

STATE OF LOUISIANA

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NO. 2000-KA-2760

VERSUS

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COURT OF APPEAL

GERALD JOSEPH

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-937, SECTION "F"
Honorable Dennis J. Waldron, Judge

Judge Charles R. Jones

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

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AFFIRMED

Gerald Joseph, Jr. appeals his conviction for attempted armed robbery, and his sentence as a multiple offender. We affirm.

Joseph and Elmeco Burnes were charged by bill of information with armed robbery. A jury trial was conducted and Joseph was found guilty of attempted armed robbery. The state filed a multiple bill alleging that he was a second offender. Joseph filed a Motion for New Trial, and the district court denied the motion, ordering a pre-sentence investigation, prior to imposing sentence.

Following a contradictory hearing on the multiple bill, the district court found Joseph to be a second felony offender and sentenced him to twenty-five years at hard labor without benefit of parole. This out-of-time appeal follows.

At trial, Tyrone Lavigne testified that at approximately 3:30 p.m., he was en route from the supermarket to his home. While he was turning into his subdivision he noticed a Jeep Cherokee behind him. Once Mr. Lavigne

turned into his driveway, the Cherokee pulled into the adjacent driveway on his immediate right. Although hesitant to exit his vehicle, Mr. Lavigne got out of the car to open his garage door. While in the process of doing so, a subject, who was subsequently identified as Joseph exited the Cherokee and approached him, demanding his money. Joseph had a ski mask covering his face and was holding a gun to Mr. Lavigne's side. Joseph was wearing camouflage pants and a jacket. Mr. Lavigne retrieved the little money he had, approximately fifteen or sixteen dollars, and handed it to Joseph. Joseph also demanded that Mr. Lavigne give him the gold bracelet that he was wearing, but when Mr. Lavigne removed the chain, it fell to the ground and was not recovered by the robber. Joseph then entered Mr. Lavigne's car, which was running, and drove off. Mr. Lavigne ran inside his home and called 911. Subsequently, Mr. Lavigne observed that the Cherokee had left the scene. Mr. Lavigne also identified the Cherokee as the vehicle in question from a series of photographs.

Officer Octave Laroche, assigned to Highway Enforcement with the New Orleans Police Department, testified at trial that he received a call on his radio that a car jacking had just occurred in the vicinity that he was patrolling. Officer Laroche proceeded to the north-side service road at I-10 and Bullard Road. As he traveled east bound on the service road, he

observed a purple Honda Accord traveling towards him. The officer angled his vehicle so as to block the oncoming vehicle. The Accord, occupied by two subjects at this time, briefly stopped immediately adjacent to Officer Laroche's vehicle and then sped off. The officer pursued the vehicle underneath the interstate until the subjects bailed out of the car and fled on foot towards Humana Hospital. Officer Laroche maintained visual contact as long as he could, giving other units a description and the direction of flight of both subjects. Officer Laroche also testified that the description provided relative to the driver was of a dark skinned African-American male with a medium type Afro, with a small diamond earring and a chain around his neck, wearing a dark shirt with a prominent emblem on the back. The passenger was described as being lighter skinned than the driver, having thick plaits in his hair, and wearing camouflage pants and shirt. Officer Laroche further testified that he was able to observe both subjects' faces when the vehicle was immediately adjacent to his, as the two vehicles were nearly touching.

Officer Laroche remained at the location of the Honda. When he looked inside the vehicle he observed a ski mask and a handgun on the passenger side of the vehicle. Both were admitted as evidence in the case.

Allen Galland, a bus driver for the Regional Transit Authority, testified at trial that at approximately 4:30 p.m. he was approaching Stillwater Street and Lake Forest Boulevard when he observed a young man peeking out from the corner of a residence. The subject, later identified by Mr. Galland as Joseph, then ran and flagged the bus down. The subject boarded the bus, paid the fare and sat down. As the driver started to pull off, the subject told him to stop. As he did, another young man came out of the bushes from the neutral ground and boarded the bus. He was wearing camouflage pants and was holding a camouflage shirt. He also had what the bus driver described as cornrows in his hair. Joseph then said something to the first subject, Burnes, who then paid his fair. Mr. Galland described Joseph as being in a big hurry. When the bus was at Crowder Boulevard and Lake Forest Boulevard, the police stopped the bus and apprehended Joseph and his accomplice, Burnes. Mr. Galland could not recall exactly what he said to the officers except that he explained where Joseph and Burnes had gotten on the bus.

