NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 0401

STATE OF LOUISIANA
VERSUS
JOE WASHINGTON

Judgment Rendered: November 2, 2012

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 03-11-0290

Honorable Louis R. Daniel, Judge Presiding

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BEFORE: WHIPPLE, McCLENDON AND HIGGINBOTHAM, JJ.

WHIPPLE, J.

The defendant, Joe Washington, was charged by bill of information with simple burglary, a violation of LSA-R.S. 14:62. He pled not guilty and, following a jury trial, was found guilty as charged. The State subsequently filed a habitual offender bill of information. A hearing was held on the matter, and the defendant was adjudicated a fourth-felony habitual offender. The trial court sentenced the defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On the night of October 15, 2010, Paul Edwards, Sr., and several of his friends were tailgating at a Scotlandville High School football game. Outside the stadium, Edwards watched the game from a hill that was in back of the stadium. During the fourth quarter, Edwards noticed a person, later identified as the defendant, inside a parked, white Chevrolet Tahoe near the hill. The Tahoe belonged to Scotlandville High School student Garen Lemon. The defendant, sitting in the front seat with the driver's side door open, was rummaging around in the backseat of the Tahoe. Edwards observed the defendant get out of the Tahoe with a book bag and quickly walk toward a wooded area. The defendant was dropping items, such as books and papers, while he was walking. The defendant then walked into the nearby woods and stopped and smoked a cigarette. Edwards testified at trial that the defendant was wearing a red jacket and a red and blue shirt. Edwards also testified that the person the police had taken out of the woods was the same person Edwards had seen in the Tahoe. Edwards positively identified the defendant in court as the person he saw in Lemon's Tahoe.

When Edwards first saw the defendant walking away from the Tahoe, he

pointed the defendant out to his friend, Theresa Griffin. Griffin testified at trial that the person Edwards showed her had on jeans and a jacket and was carrying a book bag. Griffin called 911, and shortly thereafter, the police arrived and apprehended the defendant in the wooded area near the hill. The defendant was wearing a red and blue striped shirt, but no jacket. Two book bags, papers, notebooks, books, a watch, clothes, Nike shoes, and a PSP game system were taken from Lemon's truck. Police recovered some of the items from the wooded area. One of the book bags, a school uniform, the shoes, and the PSP were not recovered. No items were found on the defendant. Griffin positively identified the defendant in court as the person she saw walking away from the Tahoe carrying a book bag.

Officer Daniel Iverson, with the Baton Rouge Police Department, was dispatched to the scene with a description of the defendant. Within minutes of arriving, Officer Iverson apprehended the defendant in the woods. The defendant was handcuffed and detained in the officer's patrol unit. Officer Iverson did not personally speak to Edwards, but information was relayed to him that Edwards had identified the person in police custody as the same individual he had seen earlier in Lemon's Tahoe.

The defendant testified at trial that he was fifty-six years old, lived with his parents, and was a 1972 Scotlandville High alumnus. He stated that he left his parents' house that night and walked to the game. After the game, he was walking back home and passed the hill where Edwards had been tailgating. When the defendant got to Jones Street, near the edge of the wooded area, he was stopped by the police. He was handcuffed and placed in a police unit. Several minutes later, and after items were found, the defendant was arrested. The defendant denied going into a vehicle and taking items. The defendant had prior convictions for armed robbery, simple burglary of a house (that was blocks away from the instant

simple burglary), and several felony thefts. At the time of trial, the defendant was on parole after serving two-and-one-half years in prison for other offenses.[1]

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to prove that he was the person seen in the Tahoe.

The defendant asserts in his brief that, while Edwards claimed to have seen him inside of the Tahoe, Edwards also testified that the interior light of the vehicle never came on. The defendant further asserts that the lighting was "relatively poor" where the burglary took place and that Griffin did not see the Tahoe being burglarized, but only observed the person who Edwards had pointed out to her. The main thrust of the defendant's entire argument, however, is that the identification of the defendant at the scene by Edwards and Griffin was unduly suggestive and that there was a substantial likelihood of misidentification. After the defendant was placed in a police unit, Edwards identified the defendant in a one-on-one "show up" as the person he had seen in the Tahoe. Griffin testified that the person she saw handcuffed - the defendant - was the same person she had seen near the Tahoe. Defendant further challenges the sufficiency of the evidence regarding the witnesses' in-court identification. According to the defendant, since his identity was firmly, but erroneously established in the minds of Edwards and Griffin, these two witnesses showed no hesitation in identifying the defendant in court.

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[1]The presentence investigation report indicates that on July 22, 2008, the defendant pled guilty to felony theft and simple battery and was sentenced to five years imprisonment at hard labor.

