

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0290

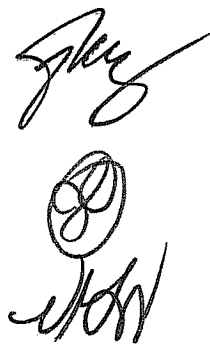
STATE OF LOUISIANA

VERSUS

KENDRICK D. BROCK

**Judgment Rendered: September 14, 2007**

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On appeal from the  
Twenty-Second Judicial District Court  
In and for the Parish of Washington  
State of Louisiana  
Suit Number 05-CR1-92890

Honorable William J. Burris, Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

## **GUIDRY, J.**

Defendant, Kendrick D. Brock, was charged by bill of information with one count of armed robbery, a violation of La. R.S. 14:64 (Count 1), and one count of second-degree battery, a violation of La. R.S. 14:34.1 (Count 2). After entering pleas of not guilty, defendant was tried before a jury, which determined defendant was guilty as charged.

The trial court subsequently sentenced defendant to serve ninety-nine years at hard labor without benefit of probation, parole or suspension of sentence for his armed-robbery conviction. The trial court further sentenced defendant to serve five years at hard labor for his second-degree battery conviction, with these sentences to be served concurrently.

After considering the assignment of error raised by defendant, we affirm his convictions and sentences.

### **FACTS**

Marcus Irvine, Jr. was employed by Cingular Wireless at a store in Franklinton, Louisiana. On March 30, 2005, Irvine was outside the rear of the store removing boxes from the inventory trailer to place in the trash bin. The thirty foot long inventory trailer was the cargo bin of an eighteen-wheeler tractor-trailer that sat a foot above the ground rather than on wheels.

At approximately 5:30 p.m., Irvine was approached by defendant who had arrived in a gray sedan. Defendant exited his vehicle and asked Irvine for some of the boxes. Defendant explained that he was moving in a few days. Irvine gave defendant several boxes to use.

According to Irvine, defendant then tackled him into the trailer and pulled a knife on him. Defendant demanded Irvine's wallet, which Irvine immediately produced. At the time, defendant was standing approximately three feet away from Irvine, between Irvine and the doors to the trailer. Defendant searched

through Irvine's wallet and told him that if he screamed, he would kill him. Defendant took all of the money in Irvine's wallet (\$40) and then closed the doors of the trailer. Placing Irvine in a chokehold, defendant told him that he would "slit your M-F-ing throat if you holler or scream." Irvine testified that he and defendant struggled with each other until defendant hit Irvine on the back of the head with some type of object. As Irvine lay on the floor of the trailer, defendant searched through his pants and socks. Defendant then ordered Irvine to move to the back of the trailer. Irvine testified that he felt if he complied with this order, he would be killed.

When Irvine failed to move to the back of the trailer, defendant began to attack him. Irvine estimated that defendant kicked him eight to ten times in the mouth, knocking off his glasses and causing several cuts to his face. Irvine recalled that he lost consciousness, probably due to the heavy loss of blood he experienced. When he regained consciousness, defendant had left. Irvine staggered a few blocks to the Sheriff's Office, where he was then taken to a hospital.

At the hospital, Irvine provided a description of his assailant as a man about 5'6" to 6'2" with a dark complexion. Irvine also told the police that his assailant drove a gray sedan with rusty rims. A few days later, Irvine provided a taped statement to the Franklinton Police Department.

On April 27, 2005, as Irvine was working at the Cingular Wireless Store, he noticed one of his coworkers assisting a customer, whom Irvine recognized as being his assailant. According to Irvine, when he overheard the customer speak to his coworker, he knew that the customer was the man who had attacked and robbed him. Defendant was waiting while another employee was preparing to do a credit check on him. Irvine testified that defendant removed his identification, looked over at him, and then placed his identification back into his wallet. Irvine

contacted the police after the defendant left the store. At trial, Irvine testified that he was so fearful of defendant's presence in the store that he considered quitting his job.

On April 28, 2005, Irvine took the day off from work to consider what had transpired. He returned to work on April 29, 2005, and again encountered defendant in the Cingular Wireless Store. Irvine phoned a friend to come to the store and pose as a customer in order to monitor the situation. According to Irvine, defendant was trying to get a case for a phone he had acquired at another store. While defendant was in the store, Irvine was able to get very close to him and look at his eyes and listen to his speech to confirm that this was his assailant.

Irvine testified that defendant grew agitated while he was in the store because they could not provide him with a case for his cellular phone. In an attempt to get defendant out of the store as quickly as possible, Irvine picked out a random case and brought it to the coworker who was dealing with defendant. As defendant left the store, Irvine watched him walk to a gray sedan that appeared to be the same vehicle defendant used on the day of the robbery. Irvine wrote down the license plate number of the vehicle, MGY483, and then contacted the police.

Detective James Holmes of the Franklinton Police Department investigated this incident. Once Irvine contacted the police with the license plate information for the vehicle defendant was seen driving, Detective Holmes stated that he had an idea of who Irvine's assailant was. Moreover, Detective Holmes was familiar with defendant and had recently observed him driving around town in a gray sedan. The vehicle was traced to an acquaintance of defendant. Detective Holmes prepared a photographic lineup using photographs of black males between the ages of 25 and 35, with extremely short hair, and medium to dark complexions.

Detective Holmes showed Irvine the photographic lineup, and Irvine identified defendant's photograph (picture number 3) as his assailant. Irvine and

Detective Holmes each testified that no suggestions were made by Detective Holmes as to which picture to select.

The State also called Carly Buras, a forensic scientist with the State Police Crime Lab, to testify. A stipulation was made between the parties that Buras was an expert in fingerprint analysis. Buras examined the evidence recovered from the crime scene, which included Irvine's brown leather wallet. Buras testified that she could not detect any fingerprints on the wallet.

