NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0652

STATE OF LOUISIANA

VERSUS

LACAL LUCKY WILSON

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 374567, Division "G"
Honorable Larry J. Green, Judge Presiding

Walter P. Reed
District Attorney
Covington, LA

and

Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Attorneys for
State of Louisiana

Gwendolyn K. Brown
Louisiana Appellate Project
Baton Rouge, LA

Attorney for
Defendant-Appellant
Lacal Lucky Wilson

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered November 3, 2006

Guidry, J. concurs.

PARRO, J.

The defendant, Lacal Lucky Wilson, was charged by bill of information with simple burglary, in violation of LSA-R.S. 14:62. The defendant pled not guilty, and after a jury trial, the defendant was found guilty as charged. The state then filed a habitual offender bill of information. The trial court denied the defendant's motion for a post-verdict judgment of acquittal and his motion for a new trial. The defendant was later adjudicated a fourth felony habitual offender and sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, raising the following four assignments of error:

1. The circumstantial evidence is insufficient to exclude every reasonable hypothesis of innocence.
2. The trial court erred by denying the motion for new trial.[1]
3. The trial court erred by denying the motion for post-verdict judgment of acquittal.
4. The trial court erred by overruling the defense objection to an instruction on flight, and in issuing that instruction to the jury.

For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

During the evening hours of December 2, 2003, Drake A. Clarke, the victim, was socializing at his workplace (Clarke's Design Service), which consisted of a two-story building located on Third Street in Slidell, Louisiana.[2] Also present in the building were the victim's wife, Sandra Clarke, her friend, Shannon, the victim's brother, Dale, and his friend Niles J. Guerra.[3] As the individuals sat in the

---

[1] The motion for a new trial was based, in pertinent part, on the argument that the verdict was contrary to the law and evidence.

[2] The two-story building consisted of approximately three thousand square feet, with fifteen hundred square feet on the top floor and fifteen hundred square feet on the bottom floor. The offices were located on the first level and an open area, consisting of a ping-pong table, pool table, and chairs, was located on the second level.

[3] The last names of Shannon and Dale were not provided during trial testimony.

open area located on the second level of the building, someone heard a noise through an open window. The victim walked downstairs and looked down the hallway, but did not observe anything unusual. After the brief inspection, the victim returned to the second level of the building. Approximately five minutes later, they heard a noise again. The victim peered through the open window and observed an African-American male intruder as he sat in the victim's vehicle rummaging through the victim's jacket pockets. The victim's vehicle was located in the building's parking lot.

The victim, his brother, and Guerra immediately ran downstairs to confront the intruder. The others contacted the police. According to the testimony of the victim and Guerra, the intruder was walking within approximately five feet of the victim's vehicle when the victim, his brother, and Guerra entered the parking lot. When questioned, the intruder conveyed that he did not have anything. Guerra told the intruder to stop, but he walked swiftly as he exited the parking lot. As the intruder walked across the street, Guerra entered his vehicle and began to follow him. Officers of the Slidell Police Department began arriving a few minutes after the 10:46 p.m. dispatch reporting a burglary in process. After being pointed out by Guerra, the defendant was arrested and brought back to the scene (two to three blocks away from the site of the arrest), where he was again identified as the intruder.

ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, AND THREE

In a combined argument for assignments of error numbers one, two, and three, the defendant avers that the circumstantial evidence presented in this case does not exclude the hypothesis that the defendant, although apparently observed in the area, was not the individual who was observed sitting in the victim's vehicle. The defendant notes that neither of the state's witnesses saw the intruder's face as he sat in the victim's vehicle. The defendant argues that he did not flee from the scene and avers that this should be considered a factor from which to infer his

innocence. Thus, the defendant does not contest that the victim's vehicle was burglarized, only the identification of the defendant as the perpetrator.

