NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1037

STATE OF LOUISIANA

VERSUS

PARRISH NEWMAN

Judgment Rendered: December 28, 2006

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 05-04-0277
Honorable Richard Anderson, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

The defendant, Parrish Newman, was charged by bill of information with one count of attempted armed robbery in violation of LSA-R.S. 14:27 and 14:64, three counts of armed robbery in violation of LSA-R.S. 14:64, three counts of first degree robbery in violation of LSA-R.S. 14:64.1, one count of attempted first degree robbery in violation of LSA-R.S. 14:27 and 14:64.1, and one count simple robbery in violation of LSA-R.S. 14:65. Prior to trial, the State dismissed the attempted armed robbery charge. The charges were then renumbered as follows: count one, armed robbery of Robert Beaulieu; count two, armed robbery of Helen Taylor; count three, first degree robbery of Gabriel Wolfe; count four, armed robbery of Melinda Smart; count five, first degree robbery of Cassie Alexander; count six, simple robbery of Margaret Luckett; count seven, first degree robbery of Kimberly Washington; and count eight, attempted first degree robbery of Morteza Parandian.

Following a jury trial, the defendant was found not guilty on count one; guilty as charged on count two; guilty as charged on count three; guilty as charged on count 4; guilty of the responsive offense of simple robbery on count five; guilty as charged on count six, guilty as charged on count seven; and guilty of the responsive offense of attempted simple robbery (a violation of LSA-R.S. 14:27 and 14:65) on count eight. He was sentenced to imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence for ninety-nine years on each of the armed robbery convictions (counts two and four), forty years at hard labor without benefit of probation, parole, or suspension of sentence on each of the first degree robbery convictions (counts three and seven), seven years at hard labor on each of the simple robbery convictions (counts five and six), and three and

one-half years at hard labor on the attempted simple robbery conviction (count eight). The trial court ordered that all of the sentences run concurrently.

Thereafter, the State filed a multiple offender bill of information seeking to have the defendant adjudicated as a habitual felony offender under LSA-R.S. 15:529.1. Following a hearing, the trial court found the defendant to be a fourth felony habitual offender, vacated the sentence imposed for the armed robbery of Melinda Smart,[1] and resentenced the defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

The defendant now appeals, urging three assignments of error as follows:

> 1. The trial judge erred in allowing the [S]tate to introduce evidence of [the defendant's] invocation of his right to remain silent following his arrest.
>
> 2. The evidence was insufficient to establish that [the defendant] was the person who attempted to rob Morteza Parandian.
>
> 3. [The defendant] was convicted by a non-unanimous verdict in violation of the United States Constitution.

FACTS

On several dates, beginning October 26, 2003 and ending March 16, 2004, an individual identified as the defendant, committed robberies at eight business establishments in the Baton Rouge area. During each robbery, the perpetrator approached the clerk/attendant and presented a note demanding money.[2] Once the clerk/attendant turned over the money, the defendant fled.

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[1] The habitual offender bill of information lists the armed robbery of Melinda Smart as "Count 5" when this particular robbery is actually trial count four.

[2] Because the defendant only challenges the sufficiency of the evidence to support the conviction of attempted simple robbery of Morteza Parandian, the facts surrounding the other robberies will not be discussed in detail.

During each of the offenses, the defendant either brandished a handgun or led the clerk/attendant to believe he was armed with a weapon. Each of the victims described the perpetrator as a black male with a disfigured eye. They all identified the defendant as the perpetrator from photographic line-ups.

When the defendant entered the Chevron station on College Drive, on or about March 16, 2004, and handed the robbery note to Morteza Parandian, the robbery attempt was unsuccessful. Upon receiving the note, Mr. Parandian advised the defendant he could not read English. The defendant then verbally advised Mr. Parandian of his intent to rob him and demanded money. Mr. Parandian refused to give the defendant the money and told him to "get out of here." Before leaving the store the defendant said, "Okay. It's cool. I'm okay." Mr. Parandian did not see a gun during the encounter. Mr. Parandian immediately reported the incident to his manager. Because nothing was taken from the store, the incident was not reported to the police that day. Several days later, when Mr. Parandian's manager observed a news report of an individual robbing a service station with a note, he realized that the facts of that offense were identical to those Mr. Parandian described to him. The manager contacted the police. The robbery attempt was captured on videotape.

