NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 0167

STATE OF LOUISIANA

VERSUS

AUGUST C. PAYNE, JR.

Judgment Rendered: September 12, 2008

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 02-05-0205

Honorable Louis R. Daniel, Judge Presiding

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Doug Moreau **Jesse Bankston** **Dylan C. Alge** **Baton Rouge, LA**	**Attorneys for Appellee,** **State of Louisiana**
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BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.

WHIPPLE, J.

The defendant, August C. Payne, Jr., was charged by bill of information with unauthorized use of a motor vehicle and armed robbery, violations of LSA-R.S. 14:68.4 and LSA-R.S. 14:64. The defendant entered a plea of not guilty to both charges. The trial court denied the defendant's motions to suppress. After a trial by jury, the defendant was found guilty as charged on count one, and guilty of the responsive offense of simple robbery on count two (a violation of LSA-R.S. 14:65). The defendant was adjudicated a third-felony habitual offender. On count one, the defendant was sentenced to ten years imprisonment at hard labor. On count two, the enhanced count, the defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The sentences were ordered to be served concurrently.

The defendant now appeals, essentially assigning as error: (1) the trial court's denial of his motion to suppress statements and evidence; (2) the jury's finding of sufficient evidence to support the convictions; and (3) the trial court's denial of his motion to reconsider sentence. For the following reasons, we affirm the defendant's convictions, habitual-offender adjudication, and sentences.

STATEMENT OF FACTS

At approximately 6:05 a.m. on November 25, 2004, officers of the Baton Rouge Police Department received a dispatch regarding a robbery committed by a black male wearing dark clothing and a skullcap. The perpetrator gained entry into and drove away in a white Chevrolet Suburban occupied by the victim, Dustin Schmidt, who was sleeping in the vehicle. After demanding Schmidt's wallet, the perpetrator stopped the vehicle and ordered Schmidt to exit the vehicle. After observing the perpetrator drive away southbound on South Acadian Thruway towards the interstate, Schmidt used a telephone at a nearby restaurant to contact the police.

Corporal Glenn Phipps and Officer Clay Gautreau were travelling northbound toward the last point of sight of the vehicle when they spotted a Suburban. The driver was a black male wearing a skullcap. As the officers repositioned their unit to pursue the Suburban, the driver made a U-turn. Officer Phipps activated the unit's bar lights and siren as the officers pursued the vehicle. The officers momentarily lost sight of the vehicle. As the officers approached Education Street, they observed the Suburban sitting in the roadway behind a building. The officers exited their unit, approached the Suburban, and noted that it had been abandoned with the engine still running. The officers used their radios to instruct other officers in the area to be on the lookout for a black male suspect. The defendant was seen running and was captured about three blocks away from the location of the abandoned Suburban.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In a combined argument for the first and second assignments of error, the defendant contends that there was no probable cause for his arrest and that accordingly, any statements made or physical evidence seized should be suppressed as constituting fruits of a poisonous tree. The defendant argues that the sole basis for his arrest was the fact that he was running near the area where the vehicle in question was found. The defendant further claims that race was the only characteristic used to identify him as the suspect.

The Fourth Amendment to the United States Constitution and article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. LSA-C.Cr.P. art. 703A. The State bears the burden of proving the admissibility of evidence seized during a search without a warrant. LSA-C.Cr.P. art. 703D. A search may be conducted without a warrant when it is made incident to a lawful

arrest. Chimel v. California, 395 U.S. 752, 762-763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685 (1969). Probable cause to arrest exists when the facts and circumstances, either personally known to the arresting officer or of which he has reasonable and trustworthy information, are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. State v. Fisher, 97-1133, p. 7 (La. 9/9/98), 720 So. 2d 1179, 1184. The trial court's factual findings during a hearing to suppress evidence are entitled to great weight and should not be disturbed unless they are clearly erroneous. State v. Casey, 99-0023, p. 6 (La. 1/26/00), 775 So. 2d 1022, 1029, cert. denied, 531 U.S. 840, 121 S. Ct. 104, 148 L. Ed. 2d 62 (2000). See also State v. Brumfield, 2005-2500, p. 5 (La. App. 1st Cir. 9/20/06), 944 So. 2d 588, 593, writ denied, 2007-0213 (La. 9/28/07), 964 So. 2d 353.

