NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-1616**
VERSUS	*	**COURT OF APPEAL**
BRYAN K. MORGAN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 363-229, SECTION "E"
Honorable Calvin Johnson, Judge
* * * * * *
Judge David S. Gorbaty
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(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

JONES, J. DISSENTS WITH REASONS

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AFFIRMED

Bryan K. Morgan appeals his conviction for attempted armed robbery, claiming there was insufficient evidence to convict him. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF THE CASE:

Bryan K. Morgan and a co-defendant were charged by bill of information with armed robbery, a violation of La. Rev. Stat. 14:64. After a two-day trial on May 4 and 5, 1994, a twelve-member jury found him guilty of attempted armed robbery. La. Rev. Stat. 14:27(64). He was sentenced on September 14, 1994, as a triple offender under La. Rev. Stat. 15:529.1 to serve sixteen years at hard labor without benefit of parole, probation, or suspension of sentence. He filed a motion to reconsider sentence, which was denied, and a motion for appeal. The State appealed the sentence on the ground that it was illegally lenient, and in *State v. Morgan,* 95-1046 (La.App. 4 Cir. 8/23/95), *unpub.*, this Court vacated the sentence and remanded the case. The trial court resentenced Morgan to twenty years at hard labor without benefit of parole, probation, or suspension of sentence.

Again, the State appealed, this Court vacated the sentence, remanded the case, and ordered the trial court to strictly comply with *State v. Dorthey*, 623 So.2d 1276 (La. 1993); *State v. Morgan*, 96-0333 (La.App. 4 Cir. 9/4/96), 680 So.2d 1230. For reasons not clear from the record, Morgan was not resentenced until January 24, 2002, to twenty-five years at hard labor without benefit of parole, probation, or suspension of sentence. Morgan was granted leave by the trial court to lodge this out-of-time appeal.

FACTS:

Officer Karen Woods testified that on March 16, 1993, at 3:20 a.m., she and her partner, Fred Russell, were patrolling the area near the Danziger Bridge, when they received a call that an armed robbery had occurred at Downman Road and Chef Menteur Highway. En route to the scene, they saw an Orleans Levee Board police car "chasing somebody." The N.O.P.D. officers joined the chase, and cornered co-defendant, Khigh Shotwell, in a vacant lot. A D.W.I. officer, who was also in the area, had apparently stopped both men within minutes of the armed robbery at Downman and Dwyer Boulevard, but Shotwell had run away. Woods testified that the D.W.I. officer told her that the two defendants had stopped him minutes earlier and asked for a ride, and he recognized them from the broadcast description of "black males, black clothing."

According to Officer Woods, after the two suspects were apprehended, the victim was brought to the vacant lot, where he identified both men. Woods said the victim, Harold Oatis, reported he was walking in the 4200 block of Downman Road, when he noticed two men leaning against a building. As he got closer, one of the men crossed the street, and appeared to be trying to hide. The other man asked Oatis if he wanted to buy a Nintendo tape, to which the victim responded no. The co-defendant, Khigh Shotwell, pulled a gun and ordered Oatis to give him his Saints starter jacket, his money, and his drugs. The victim gave him the jacket. The men told him to lie on the ground, and Morgan told Shotwell to "pop" him. Shotwell told Oatis to get up, and Oatis ran to a nearby gas station.

Officer Woods said the gun, the jacket and a Nintendo tape were recovered. She believed that Shotwell had dropped the jacket when he was running from the D.W.I. officer, and that the gun fell from the pocket. She recalled that the Nintendo tape was recovered from Morgan when her partner patted him down.

Officer Chris Landry of the Orleans Parish Levee Board stated he was on patrol the night of the incident. He was to meet Officer Mark Galbreath of the D.W.I. Task Force at the corner of Downman Road and Haynes Boulevard to discuss some D.W.I. issues. He heard the broadcast of an

armed robbery in the 3900 block of Downman Road, and heard Galbreath say he would take the call because he had just seen two suspects who matched the description. Landry went to back him up. Within five minutes, he saw Galbreath in a Time Saver parking lot, with one suspect in custody. Landry saw another man fleeing out of the parking lot, wearing dark long sleeves and dark pants, carrying a Saints starter jacket. Landry followed him at a distance of about ten feet in his vehicle as the suspect ran river bound on Downman and turned onto Mendez Street. The suspect threw the jacket down, and then turned into a dead end street where Landry caught him trying to climb a fence. N.O.P.D. officers arrived and handcuffed Shotwell.