POST-ARREST SILENCE

In his first assignment of error, the defendant contends the district court erred in allowing the State to introduce evidence of the defendant's invocation of his right to remain silent following his arrest.

In **Doyle v. Ohio**, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use, for impeachment purposes, of petitioner's silence at the time of arrest and after

receiving the **Miranda**[3] warnings, violates the Due Process Clause of the Fourteenth Amendment. See also **Portuondo v. Agard**, 529 U.S. 61, 74-75, 120 S.Ct. 1119, 1128, 146 L.Ed.2d 47 (2000). However, it is not every mention of the defendant's post-arrest silence that is prohibited by **Doyle**. As explained by the Louisiana Supreme Court, in **State v. George**, 95-0110, p. 9 (La. 10/16/95), 661 So.2d 975, 980, "*Doyle* condemns only 'the use **for impeachment purposes** of [the defendant's] silence at the time of arrest, and after receiving *Miranda* warnings... .'" The prosecutor may not use the fact of an accused's exercise of his constitutional right to remain silent, after he has been advised of this right, solely to ascribe a guilty meaning to his silence or to undermine, by inference, an exculpatory version related by the accused, for the first time at trial. **State v. Arvie**, 505 So.2d 44, 46 (La. 1987). Notwithstanding, a brief reference to post-**Miranda** silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use of the silence for impeachment. See **State v. Smith**, 336 So.2d 867, 868-70 (La.1976). See also **State v. Stelly**, 93-1090 (La. App. 1 Cir. 4/8/94), 635 So.2d 725, 729, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309.

Our review of the record reveals that Detectives Tillman Cox and Kenneth Bowman of the East Baton Rouge Parish Sheriff's Office testified regarding the investigation of the instant offenses. During Detective Cox's testimony, counsel for the defense, without articulating any specific basis, moved to suppress a statement made to the officers by the defendant during the investigation. Counsel stated:

> Your honor, before the testimony begins right there, I anticipate what the testimony will be, and although I do not consider the statements made by the defendant to necessarily be

[3] **Miranda v. Arizona**, 384 U.S. 436, 467-73, 86 S.Ct. 1602, 1624-27, 16 L.Ed.2d 694 (1966).

> inculpatory, then I think out of an abundance of caution I would go ahead and make an oral motion to suppress and let the court rule on that after the testimony and examination of the officer on the stand.

Thereafter, a hearing on the motion to suppress was held outside the presence of the jury.

During the hearing, Detective Cox testified that, in response to questioning regarding the robberies in question, the defendant stated, "I'm not going to sit here and admit to you that I've done any of these robberies. I'm not telling you that I have done them, or have or have not done them, but I'm not going to sit here and admit to you that I have done it. It's not beneficial for me to admit to this." At the conclusion of the suppression hearing, the trial court ruled the statement admissible.

On appeal, the defendant contends the trial court erred in allowing the State to introduce evidence of his exercise of his post-arrest silence. He argues the statement he made to the officers was a direct invocation of his right to remain silent after his arrest and should not have been allowed.

Upon reviewing the record before us, we find that while the defendant did object to the admissibility of the contested statement during Detective Cox's examination at the hearing on the motion to suppress, the general objection appears to have been made to the introduction of the statement based upon its potentially inculpatory nature. This objection, which the trial court overruled, does not appear to have had anything to do with any impermissible references to the defendant's post-arrest silence following **Miranda** warnings. The statement was not inculpatory and was not used for impeachment. Any error in allowing the statement was harmless.

This assignment of error lacks merit.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, the defendant contends the evidence presented at trial was insufficient to support the attempted simple robbery conviction in count eight.[4] Specifically, the defendant argues that the evidence presented at trial failed to prove, beyond a reasonable doubt, his identity as the individual who entered the Chevron and attempted to rob Morteza Parandian. The defendant argues his conviction on this particular offense cannot stand because the evidence was insufficient to negate the probability of a misidentification.

The standard for appellate review of the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821(B), 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 the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Hendon**, 94-0516, p. 4 (La. App. 1 Cir. 4/7/95), 654 So.2d 447, 449. Where the key issue in a case is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification in order to meet its burden of proof. **State v. Millien**, 2002-1006, pp. 2-3 (La. App. 1 Cir. 2/14/03), 845

[4] The defendant does not challenge the sufficiency of the evidence in support of the other six convictions.

