NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0004

STATE OF LOUISIANA

VERSUS

GARY WAYNE SLAYDON, JR.

Judgment rendered: MAY - 7 2010

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Docket No. 440995; Section "I"
The Honorable Reginald T. Badeaux, Judge Presiding

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BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

The defendant, Gary Wayne Slaydon, Jr., was charged by bill of information with aggravated burglary (Count 1), a violation of La. R.S. 14:60, armed robbery (Count 2), a violation of La. R.S. 14:64, and attempted second degree murder (Count 3), a violation of La. R.S. 14:27 and 14:30.1. He pleaded not guilty to the charges. Following a jury trial, the defendant was found guilty as charged on all three counts. The defendant filed motions for new trial and post-verdict judgment of acquittal, which were denied. A multiple offender bill of information was subsequently filed. For each of his three convictions, the defendant was sentenced to twenty years at hard labor without benefit of parole, probation, or suspension of sentence, with the sentences to run concurrently. At the habitual offender hearing, the defendant was adjudicated a third-felony habitual offender on all three convictions. The trial court vacated the three previous twenty-year sentences and sentenced the defendant to twenty-five years at hard labor without benefit of parole, probation, or suspension of sentence on the aggravated burglary conviction; sixty-seven years at hard labor without benefit of parole, probation, or suspension of sentence on the armed robbery conviction; and thirty-four years at hard labor without benefit of parole, probation, or suspension of sentence on the attempted second degree murder conviction. The sentences were ordered to run concurrently. The defendant now appeals, designating three assignments of error. We affirm the convictions and habitual offender adjudications. We affirm the armed robbery sentence (Count 2) and the attempted second degree murder sentence (Count 3). Finally, we vacate the aggravated burglary sentence and remand for resentencing.

FACTS

On November 17, 2007, two men entered Luther Hickman's home, probably sometime around midnight, while Luther was sleeping. Luther lived in an area off Louisiana Highway 433 at the Rigolets in Slidell. Luther's house and the houses

nearby were built on pilings and flanked a bayou, which leads to the mouth of Lake Pontchartrain.

As Luther slept in his upstairs bedroom, the two men began beating him with tree branches. When Luther awoke, they continued to beat him, mostly on his head, and demanded that Luther give them his wallet or they would kill him. At trial, Luther identified his two assailants as the defendant and Paul Gafford. The defendant, who was also known as "Fuzzy," was living at the house of John Fabacher, who lived two houses down from Luther. The defendant told Luther he had a gun. Luther told them that his money was downstairs. Luther actually did not have money downstairs, but lied to gain a reprieve from the beatings. The assailants dragged Luther downstairs. Luther lied again and told them his wallet was in his fifth-wheel trailer outside. The defendant left Gafford with Luther and headed toward Luther's trailer. Gafford held Luther at bay with his tree branch and told Luther they would kill him if he did not give them the money. At that moment, Luther ran and dove into the bayou. He swam the length of several houses. When he got out of the water, he ran to the house of his neighbors, Earnest Pilgreen and his wife, Jeanie, who lived three houses down from Luther. Earnest and Jeanie found Luther at their door bleeding profusely. They rendered aid, and Jeanie called 911.

Deputy Ed Vautier, of the St. Tammany Parish Sheriff's Office, testified at trial that he was dispatched to the scene and found Luther brutally injured. Luther gave Deputy Vautier the names of his assailants. He told the deputy that one of the persons who beat him was Fuzzy. Shortly thereafter, Gafford was detained. Deputy Vautier, along with other deputies, entered Fabacher's house to find the defendant. There were about twenty people inside the house. Unable to find the defendant, Deputy Vautier had Fabacher's house emptied of all the male occupants. After speaking with the males outside, Deputy Vautier suspected the defendant was still inside the house. Deputy Vautier decided to check the attic. He found the defendant

lying down in the attic between two air-conditioning vents. The defendant was apprehended.

Luther testified at trial that about a week before the night he was attacked, he went fishing with Fabacher. When they returned from fishing, Luther encountered Gafford. Gafford was upset with Luther over a girl Gafford was dating and whom Luther had dated in the past. Gafford and Luther exchanged words and began fighting. The defendant broke up the fight. Luther considered the matter ended.

