

STATE OF LOUISIANA

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NO. 2000-KA-1762

VERSUS

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COURT OF APPEAL

STEVEN L. TAYLOR

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 392-268, SECTION "D"
Honorable Frank A. Marullo, Judge

Charles R. Jones
Judge

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III and
Judge David S. Gorbaty)

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**CONVICTIONS AFFIRMED;
HABITUAL OFFENDER SENTENCES
VACATED, REMANDED**

Defendant Steven L. Taylor (hereinafter “Taylor”) was charged by bill of information on October 3, 1997, with two counts of armed robbery, violations of La. R.S. 14:64. He was found guilty as charged on March 30, 1998, following a twelve person jury trial. The district court sentenced him to twenty-five years at hard labor on April 17, 1998. On that same date, he admitted that he was the same person previously convicted of a felony, and was adjudicated a second-felony habitual offender. The district court vacated his original sentences and resentenced him to forty-nine years at hard labor on each count, with credit for time served and the sentences were ordered to run concurrently. After the habitual offender sentences were imposed, Taylor filed a motion to reconsider the sentence, a motion for appeal and a motion for new trial. The motion to reconsider the sentence was never ruled on by the district court. The district court denied Taylor’s motion for a new trial on March 22, 2000. This appeal follows.

FACTS

Rosalyn Burrell testified at trial that she was on her way to the bus

stop at approximately 6:00 a.m. September 4, 1996 when she was robbed. Ms. Burrell testified that a person was standing at the bus stop at Congress and Gallier Streets as she approached. The person went inside the hallway of a residence and ran up to Ms. Burrell with what she thought was a shotgun with a "banana clip." He was wearing light colored shorts and shirt and had a blue bandana covering the bottom of his face half way up his nose. He first told her to take her earrings off, but then demanded her purse while threatening to shoot her. She threw her purse to him, and he picked it up and ran. Ms. Burrell hurried back to her home and telephoned police. While waiting for police to arrive, Ms. Burrell watched the bus stop from her third floor window in the Florida Housing Project. At 7:30 a.m., she observed the same individual rob another woman. Ms. Burrell could not say that the individual was wearing the same clothes, but she did say he had the same firearm and was wearing a bandanna. The police arrived about the same time the second victim ran across the street Ms. Burrell informed the police that the person who robbed her was taller than she was, at least five feet five inches tall, with a medium to slim build. She later identified Taylor's photograph in a lineup shown to her by police. She replied in the affirmative when asked if she had been one hundred percent certain of her identification of Taylor. Ms. Burrell testified that an officer also showed her an individual

photo of Taylor and covered the bottom half of the face. Ms. Burrell testified that the individual photo also looked like the man who robbed her. She testified that she recognized Taylor at the time of the robbery as someone who lived in her neighborhood.

Ms. Burrell further testified on cross-examination that she recognized Taylor when she initially saw him at the bus stop. She did not know his name at that time, and admitted that before the robbery she had never seen him with a bandanna on his face. She testified that she knew his mother from the neighborhood, and that his mother lived in the same housing project, approximately four porches down from her. She testified that Taylor had run around the back of his mother's building, and that only her daughter and the police officer were present with her during the identification process.

The second victim, Laurantettera Cousan, testified at trial that she was robbed on the morning of September 4, 1996 at the corner of Congress Street and Florida Avenue by a man armed with a long black gun with a "banana clip." The robber had a bandanna covering part of his face; it was not quite over his nose. He was wearing grayish-colored shorts, perhaps faded from black, and a beige shirt. He approached Ms. Cousan from behind and demanded her purse, which she gave to him without turning around.