Landry said Oatis identified both Morgan and Shotwell within seven minutes of the crime. The officer remembered that Morgan was wearing a red and black jacket, with a white shirt. He did not recall hearing Oatis deny that one of the suspects was not one of the men who had robbed him.

Officer Mark Galbreath testified that he was assigned to the D.W.I. Enforcement Division of the N.O.P.D. on the night in question. His duties included patrolling various parts of the city from 8 p.m. to 5 a.m. each day. On the night of this incident he was patrolling eastern New Orleans. The police vehicle was partially marked, that is, it had police indicia on the side panels, but did not have light bars on top. Officer Galbreath was on the way

to meet Sergeant Landry to discuss a D.W.I. case they had worked on previously. Galbreath testified that he was flagged down by two men, and asked for a ride. When they realized Landry, who was in uniform, was a police officer, they told him that they thought he was a taxi driver. Again they asked for a ride, but Galbreath told them he was on official business and could not give them one. Galbreath then heard the call of the armed robbery. As he passed the two men on his way to a nearby Shell station where the victim of the armed robbery was located, they waved to him.

Officer Galbreath spoke with the victim who told him that one man had been wearing a Saints starter jacket and dark pants. The other one was wearing a black, red, and white jacket. Galbreath realized that this description matched that of the two men who had flagged him down. He left the victim, and began looking for the men, spotting them at a Circle K at the corner of Downman and Dwyer. One man was on the side of a van, and the other taller man was on the opposite side. Galbreath called the defendant to his car. Morgan walked over, and Galbreath quickly handcuffed him and put him in the police car. When Shotwell saw this, he ran, taking off the starter jacket and throwing it and a gun down as he ran. Officer Galbreath testified that he picked up the jacket and gun just as the levee board officer turned the corner. Shotwell was apprehended as he was trying to jump an

eight-foot fence. Galbreath said Morgan had a Nintendo tape on his person that was confiscated and given to Officer Woods. The officer said the defendant was the same man who was with Khigh Shotwell when they tried to flag him down. Galbreath stated that the victim identified both men, stating that Morgan was "with the guy who robbed me."

Harold Oatis testified he was robbed of a starter jacket that belonged to his friend as he was walking home. He saw two men ahead of him, and he crossed the street. One man crossed with him. As Oatis neared the man, the other man came from behind some bushes with a .380 handgun and demanded the jacket and dope. Oatis gave him the jacket. The gunman ordered Oatis to the ground, and then began running across the street. Oatis then ran to a gas station. Officers arrived in ten or fifteen minutes and took him to where two men had been stopped and put on a police car. Oatis said he recognized the gunman, but did not "really" recognize the other man because he had been concentrating on the man with the gun. He said the other person had just passed him by, and that in fact that person was taller than the defendant. He said the officers told him they had caught Morgan with the gunman, but Oatis did not recognize Morgan as the man with the Nintendo tape.

After a discussion in chambers, the court declared Oatis a hostile

witness as to the identification issue.

Oatis denied telling the arresting officer that Morgan was one of the perpetrators, or telling Charles Heuer, the assistant district attorney who screened the case, that he could identify the other perpetrator. The State then produced a statement signed the day of trial by Oatis saying, "I don't want to press charges 'cause I don't want to see him suffer." Oatis admitted that his statement did not state that Morgan was not one of the men who robbed him.

On cross-examination, defense counsel asked Oatis, "And the reason, as you testified to the jury, that you did not want to see [Morgan] suffer was because you couldn't be sure that he wasn't – that he was the person that was involved?" Oatis responded, "Yes, ma'am."

Khigh Shotwell, Morgan's co-defendant, testified at trial. He stated that he pled guilty to armed robbery, and was serving time at the Phelps Correctional Center. He testified that he approached the victim with a gun, and told him to give up his starter jacket and any money or dope the victim had. After he took the jacket from the victim, he was chased by N.O.P.D. officers and a deputy sheriff. He admitted that he threw down the jacket and gun as he ran. Shotwell denied that Morgan had anything to do with the armed robbery. He claimed that he met Morgan for the first time after they

were placed in the police car together. Shotwell denied changing his story.

Charles Heuer, Assistant District Attorney for the Parish of Orleans, testified that he screened the armed robbery. He met with the victim to ascertain the facts, and based on what the victim told him, decided to formally charge both defendants with armed robbery. The defense objected on hearsay grounds to Heuer testifying as to what Oatis had told him when he first met with the victim. The trial court overruled the objection because the testimony was being offered for "impeachment purposes."