Luther also testified about the injuries he sustained from the beatings by the defendant and Gafford. Luther suffered a broken arm and a broken jaw in two places. His jaw was wired shut, and he did not eat for two months, losing forty pounds. At the time of trial he had plastic plates in the bottom of his face. He received stitches for injuries to his leg, chin, and head. Also, another part of his head required staples.

Luther further testified that when he returned home from the hospital the day after being attacked, Fabacher approached him and gave him his (Luther's) keys and debit card. Anthony Roullier also approached Luther and gave him his (Luther's) ring and chain, which Luther kept in a stand next to the bed where he slept. Luther kept the debit card in a metal can, which sat atop the stand next to his bed. Fabacher and Roullier told Luther the defendant had taken his property. Luther also noticed on his return home from the hospital that the defendant and Gafford had gone through several parts of his house. Luther admitted that the defendant and Gafford ransacked his house while he was still sleeping. Luther also admitted that he had three marijuana convictions, "mostly when [he] was younger."

Fabacher testified at trial that after Luther went to the hospital, and the defendant and Gafford had been arrested, Fabacher noticed Luther's keys in the lap of Amber, his stepdaughter and the defendant's girlfriend. Fabacher also saw a wallet, which he thought was Luther's. The wallet actually belonged to the defendant, but

Luther's debit card was in the defendant's wallet. Fabacher took the debit card and the keys and returned them to Luther.

The defendant testified at trial. He denied any involvement in the attack on Luther. He stated that he did not go inside or break into Luther's house, and he did not hit Luther. He testified that Luther and Gafford had an altercation seven to ten days before Luther was attacked in his home. According to the defendant, Luther and Gafford had also been in a fight earlier the same night that Luther was attacked. That night, Gafford called the defendant looking for some marijuana. The defendant told Gafford to come over. According to the defendant, he had been purchasing marijuana from Luther for the past two months. Sometime after 11:00 p.m., Gafford drove up, but did not enter the defendant's (Fabacher's) house. Someone in the defendant's house told the defendant that Gafford was outside fighting with Luther. The defendant broke up the fight and told Gafford to leave. Luther, who was bleeding either from his nose or mouth, went home. The defendant went back inside. After about fifteen minutes, when the defendant had not heard Gafford start up his car, the defendant went back outside. He did not see Gafford. Thinking that Gafford went to Luther's house, the defendant began running in that direction. As the defendant passed his first neighbor's house, he saw Gafford leaving Luther's driveway, covered in blood. Gafford told the defendant that Luther was in the bayou. The defendant went back inside and told Amber what happened. The police had already begun to arrive, and the defendant hid in the attic because he did not want to go to jail for a parole violation or for having anything to do with what had happened. The defendant had a prior conviction for escape and a prior conviction for unauthorized use of a motor vehicle.

ASSIGNMENTS OF ERROR 1, 2 and 3

In these three assignments of error, the defendant argues the evidence was insufficient to support the convictions. Specifically, the defendant contends the State

did not prove the elements of the armed robbery because the things of value were taken prior to the use of force or intimidation upon Luther. The defendant further contends that his identity as one of the perpetrators was not established at trial. Aside from the identification issue, the defendant does not challenge the sufficiency of the aggravated burglary conviction or the attempted second degree murder conviction.[1]

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any 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 La. C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue 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. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibility of the witnesses, and this court will generally not second-guess

[1] In his first assignment of error, the defendant argues the evidence was insufficient to support the conviction. The defendant filed a motion for a new trial, which was denied. In his second assignment of error, the defendant argues the trial court erred in denying the motion for new trial. The defendant's appeal addresses the sufficiency of the evidence. Sufficiency is properly raised by a motion for post-verdict judgment of acquittal, not by a motion for new trial. Under La. C.Cr.P. art. 851(1), the trial court can consider only the weight of the evidence, not the sufficiency. See **State v. Williams**, 458 So.2d 1315, 1324 (La. App. 1st Cir. 1984), writ denied, 463 So.2d 1317 (La. 1985). We find no abuse of discretion in the instant matter of the trial court's denial of the defendant's motion for new trial. In his third assignment of error, the defendant argues the trial court erred in denying "the motion for judgment not withstanding [sic] the verdict." The proper motion, which was in fact filed, was a motion for post-verdict judgment of acquittal. See La. C.Cr.P. art. 821.

those determinations. See **State v. Hughes**, 05-0992, pp. 5-6 (La. 11/29/06), 943 So.2d 1047, 1051.