The constitutional standard for testing the sufficiency of evidence, enunciated in ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime charged and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. ***State v. Jones***, 596 So.2d 1360, 1369 (La. App. 1st Cir.), writ denied, 598 So.2d 373 (La. 1992). This standard is codified in LSA-C.Cr.P. art. 821. The ***Jackson*** standard of review is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides 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." When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. ***State v. Moten***, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein. LSA-R.S. 14:62(A). Where the key issue is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the state is required to negate any reasonable probability of misidentification. Positive identification by only one witness may be sufficient to support the defendant's conviction. ***State v. Hayes***, 94-2021 (La. App. 1st Cir. 11/9/95), 665 So.2d 92, 94, writ denied, 95-3112 (La. 4/18/97), 692 So.2d 440.

The victim testified that he could not see the intruder's face as he sat in the front seat of the victim's vehicle, although the parking lot was "fairly well lit" at

the time. The victim later specified that a light connected to the building, along with streetlights, illuminated the front parking lot. From the window, located directly above the parking space occupied by the victim's vehicle, the victim had a good view of the intruder's hands and observed that the intruder was wearing a flannel jacket. When the victim reached the parking lot, he observed an individual approximately five feet from his vehicle, wearing the same attire. At this point, the victim was about ten to fifteen feet from the individual and he was able to see his face. The victim further noted that the individual was wearing a wool cap. The victim testified the individual was questioned in the following manner, "[W]hat are you doing, what the heck you doing in the car...." According to the victim, the individual responded generally in the following manner, "I didn't get nothing, I ain't got nothing." No one else was observed in the area. The victim concluded that the individual in the parking lot was the same individual observed in the victim's vehicle. When the police brought the defendant to the scene (within 10 minutes of the initial sighting), the victim identified the defendant as the perpetrator. The victim also identified the defendant in court as the perpetrator. The victim did not give anyone permission to enter his vehicle. The victim confirmed that there were no missing items. The victim also confirmed that he had consumed a few beers on the night in question, just prior to the incident.

Guerra, the state's second witness, also observed the intruder from the open, second floor window. As the intruder sat in the victim's vehicle, Guerra observed the intruder's hands, noted his race as African-American, and further noted that his attire included a flannel jacket (later detailed as green, purple, and gold) and a cap (initially described as a ball cap, but later specified as a wool knit cap). Guerra noted that the parking lot was well lit by a light on the building and a streetlight on the corner of the parking lot. After Guerra ran downstairs with the victim, he observed an individual within five feet of the victim's vehicle, wearing the same attire that he had observed from the second floor window. No one else was observed in the area. Guerra testified that the individual was the same

person that he had observed in the victim's vehicle. At this point, Guerra was able to view the individual's face. Guerra testified that he told the individual to stop, and further stated, "he told me he didn't have anything." As the individual kept walking at a fast pace, Guerra entered his vehicle (which was parked about two spaces from the victim's vehicle) and followed the individual. Guerra stated that he never lost sight of the individual. Guerra exited his vehicle and pointed out the individual to the police when they approached (within a few minutes of the initial sighting). Guerra identified the defendant in court as the perpetrator. Guerra confirmed that he also consumed three beers that night.

Officer Fred Ohler of the Slidell Police Department was assigned to the patrol division at the time of the incident. Officer Ohler arrived at Clarke's Design Service at approximately 10:48 p.m. and obtained statements from the witnesses. According to Officer Ohler's testimony, the witnesses did not seem intoxicated and Officer Ohler could not smell any alcohol. Officer Ohler testified that the victim's vehicle was not dusted for fingerprints, concluding, "there was really no need to, since the perpetrator in this case was actually followed by a witness and then obtained while still in the [witness's] view...."

Considering the circumstances present in this case, we are convinced that the evidence presented negated any reasonable probability of misidentification. Although the witnesses could not see the perpetrator's face as he sat in the victim's vehicle, they were certain that he was the same person fully observed moments later in the parking lot in the proximity of the victim's vehicle. Guerra lost sight of the perpetrator only during the moments in which he ran downstairs to the parking lot. Although Guerra instructed the defendant to stop, the defendant quickly walked away from the scene. Guerra followed and observed the perpetrator up to the moment of his arrest. The defendant was positively identified as the perpetrator. The defendant hypothesizes that, although observed in the parking lot, he was not the same individual who was observed in the victim's vehicle. The jury apparently rejected this hypothesis. Based on the