Heuer testified that Oatis reported being on his way home when he saw two subjects on Downman Road. One subject walked away. The defendant crossed the street and asked Oatis if he wanted to buy a Nintendo tape. The other man came from behind some bushes with a gun and robbed him. Shotwell took the jacket while Morgan looked through his pockets for money. After the robbery was completed, Morgan told Shotwell, "Pop him. Pop him." At no time did Oatis tell the witness that only one man robbed him or that Morgan just walked past as Shotwell robbed him. Heuer said that both identifications were positive and that the District Attorney's Office would not have accepted the case if the identifications had not been positive.

ASSIGNMENT OF ERROR ONE:

In his sole assignment of error, Morgan argues that the evidence was

insufficient to convict him of attempted armed robbery.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Rosiere*, 488 So.2d 965 (La. 1986). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. *State v. Mussall*, 523 So.2d 1305 (La. 1988). Additionally, the 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. *Id.* The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. *State v. Cashen*, 544 So.2d 1268 (La. App. 4 Cir. 1989).

Armed robbery is the taking of anything of value 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. La. Rev. Stat. 14:64. An attempt is defined in La. Rev. Stat. 14:27(A) as:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the

> accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

A principal is a person concerned in the commission of a crime, whether present or absent, and whether he directly commits the act constituting the offense, aids and abets in its commission, or directly or indirectly counsels or procures another to commit the crime. La. Rev. Stat. 14:24. Only those persons who knowingly participate in the planning or execution of the crime are principals, and mere presence at the scene is not enough. *State v. Graves*, 96-1537 (La.App. 4 Cir. 9/10/97), 699 So.2d 903; *State v. Marshall*, 94-1282 (La.App. 4 Cir. 6/29/95), 657 So.2d 1106. One may only be convicted as a principal for a crime for which he personally has the requisite mental state. *Id.*

Specific intent may be inferred from the circumstances of the transaction and from the actions of the accused. *State v. Graham*, 420 So.2d 1126 (La. 1982). When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La. Rev. Stat. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of events; rather, when evaluating the evidence in the light most favorable to the prosecution, the court determines whether the

possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under *Jackson v. Virginia*. *State v. Davis*, 92-1623 (La. 5/23/94), 637 So.2d 1012. This is not a separate test from *Jackson v. Virginia*, but is instead an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La. 1984); *State v. Addison*, 94-2431 (La.App. 4 Cir. 11/30/95), 665 So.2d 1224.

In this case, the jury heard evidence that Morgan lured the victim into a set-up for the robbery by stopping him and asking him to buy a Nintendo tape. When the victim stopped, Shotwell had time to emerge from his hiding space and rob the victim of his jacket, a thing of value. The jury also heard evidence that after the robbery was complete, Morgan told Shotwell to "pop" the victim. These facts are sufficient to support a conviction of the defendant as principal to armed robbery. The facts are thus sufficient to convict the defendant of the lesser crime of attempted armed robbery. La. Code Crim. Proc. art. 814.

Morgan argues the State did not prove its case because the victim recanted his original report that Morgan was the second perpetrator, and

Shotwell testified that he acted alone. However, the jury heard from the police officers that the victim told them two perpetrators were involved, both men were stopped within minutes of the crime, the men matched the descriptions given, the defendant in particular was wearing an identifiable red and black jacket, the men were stopped together, the co-defendant was in possession of the gun and coat, and the defendant was in possession of a Nintendo tape that the victim reported had been the excuse for first stopping him. In addition, the jury heard the testimony of Mr. Heuer, properly admitted for impeachment purposes, that the victim reported to him the same facts that he had reported to the officers, i.e., that two men were involved and that the defendant was in fact the second man. All of these witnesses testified that the victim was positive of his identification, which, once again, took place within minutes of the crime.

The jury was free to consider that the victim changed his testimony at trial, some time after the crime was committed. It could also consider that the victim changed his testimony when confronted face to face with the two perpetrators, such that intimidation might have been a factor. The jury could also consider that the victim gave a statement that he did not want to press charges, not because Morgan did not in fact commit the crime, but because the victim did not want to see Morgan suffer. Finally, the jury was free to

consider that the version of the story told by the victim in his recantation did not fit the story told by Shotwell. The victim never changed his story that two men were involved, rather he testified at trial that Morgan was not the second perpetrator. Shotwell testified that he acted alone.

The jury chose to believe the version of facts first reported by the victim, both to officers on the scene and later to the assistant district attorney who screened the case. Issues of credibility are for the trier of fact. *Rosiere, supra.*

Accordingly, we find there was sufficient evidence to convict Morgan of attempted armed robbery. The conviction and sentence are affirmed.

AFFIRMED