After being apprehended on the bus, Joseph and Burnes were returned to Officer Laroche's location, where Officer Laroche positively identified each of them as the two who fled from the stolen Honda. Officer Laroche informed the assisting officers that Joseph, who was now attired in a white

thermal shirt, had been wearing a camouflage jacket. Officer Laroche positively identified the pants and jacket at trial, and they were admitted as evidence. The Officer also positively identified Joseph in court.

Mr. Lavigne also testified at trial that he was transported to the scene by Detective David Patroliia, where he identified Joseph to the extent possible considering Joseph had a ski mask on at the time of the robbery. Mr. Lavigne also identified the gun and ski mask as those used in the robbery, and related that approximately thirty minutes passed between the robbery and when he made the identification. Detective Patroliia identified twenty-nine dollars in U.S. currency recovered from Joseph.

Burnes testified that on the day in question, he and Joseph had planned on taking a trip out of town. Burnes knew Joseph through Joseph's sister, with whom Burnes had a relationship. Joseph picked Burnes up at a friend's house, while he was driving a Jeep. Burnes testified that he knew the Jeep was stolen when he got in it because Joseph told him so. On cross-examination, it was noted that Burnes had previously testified that he knew the Jeep was stolen because the steering column was "all cracked up". Burnes testified that they drove to New Orleans East where it began to rain; however, the windshield wipers on the Jeep would not function so Joseph and Burnes decided to procure another vehicle. While Joseph and Burnes

were driving around the Kingswood area, they observed Mr. Lavigne pull into his driveway. Burnes recounted how Joseph, wearing the ski mask, exited the car and robbed Mr. Lavigne. He related that they both entered the Honda a short distance from the location of the robbery and abandoned the Cherokee. Burnes took control of the vehicle and further recounted how they fled on foot after Joseph and Burnes were nearly stopped by the police and their subsequent apprehension on the bus.

Burnes also testified that he had entered a plea negotiation with the state wherein he would plead guilty to the crime of possession of stolen property in exchange for his testimony and that he would receive a four-year suspended sentence, with four years probation.

A review of the record reveals no errors patent.

By his first assignment of error, Joseph contends that the evidence was insufficient to support his conviction. This Court has often set forth the standard for review of the sufficiency of evidence to sustain a conviction, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) and *State v. Cummings*, 95-1377, p.3 (La. 2/28/96), 668 So.2d 1132, 1134. Thus we will pretermitt further discussion of this well-established standard.

Specifically, Joseph contends that the testimony of the co-defendant, Burnes, lacked credibility and that the remaining circumstantial evidence

was insufficient to establish his guilt beyond a reasonable doubt. He contends that Burnes' "testimony at trial was inconsistent with his prior testimony, and was, at times internally inconsistent." In support thereof, Joseph notes that Burnes had previously testified that he knew the Jeep was stolen because the steering column was "all cracked up", although at trial, Burnes testified that Joseph had told him that the Cherokee was stolen. Joseph further argues that this discrepancy was an effort to bolster Burnes' trial testimony. Joseph also notes that Burnes testified that he had known Joseph for two years prior to the incident but could not specify any previous jobs held by Joseph. Burnes also testified "Well, I don't know him like that, I just know him through his sister. The only thing I really know about him was his name. I never ran the street with him, don't know his background or none of that."

Joseph argues that no rational trier-of-fact could have believed "Burnes' testimony that a virtual stranger tracked him down at a friend's house and then participated with him in the armed robbery of a car." Joseph contends further that due to Burnes' plea agreement he had a very strong motive to fabricate testimony to convict Joseph.

Joseph also argues that the remaining evidence, which he classifies as "entirely circumstantial," is insufficient to exclude every reasonable

hypotheses of innocence. However, Joseph fails to suggest even one hypothesis in support of this assertion. While it is impossible to conclude what weight the jury placed in the testimony of Burnes, the purported inconsistencies fail to suggest that a rational trier-of-fact would have been unreasonable in accepting the testimony as truthful. Furthermore, standing alone, the remaining evidence was clearly sufficient to establish Joseph's guilt beyond a reasonable doubt. This assignment of error is without merit.

