

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

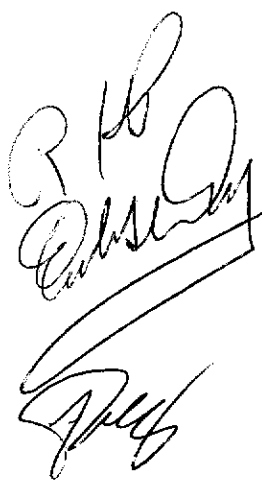
FIRST CIRCUIT

2013 KA 0500

STATE OF LOUISIANA

VERSUS

BRANDON PACE



**On Appeal from the 23rd Judicial District Court
Parish of Ascension, Louisiana
Docket No. 28,321, Division "B"
Honorable Thomas J. Kliebert, Jr., Judge Presiding**

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Brandon Pace**

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered NOV 04 2013

PARRO, J.

The defendant, Brandon Pace, was charged by bill of information with simple burglary, a violation of LSA-R.S. 14:62.¹ The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The state filed a habitual offender bill of information, and the defendant was adjudicated a fourth-felony offender after a hearing.² The defendant was subsequently sentenced to twenty years of imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.³ The defendant now appeals, assigning error as to the sufficiency of the evidence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On March 17, 2011, while at work at about 9:30 a.m., Shane Toncrey received an automated e-mail informing him that his video surveillance system detected motion at his home in Prairieville. Toncrey's home surveillance system includes one camera facing the street and one under his carport. The cameras automatically record for two to three minutes when they detect motion, and an e-mail alert is generated and sent to his phone. The e-mail alert included a photograph of a blue and gray Chevrolet truck detected in Toncrey's carport. Toncrey read the e-mail, viewed the truck that he did not recognize, and arrived at his home located a short distance from his office within five minutes of

¹ The bill of information shows that a codefendant, Frankie New, was also charged with simple burglary. However, New is not a party to this appeal, and the defendant was not tried with New. Moreover, the bill shows that the defendant was also charged on count two with possession of cocaine and on count three with possession of drug paraphernalia. The defendant went to trial only on the simple burglary charge on count one.

² The defendant's predicate guilty pleas consist of the following: a 2002 conviction for illegal possession of stolen things, a 2002 conviction for simple robbery, and a 2003 conviction for simple burglary of an inhabited dwelling.

³ As noted at the time of the sentencing and in the written reasons for sentencing, the trial court determined that the instant case warranted a downward departure from the life sentence mandated by LSA-R.S. 15:529.1(A)(4)(b). The trial court articulated a basis for departing downward from the mandatory sentence under the Habitual Offender Law, as required by **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77, and the state has not appealed the sentence. This court notes that the sentencing is not inherently prejudicial, but in the defendant's favor. **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

receiving the e-mail. When he arrived home, Toncrey noticed that his shed doors were open and that his weed-eater and edger were missing from the shed. Toncrey went to his office in his house to review the surveillance footage and contacted the police. The surveillance cameras captured the truck as it was driven on the road in front of Toncrey's home, and as it turned around in a driveway across the street and passed Toncrey's home again. The truck was also captured as it entered Toncrey's carport just before a white male is captured on foot, walking back and forth in front of the home. Finally, the truck was captured as it was driven off nine minutes later. When the police arrived, Toncrey gave them the surveillance footage.

At approximately 9:40 a.m., Deputy Kelly Brown of the Ascension Parish Sheriff's Office (APSO) responded to the scene, observed the surveillance footage, and issued a BOLO with a description of the vehicle and the individual caught on surveillance. Between 12:00 and 12:30 in the afternoon, APSO's Deputy Steven Decoteau spotted the vehicle described in the BOLO on Louisiana Highway 74, notified dispatch, and observed the suspected truck entering the driveway of a blue house. The driver, a white male, exited the truck, removed equipment from the back of the truck, and approached a black male (later identified as Durez Wilson) who was at the residence. As he waited for marked units to arrive, Deputy Decoteau observed the two individuals as they briefly conversed, and observed the driver as he got back in the vehicle, drove behind the house, and shortly thereafter drove off. Deputy Decoteau followed the truck as it travelled west on Highway 74 toward St. Gabriel, reported the pursuit and license plate number, and was advised to proceed with the stop. After the truck was pulled over, the driver (the defendant) provided his identification.

