

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2000-KA-2285
VERSUS	*	COURT OF APPEAL
CHRISTOPHER JONES AND LEONARD HENDERSON	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	
	*	

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-069, SECTION "G"
Honorable Julian A. Parker, Judge

Judge Dennis R. Bagneris, Sr.

(Court composed of Chief Judge William H. Byrnes, III,
Judge Dennis R. Bagneris, Sr., and Judge Terri F. Love)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

Defendants, Christopher Jones and Leonard Henderson, were charged by bill of information with seven counts of armed robbery. La. R.S. 14:64. They were arraigned October 18, 1999, and pled not guilty. The case proceeded to trial May 11, 2000, on six counts. Original count five was not tried, and counts six and seven were re-numbered counts five and six. They will be referred to under the new numbers for the remainder of this appeal. The jury found the defendant guilty as charged on counts one, two, five and six. The jury could not reach a verdict on counts three and four.

On May 19, 2000, the trial court sentenced the defendants on counts one and two to thirty years at hard labor without benefit of parole, probation, or suspension of sentence with those sentences to run concurrently. The court sentenced the defendants on counts five and six to ninety-nine years at hard labor without benefit of parole, probation, or suspension of sentence, with those sentences to run consecutively to the above sentences and consecutively to each other. The defendants filed motions for reconsideration of sentence which were denied. They then filed motions for

appeal.

ERRORS PATENT

A review of the record reveal no errors patent.

FACTS

On August 10, 1999, a series of armed robberies occurred in or around the French Quarter. Reverend Daniel Dukes and Richard Crusta were robbed at C.C.'s Coffee Shop in the 2800 block of Esplanade at 10:15 p.m. Michael Brooks and Ronald Jackson were robbed on the steps of Mr. Jackson's house in the 2600 block of D'Abadie Street at 10:20 p.m. Kevin Thomas and Jamal Jarreau were robbed at the Bus Stop Lounge in the 2800 block of Canal Street at 10:25 p.m. During the second incident, one of the perpetrators said, "drop it like it's hot." During the third incident, one of the perpetrators said, "We are going on a rampage. You know what time it is. Give it up." During all of the incidents, the victims were threatened that if they had more money on them than they were admitting, they would be "dealt with", or they would "get it", or they would be killed. One of the perpetrators fired his weapon at the victims during the third incident. Mr. Jarreau testified that the bullet came so close to him that he could "feel the wind." Both of the defendants carried guns during the crimes.

The defendants were arrested, along with Frederick Ward, on Bourbon

Street in the early hours of the morning on August 11, 1999. A loaded .45 caliber Glock semi-automatic handgun was found in Jones's waistband. A round was chambered, the trigger was pulled, and the gun was ready to be fired. The men were also in possession of a parking receipt for a white Buick Roadmaster parked at Mr. B.'s restaurant, which was registered to Henderson in Mississippi. Additionally, the defendants were in possession of \$992.00 in cash. Pursuant to a search warrant, the car was searched. The officers recovered two boxes of .45 caliber ammunition; a red, a gray, and a black shirt inside a duffel bag; a pair of white tennis shoes; and a pair of blue shorts from the trunk. They found a cellular telephone and a beeper inside the car.

In photographic line-ups, Mr. Brooks identified both defendants. Mr. Jackson could identify neither. At trial, Mr. Jackson explained he could make no identification because the perpetrator had the gun directly in his face. Mr. Thomas identified both defendants; Mr. Jarreau identified Henderson. Mr. Crusta identified Jones. No one identified Ward, and he was released.

The parties stipulated that a .45 caliber shell found at the scene of the third incident did not match the Glock handgun recovered from Jones.

The defense presented numerous alibi witnesses who said the

defendants were in Jackson, Mississippi late on the night of August 10, 1999.