So.2d 506, 509. However, positive identification by only one witness may be sufficient to support a defendant's conviction. **State v. Coates**, 2000-1013, p. 3 (La. App. 1 Cir. 12/22/00), 774 So.2d 1223, 1225.

In the instant case, the defendant does not dispute that the robbery attempt was committed against Mr. Parandian. Rather, he only challenges the identification.[5] The defendant argues Mr. Parandian's identification of him as the gunman should be discredited because: (1) the police never showed Mr. Parandian a photographic lineup; (2) the only physical characteristic Mr. Parandian could recall at trial was a disfigured eye; (3) the video of the offense was not of sufficient quality to make a positive facial identification; and (4) Mr. Parandian's identification of him in open court at trial was equivocal.

The record reflects that during the trial, when asked if the individual who attempted to rob him was present in the courtroom, Mr. Parandian stated, "Looks – I'm too old. Looks like this guy in the corner. Looks like him." Mr. Parandian further testified that he described the perpetrator to the police upon making the report. The defendant was described as a black male with some problem with his eye. Unlike the other robbery victims, Mr. Parandian did not make a pretrial identification of the defendant.

The defendant did not testify or present any alibi evidence at trial.

Considering the foregoing, it is clear that the jury was made aware of the fact that Mr. Parandian did not identify the defendant in any pretrial identification procedures. The jury was also privy to Mr. Parandian's less than unequivocal in-court identification. Thus, it was up to the jury to decide what weight, if any, would be given to the identification. The guilty

[5] Since defendant has only alleged the State failed to prove his identity as the perpetrator of the crime, we need not address the sufficiency of the evidence with respect to the statutory elements of attempted first degree robbery and/or attempted simple robbery.

verdict indicates that the jury, after considering the entirety of the evidence, rejected the defendant's theory of mistaken identity. Despite Mr. Parandian's less than unequivocal in-court identification, the jury apparently considered the identification in conjunction with his description of the defendant's disfigured eye (which is apparent in the defendant's photo). Therefore, viewing the evidence in the light most favorable to the State, we are convinced that a rational trier of fact could have concluded, beyond a reasonable doubt, that the evidence was sufficient to negate any reasonable probability of misidentification and that defendant was the perpetrator. This assignment of error lacks merit.

NON-UNANIMOUS JURY VERDICT

In his third assignment of error, the defendant asserts the trial judge erred in accepting non-unanimous jury verdicts as legal. Specifically, the defendant argues that, in light of recent jurisprudence, LSA-C.Cr.P. art. 782 and LSA-Const. art. I, § 17 (providing for jury verdicts of 10 to 2 in cases in which punishment is necessarily confinement at hard labor) violate the Sixth and Fourteenth Amendments of the United States Constitution. Thus, the defendant argues that the 11 to1 jury verdicts, which found him guilty on the armed robbery charge (counts 2 and 4), and the 10 to 2 verdict on the attempted first degree robbery count which found him guilty of the responsive offense of attempted simple robbery (count 8) are unconstitutional.

The punishment for armed robbery is confinement at hard labor. See LSA-R.S. 14:64(B). The punishment for attempted first degree robbery is also confinement at hard labor. See LSA-R.S. 14:27(D)(3) and 14:64.1(B). Louisiana Constitution article I, § 17(A) and LSA-C.Cr.P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case

shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 164-65.

The defendant's reliance on **Blakely v. Washington**, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) is misplaced. These Supreme Court decisions do not address the issue of the constitutionality of a non-unanimous jury verdict; rather, they address the issue of whether the assessment of facts in determining an increased penalty for a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. These decisions, thus, stand for the proposition that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See **Apprendi v. New Jersey**, 530 U.S. at 490, 120 S.Ct. at 2362-2363. Nothing in these decisions suggests that the jury's verdict must be unanimous. Accordingly, LSA-Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782(A) are not unconstitutional and, hence, not violative of the defendant's Sixth Amendment right to trial by jury.

Furthermore, we note that appellate counsel has repeatedly raised this issue before this court. In each case, the identical argument has been rejected by this court. See **State v. Caples**, 2005-2517, p. 15 (La. App. 1 Cir. 6/9/06), 938 So.2d 147. This assignment of error is without merit.

For the reasons stated herein, the defendant's convictions, habitual offender adjudication, and sentences are affirmed.

CONVICTIONS AFFIRMED; HABITUAL OFFENDER ADJUDICATION AND SENTENCES AFFIRMED.