They proceeded to a neighbor's house where they called the police. Mr. Landry subsequently discovered that the perpetrators had taken jewelry, a gun, a phone and some old gold and silver coins.

A week and a half later, on May 5, 1999, at approximately 8:45 p.m., Phi Nguyen and Mai Vo were returning home to their Lincoln Court apartment on Metairie Lawn Drive when they were approached by defendant and another black male, both wearing bandanas over half of their faces. Mr. Nguyen and Ms. Vo were entering the mail room of their apartment complex when one of the perpetrators put a gun to Mr. Nguyen's back and demanded valuables. Defendant acted as the stake-out while the co-perpetrator searched the victims' pockets and took their money and Mr. Nguyen's chain and watch. The victims were forced to face the wall while the perpetrators fled.

Also, on May 5, 1999, Ziba Morisi Azodi returned to her home on Green Acres Road at approximately 10:00 p.m. She went to check on her daughter, Shila, while her husband went outside to get something from the car. When Ms. Azodi came out of Shila's room, a black male, wearing a bandana over half his face, put a gun to her head. Shila heard her mother scream and came out of the room to see what had happened. Both Ms. Azodi and Shila were taken into the den where Ms. Azodi's husband, Ghazem Azodi, and her in-laws were seated with defendant, who was wearing a ski mask. The perpetrators demanded money and gold and removed money from purses and took rings off Ms. Azodi's hand. The co-perpetrator then took Mr. Azodi, Shila and Mr. Azodi's father one at a time around the house to search for valuables. When Shila was brought around the house, the co-perpetrator attempted to lift her shirt but she resisted. The perpetrators asked about a safe which Shila pointed out to them. The perpetrators then brought Mr. Azodi in to open the safe.

All the victims were brought into the master bedroom before the perpetrators left. Before leaving, the perpetrators asked about phones in the house and took all the wall phones and Mr. Azodi's cell phone. The victims went to a neighbor's house to call the police. The victims subsequently determined that bags of jewelry and money were taken from the home along with a portable CD player and the phones.

A few days later, on May 10, 1999, K.C. was returning to her apartment on Manson Avenue around 1:30 a.m. with her date, David Spellman, when defendant and another black male, both with bandanas on their faces, forced their way into the apartment as K.C. was locking the door.[1] Both perpetrators held guns to the victims' heads and demanded that Mr. Spellman lie on the floor and that K.C. lie on top of him. The perpetrators demanded money but the victims only had $7.00.

One of the perpetrators (not the defendant), took K.C. upstairs made her lie on the bed in her daughter's room. He covered her face but she testified that she could still see. He proceeded to pull up her shirt, unzip her pants, pull them down, and insert his fingers inside of her. He asked for money and K.C. offered him her old engagement ring. He then pulled off her pants and underwear and demanded that K.C. perform oral sex, which she did. He talked about anal penetration but never acted on it. The co-perpetrator then vaginally raped her. Defendant, who had been walking up and down the stairs, subsequently came into the bedroom and raped her as well. Thereafter, Mr. Spellman was brought upstairs at which time the

---

[1] The victim's initials are used under the authority of LSA-R.S. 46:1844(W)(3) which allows the Court to identify a victim of a sex offense by using his or her initials.

perpetrators tried to force him to have sex with K.C. Mr. Spellman refused and K.C. and Mr. Spellman were placed in an upstairs closet. The perpetrators left approximately fifteen to twenty minutes later. K.C. was later taken to Lakeside Hospital by the police where a rape kit examination was performed.

The next day on May 11, 1999, K.N. returned home to North Lafourche Court in Kenner around midnight after a trip to the grocery store for milk. When she exited her car, she noticed defendant walking toward her at which time she returned to her car. Before she was able to start the ignition, defendant was next to the car window pointing a gun at her head. She opened the door and gave defendant the keys but defendant demanded that she move over to the passenger seat. Meanwhile, another black male approached and defendant threw him the keys. The second black male attempted but was unable to open the door to the house with the keys at which time defendant forced K.N. out of the car with his hand over her nose and mouth. K.N. was forced to open the door to her home and the three walked in.

