

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

NO. 01-KA-769

VERSUS

**COURT OF APPEALS
FIFTH CIRCUIT**

FIFTH CIRCUIT

LARRY ROSS

FILED JAN 29 2002

COURT OF APPEAL


CLERK

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 99-7235, DIVISION "C"
HONORABLE ALAN J. GREEN, JUDGE

JANUARY 29, 2002

**THOMAS F. DALEY
JUDGE**

Panel composed of Judges Sol Gothard,
Thomas F. Daley, and Clarence E. McManus

PAUL D. CONNICK, JR.,
DISTRICT ATTORNEY
CHURITA H. HANSELL,
TERRY M. BOUDREAUX,
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ATTORNEYS FOR PLAINTIFF/APPELLEE

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ATTORNEY FOR DEFENDANT/APPELLANT

**AFFIRMED;
MATTER REMANDED**

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CEM

The defendant has appealed his conviction of first degree robbery claiming there is insufficient evidence to support the conviction. For the reasons which follow, we affirm.

FACTS:

The victim, John Terrance, testified at trial that, on September 6, 1999, at about 10:15 a.m., while stopped at a red light, the defendant approached the driver's side window and told him to get out of the car. Mr. Terrance stated that he got out of the car because the defendant had what appeared to be a .357 pistol wrapped in a black bag that had a shoulder strap. Mr. Terrance explained that the bag was zipped up, and that he could only see the brown handle of the pistol, but not the barrel.

Mr. Terrance testified that, once he was out of the car, the defendant demanded his money. He gave the defendant \$15.00, and the defendant then told him to "get to walking." Mr. Terrance stated that the defendant got into the car and left.

Mr. Terrance testified that after the defendant left, he ran across the street and called his wife. He told his wife that someone stole her car and to call the police. Mr. Terrance then ran home, which was only a block away. He described the perpetrator as a black male, approximately five feet nine inches tall, weighing 225 pounds. Although Mr. Terrance was not sure of the clothing worn by the robber, he stated on two occasions that he remembered "the face."

Mr. Terrance also testified that police officers came to his home to have him view some photographs. Mr. Terrance stated that, before the officer could lay down the photographs on the table, he immediately identified the defendant as the perpetrator. Mr. Terrance positively identified the defendant in court as the man who took his vehicle.

William Jones, a detective with the robbery unit of the Jefferson Parish Sheriff's Office, testified at trial that he was the lead investigator for the case. Jones stated that a robbery occurred on September 6, 1999, on Labor Day, at the intersection of Ames Boulevard and Acre Road around 10:15 a.m. He stated that the victim's car was recovered that day around 1:00 p.m. in the 2700 block of Martin Luther King Boulevard in Orleans Parish. Jones testified that no readable fingerprints were obtained from the victim's vehicle. Jones also testified that the police report's description of the perpetrator as age 25, five feet four inches tall and 230 pounds, was provided by the victim on the day of the incident.

Jones testified that once the defendant was developed as a suspect, he compiled a photographic line-up of six individuals, identified at trial as State's Exhibit 9. Jones

testified that he displayed the line-up to Mr. Terrence who identified the defendant as the perpetrator.

Tanya Thomas was called to testify by the defense. Thomas lived with her three children and her boyfriend, Ronald Ross, the defendant's brother. She testified that, on September 6, 1999, the defendant and three of his six children were staying with her family for Labor Day weekend. According to Thomas, the defendant was at her home between 10:00 a.m. and 11:30 a.m. playing video games on the day of the incident.

DISCUSSION:

On appeal, the defendant argues that the evidence presented at trial was insufficient to prove his guilt beyond a reasonable doubt, because the State did not prove the identity of the defendant as the perpetrator of the crime. The defendant argues that there were no witnesses to corroborate the victim's story, and that the defendant presented credible testimony by disinterested persons to prove that he could not have committed the crime.

The State responds that the evidence in the record clearly proves that the defendant was guilty beyond a reasonable doubt. The State claims that the trial judge found the State's witnesses to be more credible than the defendant's witnesses.

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, 573 (1979). Under Jackson, a review of a criminal conviction record for sufficiency of evidence does not require a court to ask whether it believes that the evidence at the

trial established guilt beyond a reasonable doubt. Rather, a reviewing court is required to consider the whole record and determine whether a rational trier of fact would have found guilt beyond a reasonable doubt. State v. Lapell, 00-1056 (La. App. 5 Cir. 12/13/00), 777 So.2d 541, 545. It is not the function of this Court to assess credibility or to re-weigh evidence. State v. Hotoph, 99-243 (La. App. 5 Cir. 11/10/99), 750 So.2d 1036. A determination of the weight of evidence is a question of fact, resting solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witnesses. State v. Silman, 95-0154 (La.11/27/95), 663 So.2d 27, 35.

When the key issue in the case is identification, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof. State v. Newman, 99-841 (La. App. 5 Cir. 12/15/99), 750 So.2d 252, 258. (Citations omitted). In this case, the victim, Mr. Terrance, identified the defendant in the photographic line-up and in court. Mr. Terrance was cross-examined extensively regarding the discrepancy between the height and weight of the robber on the police report and the actual height and weight of the defendant. Mr. Terrance acknowledged that he was uncertain as to the clothes worn by the robber, but added that the clothes did not matter, he remembered "the face."

At the conclusion of trial, the trial judge stated:

. . . He had identified the defendant, Mr. Ross, as the person who ordered him out of the vehicle and took his vehicle and his money and I have no doubt that he is certain that this is in fact the individual who committed the offense.

The trial judge clearly concluded that the testimony of the victim and the investigating officer was more credible than the alibi witness of the defendant. It is not the function of this Court to assess credibility or to re-weigh evidence. Hotoph,

supra. We find that the evidence presented at trial was sufficient for a reasonable trier of fact to conclude that the defendant committed first degree robbery of Mr. Terrance.

The record was reviewed 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). This review indicates that the trial judge did not inform the defendant of the prescriptive period for seeking post-conviction relief as mandated by LSA-C.Cr.P. article 930.8. Therefore, this matter is remanded and the trial court is ordered to inform the defendant of the provisions of article 930.8 by sending written notice to the defendant within ten days of the rendition of this opinion, and to file written proof that the defendant received the notice in the record. See State v. Gibson, 97-1203 (La. App. 5 Cir. 3/25/98), 708 So.2d 1276.

For the foregoing reasons, the defendant's sentence is affirmed. This matter is remanded to the district court for the limited purpose of informing the defendant of the time frame for seeking post conviction relief.

AFFIRMED; MATTER REMANDED