We find that the record establishes that probable cause existed herein for the law enforcement officers' belief that the defendant had committed the offenses at issue. According to the testimony presented during the motion-to-suppress hearing, the defendant was observed running through private backyards in the early morning hours within three blocks of the location of the abandoned Suburban shortly after the vehicle was abandoned. Specifically, a brief amount of time elapsed between the initial observation of the vehicle in question, the officer's approach of the vehicle after it was abandoned, and the officers' observation of the defendant on foot. Despite the cool weather, the defendant was sweating when he was captured. The defendant matched the description of the driver of the vehicle in question, i.e., a black male wearing dark clothing. [1] No other vehicles and no other individuals were seen in the area. The officers had probable cause to believe

[1] At the time of the hearing, Corporal Phipps recalled that the defendant was wearing dark pants at the time of the arrest, but could not recall the color of the shirt the defendant was wearing. Sergeant Tillman Cox, who was present when the defendant was transported to the police station, also testified at the hearing, but could not specifically recall the defendant's attire.

that the defendant was the person who stole and abandoned the vehicle. Thus, the trial court properly denied the motion to suppress. Assignments of error numbers one and two are without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that there was insufficient evidence to support the verdicts of unauthorized use of a motor vehicle and simple robbery. The defendant contends that the victim's testimony was unclear as to the time of the offenses and the sequence of events that preceded his 911 telephone call. The defendant further contends that the record is unclear as to whether the victim saw the defendant in the back of the police unit before the photographic lineup took place. The defendant further argues that the evidence was insufficient, as there was little physical evidence to support the convictions. Finally, the defendant contends that he was not wearing any black clothing or a black cap at the time of the arrest.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting LSA-C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. State v. Brown, 2003-0897, p. 22 (La. 4/12/05), 907 So. 2d 1, 18. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. State v. Graham, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So. 2d 416, 420.

The offense of unauthorized use of a motor vehicle is defined, in pertinent part, as the intentional taking or use of a motor vehicle without the owner's consent. LSA-R.S. 14:68.4A. Simple robbery is the taking of anything of value from the person of another or that is in the immediate control of another, by use of force or intimidation. LSA- R.S. 14:65A.

William L. Crawford, Jr., the owner of the vehicle involved in the incident in question, testified at trial. According to Crawford, equipment was loaded in the Suburban at the time of the offense, as Crawford and the victim, Dustin Schmidt, were members of a music band that had performed that night at a local establishment.[2] Sometime after 2:00 a.m., Schmidt sat in the Suburban in the parking lot and waited for Crawford. The keys were in the ignition but the engine was not running. Schmidt closed his eyes and eventually fell asleep as he waited for Crawford. Meanwhile, Crawford began socializing with a group of individuals. Crawford decided to leave Schmidt waiting in the Suburban while he temporarily left with the group.

Sometime after Schmidt fell asleep, someone entered the vehicle. Schmidt initially assumed it was Crawford, but, after the person began driving the vehicle, Schmidt realized that an unknown male had entered the vehicle and was driving. Schmidt began to question the unknown male, who eventually stopped the vehicle, pulled out a gun, and demanded that Schmidt hand over his wallet. After Schmidt complied, the assailant opened the wallet, examined the contents and asked Schmidt if that was all he had. Schmidt responded positively and the assailant told him to get out of the vehicle. Schmidt stated that the assailant drove for approximately five minutes before allowing Schmidt to exit the vehicle. Schmidt testified that he was able to look directly at the assailant's face. Schmidt ran to a

[2]Crawford and Schmidt admitted to consuming beer on the day of this incident, and both also testified that they had DWI convictions.

nearby restaurant, called 911, and reported the incident giving a description of the assailant. During the 911 telephone call, Schmidt gave a clear and concise statement of the facts. When the defendant was taken into custody, a bottle of Hugo Boss cologne, an orange-colored knife, and an assortment of coins were removed from his pockets. Schmidt identified the abandoned Suburban as belonging to Crawford. Schmidt confirmed that police cars were in the area when he identified the Suburban, although he did not view the occupants of the police cars.

During direct examination by the State, Corporal Phipps initially responded positively when asked if other officers had allowed Schmidt to see the defendant after his arrest. During cross-examination, however, Corporal Phipps stated that he could not recall if Schmidt actually saw the defendant after the arrest. Corporal Phipps also agreed during cross-examination with the defense attorney that the defendant was not wearing black clothing at the time of his arrest.

Detective Mark Beck of the Baton Rouge Police Department was present at the scene of the defendant's arrest when Schmidt identified the Suburban. Detective Beck confirmed that Schmidt was kept separate from the defendant. Detective Beck questioned the defendant after he was advised of his Miranda[3] rights. The defendant stated that he did not know anything about the truck and that he was running because he saw the police and he was scared.