The co-perpetrator immediately put a gun to K.N.'s husband, W.N., who had been asleep on the couch. Both K.N. and W.N. were forced to pull their pants and underwear down around their ankles and lay on the floor while the perpetrators pulled their shirts over their heads. K.N. could hear the perpetrators eating candy out of a candy jar in the living room. Defendant then made K.N. get up and walk around from room to room, including the rooms where K.N.'s young son and young daughter were

sleeping, with her pants down and a gun to her head while he demanded valuables.

Thereafter, defendant put K.N. in the bathroom. Defendant asked her if she would perform oral sex on him and if he could anally penetrate her. He slapped K.N. on her naked bottom and rubbed the inside of her legs. Defendant tried to put his fingers in the victim, but she resisted. He then left the bathroom. The perpetrators continued to rummage through the house. The co-perpetrator found keys to the bedroom safe which contained $2,000.00. They also found some sex toys which both defendant and the co-perpetrator each separately inserted into K.N.'s vagina against her resistance. They attempted to insert another object into K.N. but were unsuccessful. The perpetrators then brought W.N. into the bedroom and forced him to open the cedar chest so they could look through it. The perpetrators threatened many times that they were going to kill the victims.

Before leaving the house, the perpetrators ripped the phones out of the wall and specifically commented that they did not touch the kids. K.N. and W.N. waited a few minutes after the perpetrators left before calling the police on another phone. They subsequently discovered the perpetrators had taken various items including a digital camera, a gun, a video camera that had an 8mm tape in it, money and jewelry including a Rolex watch and wedding rings.

Detective Darren Monie, with the Personal Violence Section of the Jefferson Parish Sheriff's Office, investigated the above five incidents. During the investigation he learned a fingerprint was lifted from a candy jar from the May 11, 1999 incident. The fingerprint matched defendant.

Detective Monie prepared a photographic lineup with defendant's picture. Several of the victims were able to identify defendant in the lineup as one of the perpetrators of the crimes. As such, an arrest warrant and a search warrant were prepared for defendant and his residence. Some of the property stolen during the robberies and burglaries was recovered from defendant's residence during the execution of the search warrant. Defendant was subsequently arrested in Atlanta, Georgia and was returned to New Orleans on June 9, 1999. After waiving his rights, he gave a taped statement in which he inculpated himself in three of the five incidents. He denied participation in the May 5, 1999 incidents involving Mr. Nguyen and Ms. Vo and the Azodi family.

ALLEGATIONS OF ERROR

In his first assignment of error, the defendant alleges that the trial court erred in denying his motion to quash the indictment based on a misjoinder of offenses, because the offenses are not of the same or similar character or part of a common scheme or plan and, therefore, cannot be joined under LSA-C.Cr.P. art. 493. He maintains that because the offenses are not independently admissible under *Prieur* they should not have been jointly tried. Defendant further asserts the failure to sever the offenses was highly prejudicial because it led to an inference that he was a bad person. Thus, defendant claims both a misjoinder of offenses and a prejudicial joinder of offenses.

Prior to trial, defendant filed a "Motion to Quash Indictment - Misjoinder of Offenses." In the motion, defendant asserted the offenses could not be joined because 1) they were triable by different modes of trial,

and 2) they were not similar and were not part of a common scheme. In the same motion, defendant also moved for a severance of the offenses on the grounds the joinder was prejudicial because of the cumulative effect the evidence would have on the jury. After a hearing on the matter, the trial court denied the motion.

LSA-C.Cr.P. art. 493 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

All seven of the offenses with which defendant was charged were triable by the same mode of trial. In particular, with the exception of the sexual battery charge, all of the offenses with which defendant was charged mandate a punishment of confinement at hard labor and, therefore, require trial before a twelve-person jury. LSA-R.S. 14:60, 14:42, 14:64, 14:43.1; LSA-C.Cr.P. art. 782. Confinement at hard labor is discretionary for the offense of sexual battery and, thus, the offense of sexual battery only requires trial before a six-person jury. LSA-R.S. 14:43.1; LSA-C.Cr.P. art. 782. Those felonies in which punishment is *necessarily* confinement at hard labor may be charged in the same indictment with felonies in which the punishment *may* be confinement at hard labor provided the joined offenses are of similar character. LSA-C.Cr.P. art. 493.2.