La. R.S. 14:64(A) provides:

> Armed robbery is the taking of anything of value belonging to another 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.

Regarding the identity issue, the defendant contends that Luther's identification of him as one of the perpetrators is unreliable because of the injuries Luther suffered, including blows to the head and face. The defendant suggests that the small amount of blood found on his (defendant's) jeans was due to the defendant's breaking up a bloody fight between Luther and Gafford earlier that same night that Luther was attacked. Gafford, on the other hand, had Luther's blood on both of his hands and his clothes. It is the blood evidence, according to the defendant, that suggests Gafford was responsible for the vicious attack. Also, when Gafford gave a statement to the police after his arrest, Gafford did not implicate the defendant.

Luther testified at trial that about a week before the night he was attacked, he and Gafford got in a small fight. After that, Luther did not see Gafford again until a week later when Gafford was in his room with the defendant beating him. Fabacher testified at trial that a week to ten days before the incident, Luther and Gafford had gotten into a fight. From the time of that fight until the instant offenses, Fabacher had not seen any further fighting between Luther and Gafford. Luther also testified that when he got to the house of his neighbors, the Pilgreens's, and he told them that Paul and Fuzzy tried to rob and kill him. Earnest Pilgreen testified that when Luther came to his house for help, Luther told him that Fuzzy and Paul had beaten him with a ball bat and a stick. Jeanie Pilgreen testified at trial that Luther told her that Fuzzy and Paul had beat him up. Luther testified at trial that Fuzzy and Paul were the two people in his house that beat him. Luther further identified the defendant in court as one of the perpetrators.

Ten days after the incident, Luther identified the defendant and Gafford in police photographic lineups as the two men who attacked him in his home. Regarding the photographic lineups, the prosecutor asked Luther, "Were you positive in your identification of both Gary Slaydon, who you knew as Fuzzy, as well as Paul Gafford? Were you positive?" Luther responded, "Positive. Man, there never was no if, and, or butts [sic], or anything about who it was. They didn't have no mask on. They didn't try to disguise themselves, you know. I mean, it was them." (R. p. 358).

DNA evidence was introduced at trial. The blood found on the tree branches used to beat Luther was consistent with Luther's DNA. The handles (those parts that had less blood) of the tree branches were tested for contact (not blood) DNA. On one of the branch handles, there was only a partial profile consistent with Luther's DNA. On the other branch handle, there was too much of Luther's blood on it. Therefore, any effort to get contact DNA free and separate from Luther's blood was not successful. The defendant's blue jeans that he was wearing the night Luther was attacked had bloodstains on them. Five samples of blood from the defendant's blue jeans were tested. Four of those samples tested were consistent with the DNA profile of Luther Hickman. The fifth sample, which had significantly less DNA in it than the other four samples, was a partial profile consistent with the DNA of the defendant.

In finding the defendant guilty, it is clear the jury rejected the defendant's theory of misidentification. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from

acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

Luther identified the defendant to his neighbors, to Deputy Vautier, at trial, and in a police photographic lineup. Luther's testimony, coupled with the DNA evidence, clearly established the identity of the defendant as one of the perpetrators who entered his home, beat him with a tree branch, threatened to kill him if he did not give him money, and took Luther's ring, chain, keys, and debit card.

We note that when the police arrived at Fabacher's house, the defendant hid in the attic from the police. Flight following an offense reasonably raises the inference of a "guilty mind." **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984).

The defendant's other argument in these assignments of error is that the record is devoid of any evidence that anything of value was taken from Luther's person or from his immediate control through the use of force or intimidation while the offender was armed with a dangerous weapon. Specifically, the defendant contends that the force must occur prior to the taking for there to be an armed robbery. According to the defendant, if there was a taking of anything of value by the two men, the taking was while Luther was sleeping and prior to him being beaten. Since the force (the beating) that occurred after any alleged taking, the defendant argues that there is no evidence to support the armed robbery conviction.