witnesses' description of the defendant's attire, as it was observed during and immediately after the intrusion, the defendant's comments upon confrontation, and the witnesses' high level of certainty in their identification, we find such a rejection reasonable. Viewing all the evidence in the light most favorable to the state, we conclude the state proved beyond a reasonable doubt all of the elements of simple burglary and the defendant's identity as the perpetrator of the offense. Assignments of error numbers one, two, and three lack merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth and final assignment of error, the defendant avers that the instruction on flight given by the trial court was not supported by the evidence presented. The defendant avers that the instruction was erroneous and confused the jury. In contending that the error was not harmless, the defendant avers that the evidence presented was solely circumstantial.

Prior to the jury charge, the defendant objected to the inclusion of an instruction on flight. The state argued that the instruction was based upon the testimony of the witnesses who indicated the defendant fled the scene after the witnesses came out of the building and confronted him. The trial court overruled the defendant's objection, and the jury instructions included the following:

> If you find the defendant fled immediately after a crime was committed or after he was accused of a crime, the flight alone is not sufficient to prove the defendant is guilty.
>
> However, flight may be considered along with all other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt.

The ruling of the trial court on an objection to a portion of its charge to the jury will not be disturbed unless the disputed portion, when considered in connection with the remainder of the charge, is shown to be both erroneous and prejudicial. ***State v. Butler***, 563 So.2d 976, 988 (La. App. 1st Cir.), writ denied, 567 So.2d 609 (La. 1990). If there is testimony of flight after the crime was committed and the jury charge regarding flight is brief when considered in connection with the remainder of the charge, the instruction is neither erroneous

nor prejudicial. ***State v. Bell***, 97-896 (La. App. 5th Cir. 10/14/98), 721 So.2d 38, 41, writs denied, 98-2875 and 98-2890 (La. 3/12/99), 738 So.2d 1085.[4] Some erroneous jury instructions are subject to harmless error review. ***State v. Jynes***, 94-745 (La. App. 5th Cir. 3/1/95), 652 So.2d 91, 98. The appropriate standard for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the instant trial was surely unattributable to the error. ***State v. James***, 95-566 (La. App. 5th Cir. 11/28/95), 665 So.2d 581, 584 (citing ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

Both state witnesses testified that the defendant quickly left the scene by foot. The victim specifically stated that the defendant was "walking away pretty quick." He later described the defendant's departure as "walking fastly." Guerra stated that the defendant was walking away at a fast pace when they approached him in the parking lot. The defendant turned his face toward the victim and Guerra, and Guerra instructed the defendant to stop. The defendant did not stop. As there was testimony that the defendant quickly left the scene of the burglary after the crime was committed, arguably the instruction on flight was not erroneous. See ***State v. Jones***, 02-1168 (La. App. 4th Cir. 1/29/03), 839 So.2d 377, 380; ***State v. Washington***, 99-1111 (La. App. 4th Cir. 3/21/01), 788 So.2d 477, 487, writ denied, 01-1096 (La. 5/31/02), 816 So.2d 866 (albeit in the context of reasonable suspicion for an investigatory stop, flight by walking away was noted, in part, in finding reasonable suspicion).[5] Moreover, because of the brevity of this instruction, when considered in connection with the remainder of the charge, the instruction on flight was not prejudicial. Based on the record before

---

[4] The jurisprudence indicates that the jury may consider evidence of flight from the scene of a crime whether or not law enforcement personnel are involved. ***State v. Berry***, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 459, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603; see also ***State v. Davies***, 350 So.2d 586, 588-89 (La. 1977).

[5] Also, in ***Davies***, the supreme court noted as follows pertaining to flight: "[t]he term signifies, in legal parlance, not merely a leaving, but a leaving or concealment under a consciousness of guilt and for the purpose of evading arrest. Such consciousness and purpose is that which gives to the act of leaving its real incriminating character." ***Davies***, 350 So.2d at 588-89.

us, we find that the guilty verdict was amply supported by the other testimony. The guilty verdict rendered in the instant trial was surely unattributable to the disputed portion of the jury charge. This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.