On appeal, defendant challenges the joinder on the basis that the seven offenses are not of similar character or part of a common plan. There were

five incidents that occurred in the same area of Jefferson Parish over a two-week period and resulted in seven charges. All five incidents occurred at night. In all five incidents, there were two perpetrators with either one or both armed with guns and wearing bandanas who demanded money and jewelry from the victims. In the three aggravated burglary offenses and one of the armed robbery offenses, the victims' phones were destroyed or taken. The defendant's obvious goal in each of the five incidents was to take money and valuables from the victims. Furthermore, the aggravated rape offense was part of the same transaction as one of the aggravated burglaries and the sexual battery offense was part of the same transaction as one of the armed robberies. As such, it appears the seven offenses are similar in character and part of a common plan and, thus, were properly joined in the same indictment pursuant to Article 493.

Even when multiple offenses may be joined under Article 493, a defendant may be entitled to a severance of the offenses pursuant to LSA-C.Cr.P. art. 495.1 which provides:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires.

The defendant has a heavy burden of proof when alleging prejudicial joinder; he must make a clear showing of prejudice. *State v. Guccione*, 96-1049 (La. App. 5 Cir. 4/29/97), 694 So.2d 1060, 1066, *writ denied*, 97-2151 (La. 3/13/98), 712 So.2d 869. A motion to sever is within the sound

discretion of the trial court and its ruling should not be disturbed absent a showing of an abuse of that discretion. *Id.* at 1066-1067.

In considering a motion to sever, the trial court should weigh the possibility of prejudice to the defendant against economical and expedient use of judicial resources. The trial court should consider several factors in determining whether the joinder will be prejudicial: 1) whether the jury would be confused by the various counts; 2) whether the jury would be able to segregate the various charges and evidence; 3) whether the defendant would be confounded in presenting his various defenses; 4) whether the crimes charged would be used by the jury to infer a criminal disposition; and, 5) whether considering the nature of the charges, the charging of several crimes would make the jury hostile. *State v. Deruise*, 98-0541 (La. 4/3/01), ___ So.2d ___ [2001 La. LEXIS 1022], *cert. denied*, __ S.Ct. __, __ L.Ed.2d ___, [2001 U.S. LEXIS 7084] (U.S. 10/1/01), quoting *State v. Washington*, 386 So.2d 1368, 1371 (La. 1980).

The mere fact that evidence of one of the charges would not be admissible under *Prieur* in separate trials, does not prevent the joinder and single trial of multiple offenses if the defendant is not prejudiced by the joinder.[2] *State v. Deruise, supra.* There is no prejudicial effect from the joinder of two offenses when the evidence of each is relatively simple and distinct so that the jury can easily keep the evidence of each offense separate in its deliberations. *Id.*

A severance need not be granted if the prejudice can effectively be avoided by other safeguards. *State v. Celestine*, 452 So.2d 676, 680

---

[2] *State v. Prieur*, 277 So.2d 126 (La. 1973).

(La.1984). In many instances the trial judge can mitigate any prejudice resulting from joinder of offenses by providing clear instructions to the jury. The State can further curtail any prejudice with an orderly presentation of evidence. *State v. Schneider*, 542 So.2d 620, 621 (La. App. 5 Cir. 1989), *writ denied*, 548 So.2d 1245 (La. 1989).

In this case, while the five incidents share enough similarities to make the joinder of the seven offenses permissible, the facts of each offense are not identical and are easily distinguishable from each other. In the first incident, defendant and a co-perpetrator kicked in the front door of the victims' home, held the two victims at gunpoint, ransacked the home, and demanded money and other valuables. In the second incident, a week and a half later, defendant and a co-perpetrator approached the two victims when they were returning to their apartment complex, held them at gunpoint in the complex's mailroom and robbed them of their money and jewelry. On the same day, in the third incident, defendant and a co-perpetrator somehow managed to get into a home, held several people at gunpoint, ransacked the home, and demanded money and other valuables. A few days later, in the fourth incident, defendant and a co-perpetrator forced their way into the victim's home, held the victim and her date at gunpoint and raped the victim. And, the next day, in the fifth incident, defendant and a co-perpetrator approached one of the victims in her driveway, forced her inside her home at gunpoint, held her and her husband at gunpoint, ransacked the home looking for money and valuables, and sexually assaulted her.

