NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA		**COURT OF APPEAL**
VERSUS		**FIFTH CIRCUIT**
OLIVER HOWARD		**STATE OF LOUISIANA**
		01-KA-964

APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 97-5887, DIVISION "E,"
HONORABLE CLARENCE MCMANUS, PRESIDING.

JANUARY 29, 2002

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Thomas F. Daley and Walter J. Rothschild.

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AFFIRMED

On September 10, 1997, the defendant, Oliver Howard, was charged by bill of information along with Patrick Pugh with the armed robbery of Robert Fray in violation of LSA-R.S. 14:64. On September 16, 1997, the defendant was arraigned, and he entered a plea of not guilty. A two-day jury trial began on June 18, 1998, and concluded with the jury finding the defendant guilty as charged.

On July 10, 1998, the defendant was sentenced to thirty-five years at hard labor without benefit of parole, probation or suspension of sentence. That same day, the State filed a multiple offender bill of information alleging that the defendant was a second felony offender, and the defendant denied the allegations in the multiple bill. The defendant filed a motion for appeal and a motion to reconsider sentence on July 14, 1998.[1]

A multiple offender hearing was held on January 15, 1999. The defendant withdrew his denial and admitted to being a second felony offender. The trial

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[1] The defendant's motion for appeal that was filed on July 14, 1998, was dismissed on January 6, 1999 for failure to pay costs. The motion to reconsider sentence was never ruled on and is discussed in the errors patent section of this opinion.

court vacated the original sentence and sentenced the defendant to 50 years at hard labor, without benefit of suspension of sentence or probation.

On June 5, 2000, the defendant filed a motion for an out-of-time appeal. On September 22, 2000, the lower court denied the defendant's motion for an out-of-time appeal, ruling that the defendant must seek an out-of-time appeal in a post-conviction relief application. The defendant subsequently filed an application for post-conviction relief on December 27, 2000, requesting an out-of-time appeal, which was granted on March 7, 2001.

This appeal followed. Appellant urges two assignments of error. For the reasons stated herein, we affirm defendant's convictions and sentence.

FACTS

Robert Fray, the victim, testified at trial. He stated that, on August 7, 1997, he went to shoot pool at the D.C. Lounge with a friend, Rick Hamilton. Fray said that, as he was getting his pool sticks out of his car, two individuals approached him and asked him if he was "DJ'ing" that night. Fray identified the two individuals as Patrick Pugh and the defendant, Oliver Howard. Fray responded in the negative, and he then went inside D.C. Lounge with Hamilton to play pool for a couple of hours.

Fray testified that he and Hamilton left D.C. Lounge later that night and went in separate cars. Fray stated that he got into his car and proceeded to leave, when Patrick Pugh approached him. Pugh asked Fray for a ride to the Fischer Projects. Fray stated that he would not take him into to the Fischer Projects, but he would drop him off nearby at the Sheraton Hotel. As the two were leaving, Pugh asked Fray if his cousin, Oliver Howard, who was standing nearby, could also have a ride home. Fray responded in the affirmative. The defendant got into the passenger backseat of Fray's black Mustang.

As they approached the Sheraton, Pugh directed Fray to turn into the neighborhood next to the hotel. Fray stated that they went about three blocks and Pugh motioned him to pull over. According to Fray, Pugh got out of the car and asked him if he wanted any money for gas. Fray shook hands with Pugh and said it was no big deal. Fray then testified that the demeanor and voice of Pugh changed and everything got serious. According to Fray, Pugh stated, "Well, how about we take all you've got." Fray explained that at first he thought it was a joke, and then looked at the back seat at the defendant. Fray testified that Pugh told him, "Don't look back there," real firmly.

Fray handed Pugh his wallet, which only contained eight dollars -- a five-dollar bill and three one-dollar bills. After Fray handed Pugh the wallet, Pugh stated that "my boy in the back's going to take care of you with a knife." Fray testified that he then felt his head jerk back and something slicing across his throat. He grabbed the knife and pushed it away. Fray explained that he then leaned over on top of his center console with his head facing the back seat. He testified that Pugh and the defendant were hitting him. Fray stated that he reached into the console and got his .380 handgun. He chambered a round and fired a shot at the passenger window.

Fray stated that he then rolled out of the car on the driver's side because he thought Pugh might have been coming around the other side of the vehicle to get him. Fray said that, as he rolled out of the car onto the ground, the defendant was hanging on to him. According to Fray, when he was on the ground, his car rolled over his right side. He explained that he never placed his vehicle in park, but that he only had his foot on the brake. Fray testified that the defendant was on his back, and they were both fighting over control of the gun. The police showed up at the scene as the two were struggling, and immediately handcuffed them both. Fray testified that, after the police separated the two, he then felt

blood trickling down his hand. Fray stated that he sustained lacerations to his hand and neck and cuts and bruises to his face, chest, back, and elbows.

