

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0456

STATE OF LOUISIANA

VERSUS

TOLBERT MORRIS A/K/A TALBERT MORRIS A/K/A TOLBERT MORRIS,

JR., A/K/A MORRIS, TALBERT, JR.

Judgment Rendered: DEC 04 2013

APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 27652

HONORABLE RALPH TUREAU, JUDGE

Ricky L. Babin
District Attorney
Donaldsonville, Louisiana
and
Donald D. Candell
Assistant District Attorney
Gonzales, Louisiana

Attorney for Appellee
State of Louisiana

Prentice L. White
Baton Rouge, Louisiana

Attorney for Defendant/Appellant
Tolbert Morris

BEFORE: PETTIGREW, McDONALD, AND McCLENDON JJ.

Handwritten signatures and initials:
Top: *MM*
Middle: *DMC*
Bottom: *RLW*

McDONALD, J.

The defendant, Tolbert Morris, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (count 1); aggravated rape, a violation of La. R.S. 14:42 (count 2); and second degree kidnapping, a violation of La. R.S. 14:44.1 (count 3). He pled not guilty and, following a jury trial, was found guilty as charged on all counts. For the second degree murder conviction, the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the aggravated rape conviction, he was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the second degree kidnapping conviction, he was sentenced to thirty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run consecutively. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.

FACTS

On March 6, 1990, at about 11:00 p.m., eighteen-year-old Tammy Bowers was outside of Lil' Pal's Grocery Store off of La. Highway 73 in Ascension Parish talking on the payphone to a friend, Steve Villar. Someone approached Ms. Bowers, abducted her, put her in a car, and drove away. With the phone left hanging off the hook, Mr. Villar heard Ms. Bowers scream. Mr. Villar drove to Lil' Pal's and saw Ms. Bowers' car there, with her purse and keys still in it. He also found Ms. Bowers' glasses on the ground with both lenses out. Mr. Villar went to Ms. Bowers' trailer, which was right around the corner, and found a note written by her saying she was going to the store to call "Steve." Mr. Villar went back to Lil' Pal's and called 911. Deputy Quinn Leblanc, with the Ascension Parish Sheriff's Office, arrived at the scene shortly thereafter and found a half-open pocketknife on the ground and a black baseball cap near Ms. Bowers' car.

Two days later, an LP&L (now Entergy) employee found Ms. Bowers' body on River Road. The autopsy and a rape kit revealed that she had been raped and beaten to death. Several pieces of evidence were found at the scene and collected, including a green shirt, a black T-shirt, and a piece of firewood (or log), thought to be the murder weapon. At the autopsy, evidence was collected, including the sweatpants and bra Ms. Bowers was wearing, urine and blood samples, hair found on her chest and left hand, a fiber found under her buttocks, nail clippings, and finger and palm prints. Some hair and fibers collected were sent to the FBI for testing.

Dr. Emile Laga, forensic pathologist, performed Ms. Bowers' autopsy. He testified at trial that Ms. Bowers was stabbed in the neck and chest. No major arteries or organs were struck, so these wounds were not life threatening. Ms. Bowers also sustained blunt-force injury to her head, face and neck, and suffered a major skull fracture to the top of her head, which was the cause of death. Dr. Laga stated he found bark off of a "wooden block" inside that wound. The impact was so severe, the base of Ms. Bowers' skull was also fractured. There was massive bleeding inside the skull. Another blow to her face fractured her upper jaw on both sides. There was also a fracture on both sides of her lower jawbone. She also suffered a blunt injury to the upper spine, which fractured and dislocated her first and second vertebrae. The blow to the head also caused massive injury to her brain stem, which affects breathing, blood pressure, and heartbeat.

Time passed, no suspects were identified, and Ms. Bowers' case went cold. In 2002, Captain Mike Toney, with the Ascension Parish Sheriff's Office, resubmitted DNA evidence from Ms. Bowers' case to the crime lab. In 2006, the crime lab notified Captain Toney that it had a CODIS DNA hit for Herman Frazier. Mr. Frazier was arrested and charged with Ms. Bowers' kidnapping, rape, and murder. On the morning of his trial in 2010, Mr. Frazier pled guilty to

manslaughter, second degree kidnapping, and forcible rape. He was sentenced to fifty years imprisonment at hard labor without benefits. As part of the plea agreement, Mr. Frazier identified the defendant as an accomplice.