Sergeant Steven Thrash responded to the scene of the stop on Highway 74, obtained the defendant's driver's license, and advised the defendant of his **Miranda** rights and the reason for the stop. Sergeant Thrash detained the

defendant until Deputy Brown arrived. When Deputy Brown arrived he immediately identified the truck and the defendant as the individual in the surveillance footage and also advised the defendant of his **Miranda** rights. Based on the defendant's statements, the defendant's brother-in-law, Frankie New, was also arrested. The police determined that New was the owner of the truck, but he indicated that he had no knowledge of the stolen lawn equipment.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that there is no direct evidence that the weed-eater and edger recovered in this case belonged to Toncrey. The defendant notes that the surveillance footage does not include the actual offense and only shows a man approaching the front door and a truck in the driveway. The defendant further notes that the truck shown in the video belonged to his brother-in-law, Frankie New, who refused to cooperate with the police, and that there was no fingerprint evidence from the shed doors. In raising his hypotheses of innocence, the defendant contends he could have been knocking on Toncrey's door for any number of legal reasons, that the recovered lawn equipment belonged to him, and that he borrowed his brother-in-law's truck to sell and deliver his equipment to Durez Wilson. The defendant concludes that the evidence is insufficient to support the conviction.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. 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 (1979); see also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821(B), is an objective standard for testing the overall evidence, both direct

and circumstantial, for reasonable doubt. When circumstantial evidence is used to prove the commission of an offense, LSA-R.S. 15:438 requires that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

Simple burglary is, in pertinent part, defined as the unauthorized entering of any dwelling or other structure with the intent to commit a theft therein. LSA-R.S. 14:62(A). 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. **State v. Holts**, 525 So.2d 1241, 1244 (La. App. 1st Cir. 1988). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453.

During his trial testimony, Toncrey noted that his carport is located behind his home, that no one was home at the time of the incident, and that no one had permission to drive to the back of his driveway. Toncrey's shed is located at the end of his driveway and, as he approached his home after receiving the e-mail alert, he immediately noticed that the shed doors were wide open, even though they were closed when he left home that morning. He described his shed as a Lowe's, double-door building with four walls and a roof. Upon entering the shed, he noted the missing items. His shed was not in view of his surveillance cameras.

Sergeant Thrash testified that, after the defendant was advised of his **Miranda** rights, the defendant initially told the sergeant that he only had his brother-in-law's vehicle for a few minutes to run errands and stated that he did not know anything about any stolen items. Sergeant Thrash had observed the still photographs captured by Toncrey's surveillance system and noted that the defendant was obviously the subject in the photographs. The defendant told Deputy Brown that he was at home with his wife at 9:30 a.m., but when questioned further, the defendant stated that he and his brother-in-law, Frankie New, went to a subdivision where New stole a weed-eater and an edger from a shed. After the defendant was arrested, Deputy Brown went to the blue house where Deputy Decoteau observed the defendant and the black male just prior to the stop. Upon arriving at the house, Deputy Brown identified the black male as Durez Wilson and recovered two weed-eaters, one being of an Echo brand name, and an edger. Toncrey noted that Echo was the brand name of his weed-eater and subsequently testified that his belongings were recovered by the police, noting that they were the same make and model. Toncrey specifically testified that he did not know the defendant or his brother-in-law, Frankie New, or give them permission to enter his shed.

When Lieutenant Curtis Bush of APSO arrived at the scene of the stop, the defendant stated that he sold the equipment for crack cocaine and that he smoked the crack while he was driving prior to being stopped. The defendant also showed the lieutenant the tool socket (which was located between the seats in the truck) that he had used to smoke the crack. Lieutenant Bush recovered the tool socket and turned it over to Deputy Brown. Deputy Brown identified the defendant in court as the subject on the surveillance footage. The defendant did not testify or present any defense witnesses.

The verdict rendered indicates the jury accepted the testimony offered against the defendant and rejected any hypothesis of innocence. As the trier of

fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

The surveillance evidence clearly depicted an individual easily identified as the defendant, placing him at the scene at a time that he initially indicated he was home. Though the defendant ultimately stated that his brother-in-law stole the equipment in question, the defendant was the only person captured by surveillance. Shortly thereafter, just before being stopped in the vehicle in question, the defendant was observed selling the items identified by the owner as his items. The defendant confessed to selling the items for crack cocaine. After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of any reasonable hypothesis of innocence, all of the elements of simple burglary and the defendant's identity as the perpetrator of that offense. The sole assignment of error is without merit

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.