Both defendants took the stand and testified that they had left Jackson after 11:00 p.m. on August 10, 1999; they got lost on their way to New Orleans and drove in the wrong direction for a period of time. They had just arrived in the French Quarter when they were arrested. Jones said he took the gun with him for protection. Henderson said he once owned a nine millimeter handgun, but that he had “gotten rid of it.” He further testified that he had taken cash with him to buy a gift for his fiancée.

ASSIGNMENT OF ERROR NUMBER ONE

The defendants argue that the State did not produce sufficient evidence to support the convictions.

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 triers' 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, 1324 (La. 1992).

All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So. 2d 817 (La. 1987). "The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438.

Generally, direct evidence consists of testimony from a witness who actually saw or heard an occurrence, proof of the existence of which is at issue. State v. Turner, 591 So. 2d 391 (La. App. 2 Cir. 1991) *writ denied by* 597 So.2d 1027 (La. 1992). Circumstantial evidence is evidence of facts or circumstances from which one might infer or conclude the existence of other

connected facts. Circumstantial evidence consists 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 of armed robbery are: (1) the taking, (2) of anything of value, (3) from a person or in the immediate control of another, (4) by the use of force or intimidation, (5) while armed with a dangerous weapon.

State v. Banks, 96-652, 96-653, p. 12 (La. App. 4 Cir. 1/15/97), 694 So. 2d 401, 410. The testimony of an eyewitness that she observed all the elements of the offense, coupled with an identification of the defendant as the perpetrator, ordinarily is sufficient to support a conviction. Banks, 96-652, 96-653 at p. 13, 694 So. 2d at 410.

Here, the jury heard testimony that both defendants took money from all four victims: Jackson, Brooks, Thomas, and Jarreau. Both defendants carried guns. The defendants argue that it was impossible for them to have committed the crimes in such a short time. However, Officer Hunter specifically testified that the locations are in close proximity. He specifically said, "I could take these three locations at night with no traffic in five minutes or better." In addition, the jury was shown a map of the region, illustrating the close proximity of the crimes.

The defendants argue that identification was not proven because the various victims gave conflicting descriptions, such as the color of the shirts the men were wearing, their height, and whether they had gold teeth. However, the jury heard testimony as set out above that the various victims identified either one or both of the defendants in photographic lineups and again at trial. The jury believed the witnesses' identification. The jury chose not to believe the alibi witnesses. Moreover, the defendants were found not far from where the crimes were committed a few hours after the crimes. They were in possession of a gun described by the victims, and a large amount of cash. The car they had driven to New Orleans contained ammunition and several changes of clothes. The evidence was sufficient.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

The defendants argue that the identifications were suggestive and gave rise to a substantial likelihood of misidentification.

This Court stated the law pertaining to out-of-court identifications in general, and photographic identifications specifically, in State v. Sterling, 96-1390, pp. 3-4 (La.App. 4 Cir. 11/13/96), 684 So.2d 74, 75-76, as follows:

The defendant bears the burden of proving [1] that an out-of-court identification itself is suggestive, and [2] that there was a likelihood of misidentification as a result of the identification procedure. State v. Lee, 94-2584 (La.App. 4 Cir. 1/19/96), 668 So.2d 420, writ denied 96-0477 (La.5/10/96), 672 So.2d 919. An

identification procedure is unduly suggestive if it focuses attention on the defendant. State v. Davis, 27,961 (La.App. 2 Cir. 4/8/96), 672 So.2d 428. Even a suggestive out-of-court identification will be admissible if it is found reliable under the totality of circumstances. State v. Guy, 95-0899 (La.App. 4 Cir. 1/31/96), 669 So.2d 517, writ denied, 96-0388 (La.9/13/96), 679 So.2d 102.

If the photographic identification is found to be suggestive, it must be determined whether, under all the circumstances, the suggestive procedure gave rise to the substantial likelihood of irreparable misidentification, for it is the likelihood of the misidentification which violates due process, not merely the suggestive identification procedure. State v. Laymon, 97-1520 (La. App. 4 Cir. 3/15/00), 756 So.2d 1160 *writs denied by* 2000-1519 (La. 5/4/01), 791 So.2d 648; 2000-1412 (La. 5/11/01), 791 So.2d 1288.