Defendant did not testify.

#### IDENTIFICATION OF DEFENDANT

In defendant's sole assignment of error, he challenges his identification by Irvine as the perpetrator of these crimes in two ways. First, defendant argues that the trial court erred in failing to grant his motion to suppress the photographic lineup because the procedure was overly suggestive and extremely biased. Secondly, defendant also argues that the evidence is insufficient to prove his identity as the perpetrator of these crimes.

Defendant's entire argument is based on his contention that he was misidentified because he entered the store where Irvine worked a few weeks following this incident and that he possibly bore some resemblance to the actual perpetrator. Defendant argues that there was no independent evidence to verify Irvine's identification of him as the perpetrator.

#### *Motion to Suppress*

As a general matter, the defendant has the burden of proof on a motion to suppress an out-of-court identification. La. C.Cr. P. art. 703(D). To suppress an identification, a defendant must first prove that the identification procedure was suggestive. An identification procedure is suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. However, even where suggestiveness of the identification process is proven by the defendant or presumed

by the court, the defendant must also show that there was a substantial likelihood of misidentification as a result of the identification procedure. State v. Higgins, 2003-1980, p. 19 (La. 4/1/05), 898 So.2d 1219, 1232-33, cert denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

The Supreme Court held in Manson v. Brathwaite, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977), that despite the existence of a suggestive pretrial identification, an identification may be permissible if there does not exist a “very substantial likelihood of irreparable misidentification.” Under Manson, the factors which courts must examine to determine, from the totality of the circumstances, whether the suggestiveness presents a substantial likelihood of misidentification include: 1) the witness’s opportunity to view the criminal at the time of the crime; 2) the witness’s degree of attention; 3) the accuracy of his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and confrontation. Manson v. Brathwaite, 432 U.S. at 114-16, 97 S.Ct. at 2253-54.

At the hearing on the motion to suppress, Detective Holmes testified that defendant became a suspect after Irvine contacted him with information regarding the license plate number of the car defendant was driving. Detective Holmes testified that he was familiar with defendant and aware that defendant was driving a car matching the description given by Irvine. Using the AFIS machine, Detective Holmes prepared a photographic lineup with defendant’s picture and five other men who resembled defendant.

Detective Holmes met Irvine at the Cingular Wireless store and showed him the lineup. At the time he viewed the lineup, Irvine was unaware of defendant’s identity. Detective Holmes displayed the six photographs in two rows of three pictures each in front of Irvine. Detective Holmes denied that he ever indicated which photograph was that of the suspect. He stated he did not position

defendant's picture in any manner that would draw attention to it; nor did he exert influence on Irvine during Irvine's viewing of the lineup.

Irvine's testimony did not dispute that of Detective Holmes in that no picture in the lineup was presented in a manner that would draw attention to it; nor did Detective Holmes make any suggestion regarding which picture was the suspect's. Based on the record, we cannot say there is any evidence that the identification procedure was suggestive in any manner.

Defendant failed to show that the police conducted a suggestive identification. However, for the sake of argument, even assuming Irvine's attention was unfairly focused on defendant because he had been in the store two times following the incident, the Manson factors can be used to determine whether there was a substantial likelihood of misidentification to warrant suppression of the lineup.

First, Irvine testified that during the incident, defendant stood within three feet of him when he demanded his wallet. Second, Irvine testified that as soon as defendant drove up to the trailer and requested boxes, he kept a close eye on him. Third, Irvine's prior description of his assailant, although vague, matched defendant and lacked any significant discrepancies. Fourth, Irvine testified he was certain when he viewed the photographic lineup that defendant was the assailant. Irvine testified that after observing defendant in the store and listening to his voice, he was positive that defendant was the man who robbed and beat him. Finally, approximately one month elapsed from the time the crime occurred until Irvine viewed the photographic lineup. Irvine testified that the entire event was very traumatic for him, and there is nothing to indicate the passage of this time affected his memory of the event.

Applying the Manson factors, we cannot say there was a substantial likelihood of misidentification of defendant as the perpetrator that would warrant

suppression of the lineup. Accordingly, the trial court did not err in denying the motion to suppress.

### *Sufficiency of the Evidence*

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, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. La. C.Cr. P. art. 821. Where the key issue is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. The testimony of a victim is sufficient to establish the elements of the offense. State v. Johnson, 94-1561, p. 4 (La. App. 1st Cir. 10/6/95), 664 So.2d 141, 144, writ denied, 95-2988 (La. 3/15/96), 669 So.2d 426.

The defendant does not contest the elements of either offense. Instead, he argues that he was incorrectly identified as the perpetrator. After reviewing the evidence, we conclude defendant's identity as the perpetrator was established beyond a reasonable doubt. Irvine's testimony indicates that he was certain defendant was the individual who robbed and attacked him. As previously discussed, Irvine was close to defendant during the robbery and had an opportunity to see him closely and hear his voice. Irvine was able to closely observe and listen to defendant's voice on the two occasions he entered the store following the robbery, including when defendant decided against having a credit check performed after seeing Irvine in the store.

This Court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. State v. Lofton,



96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

The jury's guilty verdicts in this case clearly indicate they accepted Irvine's testimony. Although there were some discrepancies between Irvine's initial description of the vehicle defendant was using on the date of the incident and the vehicle the police associated with defendant and photographed, such discrepancies were minor and not fatal to defendant's identification as the perpetrator.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence is sufficient to prove defendant's identity as the perpetrator of these crimes. This assignment of error is without merit.

**CONVICTIONS AND SENTENCES AFFIRMED.**