The gunman demanded the fifteen rings Ms. Cousan was wearing. At that time, she turned around to face him because it took time to remove her rings. At some point, he told her to hurry or he would shoot her. The robber escaped around the back of the building and Ms. Cousan went into another building to seek help. A woman she later identified as Taylor's mother, Mrs. Desiree Taylor, asked her what happened, and Ms. Cousan told her she had been robbed. Ms. Taylor told her she did not have a telephone, but directed her across the street to a neighbor's home. Ms. Cousan testified on redirect examination that Ms. Taylor was coming down the stairs as she was going up. When the Police arrived, and Ms. Cousan was placed into the police car and Ms. Burrell then came running up on the scene and also got into the police car. Ms. Cousan testified that they rode around with the police for a while looking for the robber, but they did not find him. Approximately one week later, on the evening of September 11, 1996, Ms. Cousan went to the police substation and identified Taylor's photograph in a lineup. She identified him in court as the person who robbed her, and testified that she was one hundred percent certain he robbed her.

Ms. Cousan also testified on cross-examination that Taylor's mother went with her to the neighbor's residence so she could telephone the police. Ms. Cousan recalled seeing Ms. Taylor in a window while she was being

robbed; however, Ms. Taylor did not indicate to Ms. Cousan that she had witnessed the robbery. Ms. Cousan further testified that she had never seen Steven Taylor before the robbery. She testified that after she had selected Taylor's photograph from the lineup, she put a piece of paper over half of his face, and confirmed that he was the robber. Ms. Cousan also testified that she noticed Ms. Burrell at the police substation when she went to make the identification and that she did not know Ms. Burrell prior to the day of the robbery. She did not communicate with Ms. Burrell at the police substation, and she had not communicated with Ms. Burrell since the robbery. Ms. Cousan also testified that Taylor was at the bus stop holding the gun, but she proceeded forward anyway because she saw her 7:30 a.m. bus coming.

New Orleans Police Officer Errol Foy testified that he investigated the two armed robberies, arriving at the scene between 7:30 and 8:00 a.m. The victims gave him a description of a black male, five feet eight inches tall, having a thin build, perhaps 135 pounds, with a blue bandanna over his face, and wearing a cream-colored shirt and green pants. He searched the area with the women to no avail, and his involvement with the case ended at that point. He did not recall driving Ms. Burrell around to look for the suspect, only Ms. Cousan. Officer Foy did not recall whether either victim indicated

that they knew who the suspect was, or even that they could identify him.

Officer Reginald Landry, Officer Foy's partner on the day in question, testified at trial that the officers drove both victims around the Florida Housing Project to look for the suspect. Officer Landry did not recall either of the victims indicating that they knew the perpetrator or had seen him before.

Officer Wellington Beaulieu testified that he participated in the investigation of the two armed robberies. He received an anonymous telephone call three days after the robberies, informing him that Taylor was the perpetrator. He ran Taylor's name through a police computer and learned that there was an outstanding warrant for his arrest. Officer Beaulieu compiled a photographic lineup and displayed it to the victims. He testified that Ms. Burrell and Ms. Cousan picked out Taylor's photograph. He obtained an arrest warrant for Taylor based on those identifications. When Officer Beaulieu went to Taylor's address, his mother consented to a search of the residence. No weapons nor property from the robberies were recovered.

Officer Beaulieu further testified on cross examination that he only showed Ms. Burrell one set of photographs, and no single photograph. He also testified that Ms. Burrell hesitated "for a while" before picking out

Taylor, because she said that she could only identify him from the “bottom up” because he wore a handkerchief. At his suggestion, he held something over the faces of the bottom three photographs and the top three photos, and Ms. Burrell selected Taylor’s photograph. Officer Beaulieu also testified that Ms. Cousan did not hesitate at all in picking out Taylor’s photograph, and that the officer did not have to use the method of covering over the faces as he had with Ms. Burrell.