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' degree of attention; (3) the accuracy of the witness' 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. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); State v. Cockerham, 95-0172 (La.App. 4 Cir. 3/14/96), 671 So.2d 967 *writ denied by* 96-1257 (La. 10/25/96), 681 So.363. Also to be considered under the totality of circumstances is the deterrent effect on police behavior so the

police will guard against unnecessarily suggestive procedures for fear that their actions will lead to the exclusion of identifications as unreliable.

Manson v. Brathwaite, supra

The defendants contend that their photographs in the lineups shown to the victims improperly focused attention on them because their heads were depicted noticeably larger than the heads in the other photographs.

Henderson complains because he was looking straight at the camera. A review of the photographs reveals that there was nothing about the line-ups that drew attention to the defendants. All of the men depicted were looking at the camera and were close in age and physical appearance. The defendants' heads were not noticeably larger.

As to the first two factors, the victims were robbed as the defendants held guns directly at their heads. Their attention was necessarily focused on their assailants. The third factor, accuracy of the witnesses' prior description, was borne out at trial. Although there were minor discrepancies, these discrepancies were mostly to do with the clothes the defendants were wearing. As seen by the evidence, the defendants had taken along changes of clothes. The witnesses were certain of their identifications. Finally, as to the time between the offense and the confrontation, the victims identified the defendants within one day of the crimes.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

The defendants argue that their sentences were excessive.

While conceding that the sentences were within the statutory limits, the defendants nevertheless argue their sentences were unconstitutionally excessive because the trial court failed to comply with La. C.Cr.P. art 894.1. More specifically they argue that they were not given any consideration for mitigating factors such as their young age and their lack of criminal records. Henderson had no priors. Jones had one conviction for possession of stolen property.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Sepulvado, 367 So. 2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Lobato, 603 So. 2d 739 (La. 1992). The trial court has great discretion in sentencing within the statutory limits. State v. Trahan, 425 So. 2d 1222 (La. 1983). La. C.Cr.P. art. 894.1 sets forth sentencing guidelines to be followed so that the trial judge can tailor the

sentence to the particular defendant and his particular crime; but, it is not necessary that the judge recite all of the factors in Article 894.1 as long as there is evidence in the record that the judge considered the factors and tailored the sentence to fit the defendant and his crime. State v. Welch, 550 So. 2d 265 (La. App. 4 Cir. 1989) *writ denied by* 94-0437 (La. 6/21/96), 675 So.2d 1071.

A review of the appeal record, including the sentencing hearing, amply supports a finding that the trial court complied with La. C.Cr.P. art. 894.1. The trial judge went back over a lengthy recitation of the facts. He quoted extensively and directly from the article. He noted that the defendants had in fact been charged with seven counts of armed robbery, although they were only convicted of four. He was very influenced by the fact that one of the defendants fired a gun at two of the victims, narrowly missing them. He found intent to kill or inflict great bodily harm. He noted the close proximity in time of the crimes. He mentioned that the defendants had brought along changes of clothes so as to elude the police, evidence that the crimes were in fact planned out. He noted that because the crimes involved different victims and were in fact separate offenses, it was appropriate to sentence the defendants consecutively. La. C. Cr. P. art. 883.

The sentencing range for each armed robbery count was ten years to

ninety-nine years, without benefit of parole, probation, or suspension of sentence. Here, the defendants were sentenced to thirty years on each of the armed robberies in which no gun was fired. However, in the armed robberies in which the defendant fired at the victims, narrowly missing them, the defendants were sentenced to ninety-nine years at hard labor. The sentences are supported by the facts and were not excessive.

This assignment is without merit.

CONCLUSION

For the foregoing reasons, we affirm the convictions and sentences.

CONVICTION AND SENTENCE AFFIRMED