Around 6:00 a.m., Crawford returned to the parking lot where he had left Schmidt in his truck and discovered that his truck was no longer there. Because his cellular telephone had been left in the vehicle, Crawford used the telephone of an associate to check his messages and retrieved the message from the police informing him of the incident that had occurred. Crawford's associate took him to

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[3]Miranda v. Arizona, 384 U.S. 436, 444-445, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

the police station, and the police asked Crawford to describe any items that had been in the truck. Crawford specifically described a bottle of "Hugo Boss" cologne that he had in the console, a thin, orange knife, with a piece of Velcro on it, and pocket change. Although these items were eventually returned to Crawford, several pieces of equipment that were in the truck before the offense were never recovered.

At approximately 8:19 a.m., in a photographic lineup at the police station, Schmidt identified the defendant as the person who committed the offense. Schmidt testified that the last time he saw the defendant before the photographic lineup identification was when Schmidt exited the Suburban at the defendant's request.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. State v. Richardson, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where 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. Richardson, 459 So. 2d at 38. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. State v. Smith, 600 So. 2d 1319, 1324 (La. 1992). In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. State v. Thomas, 2005-2210,

p. 8 (La. App. 1st Cir. 6/9/06), 938 So. 2d 168, 174, writ denied, 2006-2403 (La. 4/27/07), 955 So. 2d 683.

We find that the evidence supports the convictions herein. As to count one, the record reflects that the defendant was discovered running in the vicinity of the abandoned vehicle, shortly after the abandoned (but running) vehicle was found by the police. Items found on the defendant at the time of the arrest matched the specific descriptions by the owner of the Suburban of the items that he had left in the vehicle. Schmidt, who had observed and conversed with the defendant in the vehicle, identified the defendant in a photographic lineup and at trial as the individual who drove the vehicle out of the parking lot. Schmidt and Crawford testified that they did not know the defendant and did not give him permission to use the vehicle. As to count two, the testimony presented at trial established that the defendant took Schmidt's wallet before ordering him out of the vehicle. Viewing the evidence in the light most favorable to the prosecution, we find that the evidence in the record sufficiently supports the convictions.

Assignment of error number three also lacks merit.

ASSIGNMENTS OF ERROR NUMBERS FOUR AND FIVE

In a combined argument for the fourth and fifth assignments of error, the defendant argues that the trial court erred in failing to find the mandatory life sentence under LSA-R.S. 15:529.1 excessive and in failing to grant a downward departure. The defendant also contends that the trial court erred in denying his motion to reconsider sentence. In support, the defendant notes that only one of his prior convictions was a crime of violence. On appeal, the defendant challenges only the enhanced sentence imposed on count two.

The following prior convictions were considered in the adjudication of the defendant as a third-felony offender: September 24, 1999 convictions for possession with intent to distribute marijuana and possession with intent to

distribute cocaine and April 27, 1992 convictions for two counts of simple burglary. The third offense (the instant enhanced offense), simple robbery, is a crime of violence, the possession with intent to distribute marijuana and cocaine convictions are violations of the Uniform Controlled Dangerous Substances Law punishable by imprisonment of ten years or more, and the simple burglary convictions are offenses punishable by twelve years. LSA-R.S. 14:2B(23); LSA-R.S. 40:966B(3); LSA-R.S. 40:967B(4)(b); & LSA-R.S. 14:62B. Thus, pursuant to LSA-R.S. 15:529.1A(1)(b)(ii), the defendant was subject to a mandatory life imprisonment sentence.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. The Louisiana Supreme Court in State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979), held that a sentence that is within the statutory limits may still be excessive. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. State v. Hurst, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So. 2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So. 2d 962. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. Hurst, 99-2868 at pp. 10-11, 797 So. 2d at 83.

In State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual-Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to

the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in Dorthey was made only after, and in light of, express recognition by the court that the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. Dorthey, 623 So. 2d at 1278.

To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

State v. Johnson, 97-1906, p. 8 (La. 3/4/98), 709 So. 2d 672, 676 (quoting State v. Young, 94-1636, pp. 5-6 (La. App. 4th Cir. 10/26/95), 663 So. 2d 525, 528 (Plotkin, J., concurring)). A trial judge may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence which justifies rebutting the presumption of constitutionality. Johnson, 97-1906 at p. 7, 709 So. 2d at 676.

Based on the record before us, we find that the defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we do not find that downward departure from the mandatory life sentence was required in this case. Accordingly, the trial court did not err in denying the motion to reconsider sentence. These assignments of error also lack merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.