The evidence against the defendant was not complex and was presented in an orderly fashion, incident by incident. All of the witnesses, with the

exception of Detective Darren Monie, testified to only one of the five incidents. Detective Monie testified regarding the evidence collected against defendant from several of the incidents including the recovery of various stolen property. Since the facts of each offense were not confusing or complex, there was little likelihood that the jury would have been confused by the presenting evidence of the crimes together. In the State's opening and closing statements, the prosecutor compartmentalized each separate count. The defense's closing argument likewise separated the evidence according to each count. Additionally, the jury instructions clearly set forth the elements the State had to prove as to each count. And, the verdict form had seven separate blank lines for the jury to write its verdict for each count. Each blank line was clearly identified as to the incident and count to which it referred. The trial court carefully explained the verdict form to the jury. There is no indication the jury was confused by the various counts, or unable to understand or to segregate the seven charges and evidence relating to each.

Defendant argues that the joinder of the seven offenses allowed the jury to characterize him as a bad person. There is no evidence that the jury inferred defendant had a criminal disposition. However, considering the offenses and the demeanor of the perpetrator according to the victims' testimony, it is likely the jury would have characterized the defendant as a bad person even if the offenses had been tried separately. See, *State v. Lee*, 99-1404 (La. App. 4 Cir. 5/17/00), 764 So.2d 1122, 1128.

We find that defendant has not demonstrated that he was prejudiced by the joinder of the seven offenses. Therefore, the trial court did not abuse

its discretion in denying defendant's motion to quash, which included a motion to sever.

In his second assignment of error, the defendant argues that the verdict of the jury was contrary to the law and evidence, as there was insufficient evidence, when viewed in a light most favorable to the prosecution, for the jury to find the defendant guilty of all the crimes charged beyond a reasonable doubt. Defendant specifically challenges the sufficiency of the evidence as to the armed robbery of Phi Nguyen and Mai Vo and the aggravated burglary of Ghasem Azodi both of which occurred on May 5, 1999. Defendant maintains the State failed to prove identity in these two incidents because the identifications made by the victims were unreliable. He argues the victims' identifications were unreliable because the crimes took only minutes, the perpetrator had his face partially covered, and the victims only saw the perpetrator's eyes. Defendant further claims the victims' testimonies regarding the incident and perpetrator were inconsistent and, therefore, their identifications of defendant were unreliable.

The standard of review for the sufficiency of 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, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In addition to proving the statutory elements of the charged offense at trial, the State is required to prove the identity of the perpetrator. *State v. Vasquez*, 98-898 (La. App. 5 Cir. 2/10/99), 729 So.2d 65, 69. Where the key issue is

identification, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof. *Id.*

To prove identification in the two May 5, 1999 incidents, the State offered the testimony of several victims. In the armed robbery of Phi Nguyen and Mai Vo, Mr. Nguyen testified that defendant acted as the stake-out person while the co-perpetrator robbed him and Ms. Vo. He stated that defendant was wearing a black bandana over part of his face, blue jeans and a T-shirt. Mr. Nguyen stated it was dark and explained that he could only see defendant from the bridge of his nose up. He stated defendant wore his hair in an Afro. Although Mr. Nguyen was unable to identify defendant in a photographic lineup, he identified defendant in court as one of the two perpetrators who robbed him. Mr. Nguyen explained the photographs in the lineup were not clear and it was not until he saw defendant in person in court that he recognized defendant as one of the perpetrators.

Mai Vo also testified that defendant acted as the stake-out person. She stated defendant had his face partially covered with a bandana and wore his hair in an Afro. In a photographic lineup one week after the incident, Ms. Vo identified defendant as one of the perpetrators who robbed her. At the time of the out-of-court identification, Ms. Vo ranked the certainty of her identification as a 3 out of 10. Ms. Vo also identified defendant in court as one of the perpetrators of the crime and stated she was "very sure" defendant was one of the perpetrators.

Defendant challenges Mr. Nguyen's identification on the basis he only saw defendant's eyes and he could not identify defendant in the photo lineup weeks after the incident but he could identify defendant in court eight

months later. Defendant challenges Ms. Vo's identification on the basis her certainty of her out-of-court identification was low. He further argues the identifications were unreliable because neither Mr. Nguyen nor Ms. Vo were close to defendant and the robbery only took minutes.