Fray also testified that his car kept rolling down the street during the struggle. There were scratches on the rear bumper, and his passenger door was bent all the way forward toward the front wheel. Fray identified State's Exhibits 8 A, B, C, D, and E, which were pictures that depicted the damage to his vehicle. Fray also stated that he found the knife blade stuck underneath the seat of his vehicle. He explained that he found the blade a couple of weeks later after his car was fixed, and he turned the blade over to the police.

Officer Scott Vinson of the City of Gretna Police Department testified that, on August 8, 1997 at 2:29 a.m., he responded to a call regarding a fight in the street at the 900 block of Romain Street. Vinson stated that, when he arrived at the scene, the defendant was on Fray's back, and they were fighting over a gun. He explained that both individuals were screaming, "He's trying to kill me." Vinson exited his vehicle, kicked the gun away and immediately detained Fray. He stated that Officer Purdy, the assisting officer, detained the defendant. Vinson separated Fray and the defendant and advised them of their constitutional rights.

After separating the two, Vinson learned that Fray was the victim of an armed robbery with a knife. Vinson testified that Fray had lacerations on the neck and straight lacerations on the hands across the fingers, which indicated a struggle with a knife. He stated that the defendant was then arrested.

Vinson testified that he found blood on the passenger seat of Fray's vehicle. The passenger window was shattered and the car was found damaged in a yard nearby. Vinson located a black kitchen knife handle at the scene in the street. Vinson also testified that Pugh was found around the corner with a gunshot wound to the chest holding eight dollars in his left hand. Vinson

explained that Fray's mother later brought the knife blade found in the vehicle to the police station.

Detective Wayne Lawrence of the Gretna Police Department testified that he took statements from the victim and the defendant. Detective Lawrence advised the defendant of his constitutional rights. He executed a waiver of rights form, which the defendant signed. Detective Lawrence testified that the defendant's statement was audio-taped and transcribed. This tape was played to the jury. He explained that after the defendant gave his statement, he was arrested for armed robbery.

Taped Statement

The defendant's statement was taken on August 7, 1997 at 5:18 a.m. In the statement, the defendant said that he and Pugh got together after work and drank a few beers. The defendant admitted that, while they were drinking beer, they planned on robbing someone that night in order to make some money. They decided to go to the D.C. Lounge, and, prior to leaving the apartment complex, the defendant grabbed a black handled knife.

The defendant said that they went to the D.C. Lounge to shoot pool; however, he claimed that they never shot pool that night because the tables were occupied. He then said that they left the D.C. Lounge to go across the street to the Danny and Clyde's store to buy beer, because it was cheaper. He and Pugh sat outside the D.C. Lounge and drank beer.

The defendant alleged in his statement that he told Pugh that he was having second thoughts about robbing someone stating, "I'm not really too sure about this." The defendant then said that he and Pugh separated in front of the lounge.

The defendant said that Pugh later showed up in Fray's car. Pugh told him to get into the car and that they had a ride. The defendant said that he sat in the

back passenger seat. The defendant claimed that Fray was still driving the car when Pugh demanded money from him by saying "give it up." He then said that Fray slowed down and reached into his pocket. According to the defendant, after Fray went into his pocket, Fray produced the gun and fired a shot. When the defendant heard the gunshot, he said that Fray looked like he was going to shoot him. He said that he grabbed Fray's wrist while holding the knife. They began to struggle and the defendant said that he lost the knife during the scuffle.

Later in the statement, the defendant said that he held the knife to Fray between the time Pugh said "give it up" and the time the gun went off. The defendant admitted that he knew that Pugh was attempting to rob Fray.

After hearing the trial testimony and considering the evidence, the jury found the defendant guilty by a vote of twelve to zero.

ASSIGNMENT OF ERROR NUMBER ONE

The evidence was insufficient to support a conviction for armed robbery.

DISCUSSION

The defendant claims that there was insufficient evidence to convict him of armed robbery because he was not a principal to the crime. The defendant claims that he was not aware of Pugh's intent to rob Fray and that he did not aid in the commission of the armed robbery, but rather only protected himself from Fray with the knife for fear of being shot.

The State responds that the evidence presented proved the defendant's intent to commit armed robbery beyond a reasonable doubt. The State contends that there was both direct and circumstantial evidence introduced to support the jury's verdict.

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. 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, *writ denied,*00-3546 (9/14/01), 796 So.2d 675. 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, *writs denied*, 99-3477 (La. 6/30/00), 765 So.2d 1062 and 00-150 (La. 6/30/00), 765 So.2d 1066. 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.

The defendant was charged with LSA-R.S. 14:64, armed robbery, which provides in part that "Armed 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, while armed with a dangerous weapon."