At trial, Mr. Frazier testified that on the night Ms. Bowers was abducted, he was riding with the defendant in the defendant's Plymouth Duster. They saw Ms. Bowers talking on the payphone outside of Lil' Pal's. The defendant pulled into the parking lot behind her car. The defendant got out of his car, approached Ms. Bowers and knocked her out. He put her in his car, and they drove about fifteen minutes to a gravel lane where the defendant removed Ms. Bowers from the car and raped her. They returned to the car and drove to River Road. The defendant removed Ms. Bowers from the car and again raped her. They then drove further down River Road, and the defendant pulled into a driveway. The defendant, while holding a knife, told Mr. Frazier that he might as well take his turn. Mr. Frazier then raped Ms. Bowers. The defendant then took Mr. Bowers by the hand and walked her down a dirt road. A while later, Mr. Frazier heard screaming. He walked to where Ms. Bowers and the defendant were and saw them fighting. Ms. Bowers fell to the ground, and the defendant picked up something and began hitting her with it. Mr. Frazier ran away without helping Ms. Bowers. Mr. Frazier testified he knew the defendant from growing up around him and that he was a friend of the family.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the evidence was insufficient to support his convictions. Specifically, the defendant contends that his identity as a co-perpetrator of these crimes against Ms. Bowers was not established at trial by the State. A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const.

art. I, §2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all 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. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 93-0893

(La. 2/3/94), 631 So.2d 427, 428 (per curiam). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. **State v. Arnold**, 2007-0362 (La. App. 1st Cir. 9/19/07), 970 So.2d 1067, 1072, writ denied, 2007-2088 (La. 3/7/08), 977 So.2d 904. Thus, a general principle of accessorial liability is that, when two or more persons embark on a concerted course of action, each person becomes responsible for not only his own acts but also for the acts of the other. **State v. Smith**, 2007-2028 (La. 10/20/09), 23 So.3d 291, 296 (per curiam).

The defendant concedes Ms. Bowers was abducted, raped, and murdered. However, he contends there were no eyewitnesses to these crimes and that Mr. Frazier's identification of him as a co-perpetrator was a fabrication to procure a lighter sentence. Further, according to the defendant, the DNA tests, which suggested the defendant's presence at the crime scene, were inconclusive. Accordingly, the defendant argues that his identity as a perpetrator was not proved beyond a reasonable doubt.

Testimony and physical evidence introduced at the trial established that Ms. Bowers was abducted, raped, and killed. She died from having her skull crushed, likely from a large piece of wood (perhaps a tree branch) found near her body on River Road. Ms. Bowers was also stabbed in the neck and chest. Evidence from a rape kit, including nail clippings, semen, and hairs obtained from a pubic combing, was collected. A black shirt and a green shirt found near Ms. Bowers' body were collected. In 1990, hair samples and other evidence, such as the black cap, eyeglasses, and pocketknife, were sent to the FBI for testing. In 2002, the evidence was resubmitted for DNA testing. When the DNA testing implicated Mr. Frazier in the crimes, Mr. Frazier confessed to helping kidnap Ms. Bowers and to raping her. In exchange for the reduced charges of manslaughter and forcible rape and a lesser total sentence, Mr. Frazier identified the defendant as the person who

killed Ms. Bowers. According to Mr. Frazier, the defendant knocked Ms. Bowers unconscious while she was on the payphone, put her in his (the defendant's) car, and raped her twice in different locations.

Romy Franco, with Orchid Cellmark, a private DNA testing laboratory in Dallas, Texas, testified at trial as an expert in mitochondrial DNA analysis. According to Ms. Franco, mitochondrial DNA is inherited only from one's mother. She explained that a mother passes her mitochondrial DNA directly to her children. She opined that this type of DNA testing did not establish a unique profile (like autosomal DNA) because of the mode of inheritance, namely that everyone in the same maternal lineage, up or down, would share the same mitochondrial DNA profile. Ms. Franco further indicated that unrelated people could share the same mitochondrial DNA profile.

Ms. Franco tested a particular hair sample - a hair obtained from the pubic hair combing of Ms. Bowers - and determined that the defendant could not be excluded as a contributor of that hair. Stated another way, the defendant's DNA was consistent with the mitochondrial DNA in that hair. Ms. Franco indicated that because this particular hair had no root, mitochondrial DNA testing was the only testing available. Ms. Franco explained that she entered that DNA profile into a database maintained and compiled by the FBI laboratory, which searches for matching DNA profiles. She explained that the database is composed of 4,839 individuals (DNA profiles) and that the search revealed that of the Caucasian, Asian, and Native American populations, there were no matches; in the Hispanic population, there was one individual out of 686 who shared the same sequence as the defendant's; and in the African-American population (the defendant is African-American), there were two individuals out of 1,305 who shared the same sequence

as the defendant's.¹ Ms. Franco pointed out that the FBI database contained 4,839 anonymous, unrelated individuals. Thus, these three people with the same mitochondrial DNA profile as the defendant were of no relation to the defendant. In determining population frequency based on the number of matching individuals in the FBI database, Ms. Franco explained that a calculating tool known as the "95 percent confidence interval" was used. Using this method, Ms. Franco stated that the three out of 4,839 individuals meant that .06 percent would share the same sequence, and that if you took into account population size and a conservative estimate, .13 percent of individuals would possibly share that same sequence. She concluded that the probability of exclusion would be 99.87 percent, or that this percentage of individuals would be excluded. On cross-examination, defense counsel suggested that the population of Ascension Parish was 109,985 as of 2011. Using her method of calculation, Ms. Franco testified that 143 people in Ascension Parish could match that mitochondrial DNA profile.