The use of force or intimidation does not have to occur before, or contemporaneous with, the taking. The force or intimidation element of robbery is satisfied by evidence that force or intimidation directly related to the taking occurred in the course of completing the crime. **State v. Meyers**, 620 So.2d 1160, 1162-63 (La. 1993).

Luther was awakened by the defendant and Gafford beating him with tree branches, demanding that he give them his wallet or they would kill him. Instead of money, the defendant and Gafford took Luther's keys, ring, chain, and debit card. At what particular object the force or intimidation may have been originally directed is irrelevant. Thus, despite the defendant and Gafford not finding what they were apparently looking for (Luther's money), they nevertheless took items of value belonging to Luther by use of force or intimidation while armed with tree branches. It is not clear from the record when Luther's ring, chain, debit card, and keys were taken - before or after Luther was awakened. It is probable, however, that since three of the items taken were right next to where Luther was sleeping, they were taken after Luther was awakened.

In any event, even if the defendant (or Gafford) took Luther's property before Luther was awakened the defendant still committed an armed robbery.[2] A rational juror could have reasonably concluded that property taken by the defendant (or Gafford) was in the immediate control of Luther. See **State v. Baldwin**, 388 So.2d 664, 677 (La. 1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 901, 66 L.Ed.2d 830 (1981). See also **State v. Cooks**, 97-0999, p. 28 (La. 9/9/98), 720 So.2d 637, 652, cert. denied, 526 U.S. 1042, 119 S.Ct. 1342, 143 L.Ed.2d 505 (1999) (armed robbery may occur where property taken is not in actual contact with the victim). Further, a rational juror could have concluded beyond a reasonable doubt that the defendant used force or intimidation by beating Luther, initially to take his money, and then to retain possession of Luther's property, and to effect an escape from the scene. This force or intimidation was directed at the victim of the taking at the place of the taking and immediately after the taking of the property, and a rational juror could have concluded that the force or intimidation occurred in the course of the defendant's

[2] Whether defendant *physically* engaged in the actual taking of Luther's property (as opposed to directing a confederate to do so) is not important. The evidence clearly revealed his participation in the crime as a principal. La. R.S. 14:24. See **State v. Boelyn**, 432 So.2d 260, 262 n.2 (La. 1983).

committing a robbery. See **Meyers**, 620 So.2d at 1163. The State proved beyond a reasonable doubt that the defendant committed an armed robbery.

After a thorough review of the record, we find that the evidence supports the guilty verdicts. We find also that the evidence negates any reasonable probability of misidentification. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of aggravated burglary, armed robbery, and attempted second degree murder.

These assignments of error are without merit.

SENTENCING ERROR

Under La. C.Cr.P. art. 920(2), which, limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we have discovered a sentencing error. In sentencing the defendant, the trial court indicated that the sentences for all three convictions were to be served without benefit of parole, probation or suspension of sentence.[3] The sentence for an aggravated burglary conviction contains no parole prohibition. See La. R.S. 14:60. Thus, the denial of parole eligibility on the defendant's third-felony habitual offender sentence for the aggravated burglary conviction is unlawful. It is not sufficient to merely remove the illegal condition, since the twenty-year to sixty-year sentencing range involves discretion. See La. R.S. 15:529.1(A)(1)(b)(i). Accordingly, this sentence must be vacated and the matter remanded to the trial court for resentencing on the aggravated burglary conviction (Count 1).

DECREE

For the foregoing reasons, we affirm convictions and habitual offender adjudications, affirm the armed robbery sentence (count 2) and the attempted second

[3] The minutes reflect the sentences are to be served without benefit of probation or suspension of sentence. (R. p. 34). When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

degree murder sentence (count 3), vacate aggravated burglary sentence (count 1), and remand for resentencing on the aggravated burglary conviction.

CONVICTIONS AND HABITUAL OFFENDER ADJUDICATIONS AFFIRMED; ARMED ROBBERY SENTENCE (COUNT 2) AND ATTEMPTED SECOND DEGREE MURDER SENTENCE (COUNT 3) AFFIRMED; AGGRAVATED BURGLARY SENTENCE (COUNT 1) VACATED; REMANDED FOR RESENTENCING ON AGGRAVATED BURGLARY CONVICTION