The State contends that the defendant and Pugh planned and committed the crime together as principals. LSA-R.S. 14:24 defines a principal as: [a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

Only those persons who knowingly participate in planning or executing a crime are principals to that crime. Mere presence at the scene of a crime is not enough to make one a principal. State v. Pierre, 93-0893 (La. 2/3/94), 631 So.2d

427; State v. Girod, 94-853 (La. App. 5 Cir. 3/15/95), 653 So.2d 664. Moreover, an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state. State v. Pierre, *supra*; State v. Cedrington, 98-253 (La. App. 5 Cir. 12/16/98), 725 So.2d 565, 574. The mental state of one defendant may not be imputed to another defendant. State v. Cedrington, *supra*, at 573.

The defendant contends that he did not have the specific intent to rob Fray nor did he know of Pugh's intent to rob Fray. The defendant specifically argues that, while he may have planned to help commit a robbery that night, he had decided to withdraw from that plan while at the D.C. Lounge. He also argues that he did not know Pugh's intent to rob Fray, because he thought Pugh and Fray were friends, and that he (the defendant) and Pugh were just going home for the night.

Based on the defendant's own taped statement which was played for the jury, he and Pugh planned on robbing someone that night in order to make some money. The defendant admitted that he brought a knife with him to the D.C. Lounge in order to carry out the crime. He also admitted that he knew Pugh was attempting to rob Fray. Fray testified that, after he turned over his wallet, the defendant attempted to slice his throat with a knife. Based on this testimony, the jury was reasonable in finding that the defendant had the intent to commit the crime, that he knew of Pugh's intent to commit the crime of armed robbery, and that the defendant aided in the execution of the crime by holding the knife to the victim.

The defendant also argues that he did not initiate the robbery and only produced the knife in order to protect him from being shot by Fray. Fray testified that the defendant put the knife to his throat after he handed over the wallet and before the gun was produced. In the defendant's taped statement, he first said

that he produced the knife after the gunshot or at the same time. Later in the statement, he said that he held the knife to Fray after Pugh said give it up and before the gun shot. Based on Fray's testimony and the defendant's own admission to producing the knife before the gun shot, the jury was reasonable in finding that the defendant aided in the commission of the crime of armed robbery of Fray while armed with a knife.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

The defendant's sentence was unconstitutionally excessive.

DISCUSSION

The defendant claims that the enhanced sentence of fifty years at hard labor without suspension of sentence and probation was not justified, in light of the young age of the defendant, his employment record, and his chances of rehabilitation. He also asserts that the length of sentence is disproportionate to the seriousness of the crime.

The State contends that the defendant is precluded from seeking review of his sentence because he admitted the allegations in the multiple bill and agreed to a set sentence of fifty years.

At the sentencing for the multiple bill, the trial judge engaged in a colloquy with the defendant regarding the rights that the defendant was waiving. The trial judge explained the sentencing range and stated: "Sentencing range on this multiple bill is forty-nine and half years to a maximum of one hundred and ninety-eight years, and you will receive a sentence of fifty years hard labor." Further, the defendant signed a waiver of rights form as a multiple offender which stated that the defendant would receive a sentence of fifty years at hard labor.

The defendant is precluded from challenging his habitual offender sentence, since it was agreed upon by the parties before defendant entered his

admission to the habitual offender bill. Under LSA-C.Cr.P. art. 881.2A(2), a "defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea." This Court has applied these provisions to cases in which a defendant admits to the allegations in a habitual offender bill as part of a sentencing agreement. See, State v. Stanley, 98-920 (La. App. 5 Cir. 2/10/99), 729 So.2d 33, 37, *writ denied*, 99-614 (La. 6/25/99), 745 So.2d 1186; State v. Francis, 98-811 (La. App. 5 Cir. 1/26/99), 727 So.2d 1235, 1240, *writ denied*, 99-671 (La. 6/25/99), 746 So.2d 597.

This assignment of error is without merit.

ERROR PATENT DISCUSSION

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).

The defendant filed a motion for reconsideration of sentence on July 14, 1998, after the original sentencing of thirty-five years at hard labor. The trial court failed to rule on the motion for reconsideration. However, on January 15, 1999, the trial court vacated that sentence and subsequently sentenced the defendant to an agreed-upon sentence of fifty years as a second felony offender. Because the original sentence was vacated, the motion for reconsideration of that sentence is now moot.

Also, the defendant was sentenced to fifty years without benefit of probation or suspension of sentence, although LSA-R.S. 14:64 requires that the sentence be served without the benefit of parole, probation or suspension of sentence. However, based on the self-activating provisions of LSA-R.S.

15:301.1(A), the sentence imposed by the trial court is deemed to contain provisions that the sentence will be served without the benefit of parole, probation or suspension of sentence. *See also*, State v. Sidney Williams, 00-1725 (La. 11/28/01), _____ So.2d _____, (2001 La. LEXIS 3108).

CONCLUSION

Accordingly, for the reasons assigned herein, the conviction and sentence of defendant Oliver Howard are affirmed.

AFFIRMED