Taylor’s mother testified at trial that on September 4, 1996 she witnessed a woman being robbed. After the robber left, she leaned out of her window and asked the victim if she needed any help. The woman responded in the affirmative. Ms. Taylor went downstairs, and the victim asked if she had a telephone. She said no, but went across the street and called the police from her neighbor’s residence. Ms. Taylor testified that when Officer Beaulieu arrived, the first thing he said was that he knew the robber was a guy named “Pencil.” Officer Beaulieu further stated that “they” had just robbed two more women on St. Claude Avenue, as well as two in the Desire Housing Project. She claimed that Officer Beaulieu described the robber as having two red bandannas, one over his face and one on the top of his head. Ms. Taylor further testified that the robber she saw was wearing the same thing and that she did not recognize the robber as

anyone she knew. Ms. Taylor also testified on cross-examination that the robber had a big gun, not a pistol, and that the gun had something wrapped around it. She confirmed that the bandanna on the top of the robber's head covered his entire head. Ms. Taylor further testified that her son did not live with her, but lived at home with his wife and children. She further testified that she had not seen him that day but that he would check on her during the evening. On recross examination, Ms. Taylor could not recall when she last saw her son prior to the day of the robberies, explaining once again that he stayed at home with his wife and kids. However, she did voluntarily testify that her son had called her that morning when questioned by the prosecutor if she was just assuming he was at home. However, immediately thereafter she claimed that she did not remember whether he called her that day. When asked how he could call her if she did not have a telephone, she explained that he would page her and she would call him back.

Ms. Burrell, recalled as a witness by the defense, testified that she could not remember whether police showed her an individual photo of Taylor. She reiterated that the person who robbed her wore a single blue bandanna, but thought that the person who robbed Ms. Cousan wore a single red bandanna.

ERRORS PATENT & ASSIGNMENT OF ERROR NO. 2

A review of the record reveals two errors patent, the first of which necessitates a remedy that renders the second error moot. First, in sentencing Taylor as a habitual offender, the district court vacated “the previous sentence,” without specifying which of the two identical original sentences it was vacating. Taylor was convicted on two counts of armed robbery, and received identical sentences on each count. The habitual offender bill of information charged him on only one count, and thus it might be presumed that the district court vacated the original sentence in that conviction. However, the district court then proceeded to “resentence” Taylor to forty-nine and one half years “on both counts.” In view of this circumstance, we cannot determine whether the district court vacated both of the original sentences before resentencing Taylor as a habitual offender on both counts. Accordingly, Taylor’s sentences as a habitual offender must be vacated, the original sentences reinstated, and the case remanded to the district court for proper resentencing as a habitual offender.

The second error patent, rendered moot by the action necessary to remedy the first, is that the district court imposed illegally lenient sentences both when it originally sentenced Taylor and when it sentenced him as a second-felony habitual offender, with no stipulation that the sentences be served without benefit of parole, probation or suspension of sentence. La.

R.S. 14:64 provides that a sentence for armed robbery shall be without the benefit of parole, probation, or suspension of sentence. The restrictions on parole eligibility imposed on habitual offender sentences under La. R.S. 15:529.1, unless specifically provided for, are those called for in the reference statute. State v. Tate, 99-1483, pp. 1-2 (La. 11/24/99), 747 So.2d 519, 520. However, this court does not correct a sentencing error favorable to the defendant when it is not raised by the State or the defendant. State v. Martin, 98-1507, p. 8 (La. App. 4 Cir. 4/5/00), __ So. 2d __, __, 2000 WL 528072.

Finally, in his second assignment of error, which Taylor asserts is an error patent, he argues that the district court erred in failing to advise him at sentencing of the prescriptive period for post conviction relief under La. C.Cr.P. art. 930.8 which provides, “two years from the date the judgment of conviction and sentence become final, with several exceptions”. The district court’s failure to inform Taylor of the prescriptive period for post conviction relief is not an error patent. State v. Morgan, 2000-0050, p. 3 (La. App. 4 Cir. 8/30/00), 769 So. 2d 139, 141. Taylor cites State v. Hopson, 98-943 (La. App. 5 Cir. 3/30/99), 735 So. 2d 81, 89, where the court, following the jurisprudence of its circuit, remanded the case to the district court with an order to inform the defendant of the provisions of La. C.Cr.P. art. 930.8.

This court has specifically declined to follow the Fifth Circuit policy with respect to remands for compliance with La. C.Cr.P. art. 930.8(C). State v. Delaune, 2000-0196, p. 2 (La. App. 4 Cir. 2/7/01), 780 So. 2d 1098, 1098-1099.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, Taylor argues that the State failed to produce sufficient evidence to convict him.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[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 (La.1992) at 1324.