In the aggravated burglary of the Azodi home, Ziba Azodi testified that one of the perpetrators wore a black and white bandana over part of his face, had distinguished eyes and wore his hair in an Afro. She also testified that the other perpetrator wore a ski mask. Ms. Azodi stated the perpetrator with the ski mask guarded everyone while the perpetrator with the bandana searched the house. Ms. Azodi identified defendant in a photographic lineup a few days after the incident as one of the perpetrators. She also identified defendant in court during trial based on his distinctive eyes and eyebrows. On cross-examination, Ms. Azodi stated she was never asked to rate the certainty of her out-of-court identification but testified she was 100 percent sure defendant was one of the perpetrators. She admitted on cross-examination that she told police that one of the perpetrators had distinguished yellowish hazel eyes and that the picture of defendant in the lineup showed defendant's eyes to be brown or black.

Shila Azodi testified that one of the perpetrators wore a blue and white bandana across his face and the other perpetrator wore a ski mask. Shila was forced to walk around the house with the perpetrator wearing the bandana and point out the location of the valuables. Shila identified defendant in a photographic lineup as the perpetrator with the bandana. She also identified defendant in court and stated she was "almost positive" he was one of the perpetrators.

Defendant argues the testimony of Ms. Azodi and Shila are inconsistent because one described the bandana defendant was wearing as black and white and the other stated the bandana was blue and white. He further contends Ms. Azodi's description to police of the perpetrator's eyes given immediately after the incident conflicts with her trial testimony. In particular, Ms. Azodi described the perpetrator's eyes as yellowish hazel when defendant's picture showed his eyes to be brown or black.

The jury heard all of the evidence. Specifically, they heard the victims' testimonies both on direct and cross-examination. After hearing the evidence, the jury chose to believe the victims' testimonies identifying the defendant as one of the perpetrators of the crimes despite minor discrepancies. It is the jury's function to determine the weight of the evidence bearing on the defendant's identification. And, it is not the appellate court's function to reevaluate the credibility choices made by the jury. *State v. Spencer*, 93-571 (La. App. 5 Cir. 1/25/94), 631 So.2d 1363, 1370.

Three of the four victims were able to identify defendant in a photographic lineup shortly after the incidents. All of the victims made in-court identifications of defendant. Although in both of the May 5, 1999 incidents the victims testified the perpetrator's face was partially covered, they claimed they could see his eyes and his hair. Identifications of defendants whose faces were covered or partially covered have been upheld by Louisiana courts. See, *State v. Nicholas*, 397 So.2d 1308 (La.1981) and *State v. Vasquez*, 98-898 (La. App. 5 Cir. 2/10/99), 729 So.2d 65, 70-71. Viewing the evidence in the light most favorable to the prosecution, a

rational trier of fact could find, beyond a reasonable doubt, that defendant was the perpetrator of the two crimes on May 5, 1999.

In his third assignment of error, defendant requests that this Court review the record for errors patent and to take whatever corrective action it deems appropriate.

We have reviewed the record for errors patent, according to LSA-C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990), and note the following. The defendant was charged with and convicted of a "sex offense" as defined by La. R.S. 15:542(E). La. R.S. 15:540, et. seq. require registration of sex offenders. La. R.S. 15:543(A) requires that the court shall provide written notification to any defendant charged with a sex offense of the registration requirements of La. R.S. 15:542 by including the notice on any judgment and sentence forms provided to defendant. Here, however, the record does not indicate that the judgment and sentence forms contained the required written notification pursuant to La. R.S. 15:543(A). This omission warrants a remand for written notification. *State v. Wallace*, 00-1745 (La. App. 5 Cir. 5/17/01), 788 So.2d 578, 588; *State v. Stevenson*, 00-1296 (La. App. 5 Cir. 1/30/01), 778 So.2d 1165, 1166-1167.

CONCLUSION

For the above discussed reasons, the defendant's convictions and sentences are affirmed. The matter is remanded and the trial court is ordered to inform the defendant of the registration requirements as provided in La. R.S. 15:543(A), by sending appropriate written notice to the

defendant, within ten days of this Court's opinion, and to file written proof in the record that defendant received such notice.

AFFIRMED AND REMANDED