Carolyn Booker, a forensic DNA analyst with the Acadiana Crime Lab, testified at trial as an expert in nuclear and YSTR DNA testing. Three bloodstains were cut out of the green T-shirt found at the scene and tested in 1990. Ms. Booker tested these same three stains in 2010 for DNA. One of the stains was a DNA match for Ms. Bowers. Each of the other two stains was tested, which revealed the presence of male DNA, meaning a Y chromosome was detected. Accordingly, Ms. Booker conducted YSTR (short tandem repeat on the Y chromosome) testing on these stains. Ms. Booker explained that only males have the Y chromosome and that YSTR testing is specifically for the markers on a Y chromosome. She further opined that YSTR DNA is paternal DNA, meaning that the father passes this type of DNA to his son.

¹ A hair in the baseball cap found at Lil' Pal's was tested and Mr. Frazier (his mitochondrial DNA profile) could not be excluded as the contributor.

In each of the two cuttings she tested, Ms. Booker found a major-minor mixture of males, meaning one person is there a lot more than the other person. Comparing the first cutting to the defendant's DNA, Ms. Booker found that the major contributor of the stain matched the defendant at sixteen out of seventeen markers. On the second cutting, the major contributor matched the defendant at fifteen out of seventeen markers. Thus, the defendant could not be excluded as a contributor of the profile on this second cutting, but Mr. Frazier was excluded. Ms. Booker stated that 99.96 percent of the male population could be excluded, or put another way, approximately one in 2,800 males could be included. Thus, the defendant shared the same paternal DNA as that found on the green shirt.

Ms. Booker noted that the defendant's YSTR profile was searched in a database of about 8,400 individuals and there were no matches. On cross-examination, Ms. Booker agreed with defense counsel that the lack of a match of the defendant's YSTR profile in the database did not mean his profile was unique, but only that that profile had not yet been added to the database. Using the 95 percent confidence interval to account for population size, Ms. Booker indicated that one in 2,800 meant .04 percent. Defense counsel suggested that given the current population of the three-parish area of Ascension, Baton Rouge, and Livingston, .04 percent of the male population with the same YSTR profile of the defendant was 136. Ms. Booker suggested that the population date from 1990 would yield a more accurate number.

Mr. Frazier testified that the night Ms. Bowers was abducted, the defendant was driving a tan Plymouth Duster. David Rathbun testified at trial that, on the night Ms. Bowers was abducted, he was driving his eighteen-wheeler past Lil' Pal's when he saw a black male get out of the passenger side of a vehicle and walk toward a girl on the payphone. Mr. Rathbun saw the girl speak to the black male briefly before losing sight of her. He described the car he saw the black male get

out of as a 1974 Ford Torino. Mr. Rathbun stated the car was possibly light blue, and it had damage to the right rear fender. Major Benny Delaune, retired from the Ascension Parish Sheriff's Office in 2011, testified that the defendant owned a 1979 Plymouth Volare, the Duster version, and that its color was listed as cashmere. Major Delaune testified that the impound report from June 1990 indicated the defendant's car was pretty beat up, and that the rear end was damaged. Major Delaune noted that a 1970s Torino looked like a Duster. He further stated that the defendant lived on La. Highway 74 in Geismar, directly behind Lil' Pal's.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See State v. Moten, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that, based on the physical evidence and the testimony of several witnesses, including and especially that of Mr. Frazier and the expert witnesses, the defendant kidnapped, raped, and killed Ms. Bowers. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. Id.; see also State v. Andrews, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453.

The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify and presented no rebuttal testimony. See Moten, 510 So.2d at 61-62. Whether the jury believed some or all of the testimony of Mr. Frazier cannot be ascertained from the verdicts. Regardless, in the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. State v. Higgins, 2003-1980

(La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Accordingly, Mr. Frazier's testimony established the defendant participated as a principal in Ms. Bowers' kidnapping, rape, and murder. Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's unanimous verdicts for each of the defendant's convictions. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of the hypothesis of innocence suggested by the defense at trial, that the defendant was guilty of the second degree kidnapping, the aggravated rape, and the second degree murder of Tammy Bowers. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

For the foregoing reasons, we affirm the defendant's convictions and sentence.

CONVICTIONS AND SENTENCES AFFIRMED.