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, *supra*, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Taylor was convicted of armed robbery, a violation of La. R.S. 14:64, which 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."

Taylor attacks his identifications by the two robbery victims, questioning how either victim could have positively identified him as the robber when neither was able to get a full and complete look at the robber's face. He calls it perplexing that Ms. Burrell was unable to make a positive identification of his photograph until Officer Beaulieu covered the bottom half of his face. In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53

L.Ed.2d 140 (1977), the United States Supreme Court set forth a five-factor test to determine whether an identification is reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. While the Manson analysis is normally employed when determining whether a suggestive identification was reliable during review of a trial court's ruling on a defendant's motion to suppress the evidence, the analysis should prove somewhat helpful here.

Both victims had an excellent opportunity to view the individual who robbed them. Ms. Burrell testified that she was robbed shortly after 6:00 a.m., while it was light outside and that she saw the robber approaching her from the front prior to being robbed. Ms. Cousan was robbed at about 7:30 a.m., and she too saw the robber prior to being robbed. Although he approached from behind, she testified that she turned to face him while removing the jewelry she was wearing. There is nothing in the record to suggest that the victims were not attentive to what was occurring during the robberies, even though Ms. Cousan did testify that she observed a woman later determined to be Taylor's mother watching the robbery from her

window, and she also noticed that the bus came and went during the robbery. Ms. Burrell further testified that the person who robbed her was taller than she, at least five feet five inches tall, and of a medium to slim build. Officer Foy testified that the victims gave a description of a black male, five feet eight inches tall, having a thin build, perhaps 135 pounds. There was no evidence presented at trial to suggest that these similar descriptions of a medium to slim black male were inaccurate. Ms. Burrell also testified that the bandanna on the person who robbed her was approximately halfway up his nose, and Ms. Cousan said the bandanna on the person who robbed her was “not quite over the nose.” Ms. Burrell further testified that the person who robbed her wore a blue bandanna while Ms. Cousan did not testify as to the color of the bandanna. However, Ms. Burrell testified that she thought the person who robbed Ms. Cousan wore a red bandana, although she thought it was the same person who robbed her. But Officer Foy testified that both women gave a description of a blue bandanna.

Each victim testified at trial that they were one hundred percent certain that Taylor was the person who robbed them. Their photographic identifications were made only seven days after the robbery. Officer Beaulieu testified that Ms. Burrell was hesitant and did not identify Taylor’s photograph until he placed something over the bottoms of all the photos.

Ms. Cousan did not hesitate when identifying Taylor's photograph without any modification, although she too testified that after she made the identification she put something over the bottom half of Taylor's photograph to confirm the correctness of her identification. Each woman identified Taylor separately and without any communication between them since the day of the robbery. While no weapon was recovered, we note that each victim gave a description of a long gun, likely to be a gun other than a handgun, with a "banana clip." The similarity between these descriptions of the gun, and the descriptions in general indicate that the jury verdict is based upon competent evidence which strengthens the overall case against Taylor. Additionally, the fact that both robberies were committed at the same location within one and one-half hours of each other strengthens the case as well.

Nevertheless, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense of armed robbery present beyond a reasonable doubt as to both crimes. Thus, the evidence is sufficient to sustain both convictions.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error Taylor argues that his sentence is excessive. As previously discussed, an error patent necessitates that his habitual offender sentences be vacated and the case remanded for resentencing. In addition, following imposition of his sentence, Taylor filed a motion to reconsider sentence, which the district court said would “remain in effect as long as the defendant is ‘in prison’ in the event that the law changes.” As this comment indicates, the district court did not rule on Taylor’s motion to reconsider sentence. This court cannot consider Taylor’s claim of excessive sentence where the district court has not ruled on a motion to reconsider sentence. State v. Boyd, 2000-0274, p. 3 (La. App. 4 Cir. 7/19/00), 775 So. 2d 463, 465.