Prior to the imposition of his sentence, Joseph filed a Motion for New Trial wherein he alleged the following:

Mr. Bryan Marcel [one of the two prosecutors in the case] told the voir dire panel that after they heard from the State they may or may not hear "a story" from the defense. He used the word "story" repeatedly, as if to raise an expectation in the mind of the jury, and therefore an impermissible inference that Defendant had something to hide by not taking the stand. The State's actions violated Mr. Joseph's Fifth Amendment right against self-incrimination.

By this assignment of error Joseph argues that his counsel was ineffective for failing to request a mistrial following the prosecutor's comments during voir dire. However, the failure of Joseph to enter a contemporaneous objection would of course bar review of the alleged violation on appeal. La. C.Cr.P. art. 801. Joseph further notes that his trial counsel entered an objection to the entire voir dire at its conclusion;

however, the record does not reflect the basis for the objection and is therefore insufficient to preserve the error for appeal. La. C.E. art. 103(A) (1).

Likewise, this Court has often discussed the standard for appellate review of the assignment of error relating to ineffective assistance of counsel citing *State v. Prudholm*, 446 So.2d 729 (La. 1984); *State v. Reed*, 483 So.2d 1278 (La. App. 4 Cir. 1986); *State v. Ratcliff*, 416 So.2d 528 (La.1982); *State v. Garland*, 482 So.2d 133 (La. App. 4 Cir. 1986); *Strickland v. Washington*, 466 U.S. 668, 104 Sct. 2052 (1984); and *State v. Fuller*, 454 So.2d 119 (La.1984). Thus, we preterm discussion of this well-settled principal of law.

Joseph contends that had counsel objected to the remark by the prosecutor a mistrial would have been warranted.

La.C.Cr.P. art. 770(3) states in pertinent part:

"Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the ... district attorney... during the trial or in argument, refers directly or indirectly to:

(3) The failure of the defendant to testify in his own defense..."

An indirect reference to the defendant's failure to take the stand is

reversible error when the prosecutor intended to emphasize it. *State v. Jackson*, 454 So.2d 116 (La.1984). If the prosecutor's intention was to emphasize that the State's case was un rebutted and that there were witnesses other than the defendant who could have testified on behalf of the defense but did not, the comment does not constitute an indirect reference to the defendant's failure to testify. *State v. Johnson*, 541 So.2d 818 (La.1989). But if the defendant was the only witness who could have rebutted the State's case, a reference to the fact that the case was uncontroverted focuses the jury's attention on the defendant's failure to testify. *Id.* at 822.

This Court has also held that during voir dire the State may mention the defendant's constitutional privilege against self-incrimination to the jurors, and then question them regarding the weight they will give to the defendant's testimony should he decide to testify. *State v. Shea*, 421 So.2d 200 (La.1982), *reversed on other grounds*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985); *State v. Thomas*, 553 So.2d 980 (La. App. 4 Cir. 1989).

In *State v. Smith*, 97-1546 (La. App. 4 Cir. 6/9/99) 740 So.2d 714, the prosecutor stated the following during voir dire:

Now, beyond a reasonable doubt, the fact that there's, [sic] you have two stories where one is presented by the State and one, obviously, is presented by the Defense, the fact that there are two different stories, that's not reasonable doubt.

The defendant argued that the prosecutor's reference to "two different stories" implied to the jury that the defendant would testify so that his "story" could be presented to the jury, and when the defendant did not testify, called that fact to the jury's attention.

In finding that the claim lacked merit this Court stated:

Here, the prosecutor made no reference to the defendant's failure to testify. Instead, during voir dire, the prosecutor outlined the concept that reasonable doubt does not arise solely because conflicting versions of events may be presented by the State and the defense. **The prosecutor did not suggest that the State's case would be un rebutted**, which could be an indirect reference to the defendant's failure to testify. (**emphasis added**).

Id., 97-1546 at p. 8, 740 So.2d at 719.

This Court also noted that the comment was made during voir dire and not after the defense had failed to call any witnesses. *Id.* The facts herein are virtually indistinguishable from that in *State v. Smith*. A benign reference to a defense as a "story" is insufficient to find a direct violation of Joseph's right. Accordingly, this claim lacks merit.

By his first pro se assignment of error, Joseph contends that the identification of him should have been suppressed as a fruit of the poisonous tree because the police lacked probable cause to arrest him. Although Joseph did not file a Motion to Suppress the Evidence or a Motion to

Suppress the Identification, his co-defendant did, and Joseph's attorney participated in all of the hearings in this regard. La. C.Cr.P. art 842 provides that: "If an objection has been made when more than one defendant is on trial it shall be presumed, unless the contrary appears, that the objection has been made by all defendants." Our Supreme Court has held that La. C.Cr.P. art. 842 applies to pretrial motions as well. *State v. Lavigne*, 412 So.2d 993, 996 (La. 1982). Moreover, Joseph's attorney participated fully in the hearings and there is no indication that the district court's ruling applied to only one of the defendants.

In the instant case, a concerned citizen telephoned to alert the police about the suspicious behavior of two people, who were ducking in and out of the bushes and appearing to be looking for something. The informant also told the police that the two individuals boarded a transit bus. The description of the suspicious persons provided by the informant matched the appearance of Joseph and Burnes. Joseph contends that the information obtained from what appears to have been an anonymous source was insufficient to establish probable cause for his arrest. However, Joseph fails to recognize that the information provided only helped the police establish the location of Joseph and Burnes. The likelihood that Joseph and Burnes had committed the crime was established by their flight from the stolen car,

soon after it was taken; the recovery of the gun and the ski mask in the car; and the unique and highly detailed descriptions provided by Officer Laroche, which they matched. Clearly, the police had probable cause to arrest Joseph. This assignment of error lacks merit.

By his second pro se assignment of error, Joseph contends that the district court erred by allowing the photographs of the Cherokee to be admitted into evidence. The record reflects that when the state moved to introduce the photographs of the Jeep, the district court noted an objection by the defense on the basis of the pretrial conference. Joseph argues that his counsel objected because he had only been provided with notice of the photographs on the day of trial and that this late notice by the state failed to comply with the provisions of La. R.S. 15:436.1 which provides that:

A. A photograph of property alleged to be the object of a theft, otherwise admissible, may be admitted as evidence without regard to the availability of the property itself.

B. An affidavit of the value and ownership of property which is alleged to be the object of a theft shall be admissible in evidence under the following circumstances:

(1) The affidavit shall be upon personal knowledge and shall state the basis for such knowledge;

(2) The affidavit shall be paraphrased for identification with the photograph taken pursuant to Subsection A, and

(3) The state shall give written notice of its intent to introduce the affidavit, along with a copy of the affidavit and photograph,

not less than ten days prior to commencement of the trial.

C. An affidavit admitted pursuant to Subsection B shall be deemed prima facie evidence of the value and ownership of the property alleged to be the object of a theft. Provided, however, that if the defendant files a written objection to the admission of the affidavit within three days prior to the commencement of trial, the affidavit shall not be admissible and shall not be deemed to be prima facie evidence of the value and ownership of the property.

Joseph contends that because the state did not comply with the notice provisions of the statute, the photographs should not have been admitted. However, this argument is invalid because the state did not seek to establish the value of the Cherokee as would be necessary had Joseph been charged with possession of stolen property. Furthermore, La. R.S. 15:436.1 does not link the notice provisions to any and all photographs that may be introduced by the State.

Joseph further contends that the only evidence that the Cherokee was stolen was from the testimony of Burnes, and that the photographs were used to bolster his testimony. This argument also lacks merit because there is nothing to prohibit the State from bolstering its case by introducing additional evidence. Furthermore, the State was not obligated to establish that the Cherokee was stolen as Joseph was charged with the armed robbery

of money and a vehicle from Mr. Lavigne.

Implicit in Joseph's argument is a claim that he was prejudiced by the introduction of the photographs, as the fact that the Jeep was stolen portrayed him as a person of bad character.

La. C.E. art. 404(B)(1) provides in part:

Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, . . . **when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding. (emphasis added)**

In the present case, the fact that the Jeep was stolen was "related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it." *State v. Brewington*, 601 So.2d 656, 657 (La. 1992). The testimony and photographs of the Jeep "complete[ed] the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Haarala*, 398 So.2d 1093, 1098 (La. 1981). Therefore, the photographs were admissible under La. C.E. article 404(B). This assignment of error lacks merit.

For the reasons above indicated, Gerald Joseph's conviction and

sentence are hereby affirmed.

AFFIRMED