PRO SE ASSIGNMENT OF ERROR

While Taylor denotes his pro se assignment of error as number three, there is only one wherein he presents several arguments, asserting that the out-of-court identifications by the victims should have been suppressed because they were suggestive and unreliable; and that due to the unreliable identifications, the evidence was insufficient. This latter claim of sufficiency was addressed in Assignment of Error No. 1, and found to be lacking in merit.

The defendant bears the burden of proving that an out-of-court

identification was suggestive, and that there was a substantial likelihood of misidentification as a result of the identification procedure. State v. Ballett, 98-2568, p. 17 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 597, writ denied, 2000-1490 (La. 2/9/01), 785 So. 2d 31; State v. Martello, 98-2066, p. 8 (La. App. 4 Cir. 11/17/99), 748 So.2d 1192, 1198, writ denied, 2000-0240 (La. 12/15/00), 777 So. 2d 475. A defendant must first prove that the identification was suggestive. State v. Thibodeaux, 98-1673, pp. 20-21 (La. 9/8/99), 750 So. 2d 916, 932, cert. denied, 529 U.S. 1112, 120 S.Ct. 1969, 146 L.Ed.2d 800 (2000). An identification procedure is suggestive if it focuses attention on the defendant. State v. Laymon, 97-1520, p. 16 (La. App. 4 Cir. 3/15/00), 756 So. 2d 1160, 1172, writs denied, 2000-1519 (La. 5/4/01), __ So. 2d __, 2001 WL 501476, 2000-1412 (La. 5/11/01), __ So. 2d __, 2001 WL 538486. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, p. 11 (La. App. 4 Cir. 3/3/99), 729 So. 2d 132, 137.

Taylor contends that when Ms. Burrell initially hesitated in making an identification of him, Officer Beaulieu covered the bottom half of “his” photograph, and Ms. Burrell then identified him. Ms. Burrell testified at the

hearing on the motion to suppress that she was shown “a picture,” and she asked the police officer to put his hand over it so she could “make sure that was him.” Officer Beaulieu testified at the motion to suppress hearing that when he showed Ms. Cousan six photos, she identified the perpetrator but asked the officer to cover the photographs so she could make certain.

Officer Beaulieu testified that he then covered “it” with paper and from there Ms. Cousan identified Taylor. The district court asked if she had identified Taylor first, and then identified him again covered with paper, and the officer replied in the affirmative. Officer Beaulieu then testified that as to the second victim, he covered the “face” up “as I did with Ms. Burrell (apparently meaning Ms. Cousan),” and she positively identified Taylor. In making its ruling, the district court interpreted Officer Beaulieu’s testimony as establishing that Ms. Burrell was able to make the identification only after the photograph or photographs were covered up, while Ms. Cousan made identifications under both circumstances. The trial testimony of the victims and Officer Beaulieu support this view. The issue as to suggestiveness insofar as Ms. Burrell is concerned relates to whether Officer Beaulieu covered up only Taylor’s photograph or all of them, as he testified to at trial, before Ms. Burrell was able to make an identification. Officer Beaulieu further testified at trial that it was his suggestion that he cover the bottoms of

the photographs, indicating he first covered the bottom three, then the top three. It is a reasonable view of the evidence that the officer covered all the photos.

However, even assuming that the procedure employed with Ms. Burrell was suggestive, a suggestive identification will be admissible if it is found reliable under the totality of circumstances. Laymon, supra. As discussed in detail during the review for sufficiency of the evidence, the identifications in the instant case were reliable. Therefore, as Taylor has failed to show that either of the identifications were both suggestive and unreliable, the district court properly denied the motion to suppress the identifications.

There is no merit to this assignment of error.

DECREE

For the foregoing reasons, Steven L. Taylor's convictions are affirmed. Taylor's sentences as a habitual offender are vacated, and his original sentences are reinstated to the extent that one or both of his sentences were vacated by the district court, and that the case is remanded for resentencing of Taylor as a second-felony habitual offender in accordance with the views expressed herein.

**CONVICTIONS AFFIRMED;
HABITUAL OFFENDER SENTENCES**

VACATED, REMANDED