In support of his misidentification argument, the defendant cites the five-factor test in determining the reliability of identification of a suspect discussed in Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977), and Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972). The defendant's reliance on these Supreme Court decisions is misplaced. These decisions are concerned with the admissibility, not the sufficiency, of identification testimony. Once the identification testimony is introduced into evidence, as in the instant matter, an analysis under Brathwaite is not required. Specifically, Brathwaite addresses whether or not pretrial identification evidence should be excluded. The issue, the Brathwaite Court noted, was whether the Due Process Clause compelled the exclusion, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was suggestive and unnecessary. Brathwaite, 432 U.S. at 99, 97 S. Ct. at 2245. Moreover, the defendant herein did not file a pretrial motion to suppress the identifications by the witnesses, nor did he object to the admission of identification testimony at trial. A defendant who fails to file a motion to suppress identification, and who fails to object at trial to the admission of the identification testimony, waives the right to assert the issue on appeal. State v. Moody, 2000-0886 (La. App. 1st Cir. 12/22/00), 779 So. 2d 4, 8, writ denied, 2001-0213 (La. 12/7/01), 803 So. 2d 40. See LSA-C.Cr.P. art. 703(D), 703(F) & 841(A); LSA-C.E. art. 103(A)(1); State v. Wilkerson, 261 La. 342, 259 So. 2d 871 (1972). See also State v. Boyance, 2005-1068 (La. App. 3rd Cir. 3/1/06), 924 So. 2d 437, 440, writ denied, 2006-1285 (La. 11/22/06), 942 So. 2d 553; State v. Brooks, 633 So. 2d 659, 663 (La. App. 1st Cir. 1993), writ denied, 94-0308 (La. 5/20/94), 637 So. 2d 475.

The failure to file a motion to suppress identification notwithstanding, 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 LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207 (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, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 2001-2585 (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 credibilities of the witnesses, and this court will generally not second-guess those determinations. See State v. Hughes, 2005-0992 (La. 11/29/06), 943 So. 2d 1047, 1051; State v. Davis, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So. 2d 161, 163-64. To support a conviction of simple burglary, the State must prove the unauthorized entry of the vehicle and that the intruder entered with the intent to commit a theft or felony therein. See LSA-R.S. 14:62(A); State v. Jacobs, 504 So. 2d 817, 820 (La. 1987).

The evidence at trial established that the defendant was the person inside the Tahoe without Lemon's permission and that the defendant took items from the Tahoe that did not belong to him. Edwards testified that he and some friends were

tailgating on a hill in the back of the stadium. During the fourth quarter of the game, Edwards noticed someone inside a parked white Tahoe. Edwards was twenty to thirty feet from the Tahoe. Edwards saw the person, a black male, sitting in the front seat with the driver-side door open searching around. There was no interior light in the Tahoe, but according to Edwards, there was light all around. Edwards observed the person get out of the Tahoe with a backpack, then walk quickly past Edwards toward the woods. Edwards saw that the person was wearing a red jacket and a blue and red shirt. Edwards observed the person dropping things as he was walking away from the Tahoe. When the person got to the wooded area, Edwards noticed that the person stopped there and smoked a cigarette.

When Edwards had first seen the person leaving the Tahoe, Edwards pointed him out to his friend, Griffin. Griffin similarly testified that, while she did not see the person inside the Tahoe, she saw a tall black male wearing jeans and a jacket, carrying a book bag. Griffin described the scene as having light from the interstate and the stadium lights. Griffin observed the person walk away. She lost sight of him, but the person returned and passed by "real close" to where she was. Griffin called 911 and gave a description of the person she had seen. When the person came back toward Griffin, he was no longer carrying the book bag.

Officer Iverson testified that he responded to the burglary call. He was told the suspect was a black male wearing a red and blue striped shirt. Officer Iverson described the scene as "fairly bright" because it was very close to the stadium. According to Officer Iverson, within minutes of his and other police officers' arrival, the defendant was apprehended in the wooded area wearing a blue and red striped shirt. Another officer had been waiting on the other side of the wooded area in case someone came through there. The defendant was the only person found in the wooded area. About twenty feet from where the defendant was

apprehended, Officer Iverson found a watch on the ground. The watch had been in the Tahoe and belonged to Lemon's friend. Further inside the woods, Lemon's book bag was recovered.

The defendant was detained and placed in the police unit. Griffin testified that the person she saw in handcuffs was the same person she had seen by the Tahoe. She identified the defendant in court as the person she had seen that night and later in handcuffs. Griffin was shown a picture of the defendant wearing the same red and blue striped shirt. She testified that the person in the picture was the same person, wearing the same shirt, she saw by the Tahoe. Similarly, Edwards was shown the picture of the defendant and testified that the defendant was the person he saw inside of the Tahoe. Further, while it does not appear Edwards was taken to the police unit to identify the defendant, Edwards testified that he confirmed the identity of the defendant to the police as the defendant was being taken from the woods. Edwards also positively identified the defendant in court.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984). The defendant indicated at trial that he did not take anything from the Tahoe. However, 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 (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 (La. 10/17/00), 772 So. 2d 78, 83. The fact that the record may contain evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. See State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. State v. Higgins, 2003-1980 (La. 4/1/05), 898 So. 2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S. Ct. 182, 163 L. Ed. 2d 187 (2005).

The jury heard all of the testimony and viewed all of the physical evidence presented to it at trial and, notwithstanding any conflicting testimony, found the defendant guilty. The jury's verdict reflected the reasonable conclusion that based on the physical evidence and the eyewitness testimony, the defendant entered Lemon's Tahoe without permission with the intent to commit and, in fact, committed a theft therein. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. See Captville, 448 So. 2d at 680.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's verdict. 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 the hypothesis of innocence suggested by the defendant at trial, that the defendant was guilty of the simple burglary. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues his sentence is unconstitutionally excessive. Specifically, the defendant contends that his life

sentence is excessive and that a life sentence, under the habitual offender law, should not have been imposed without a jury trial.

A thorough review of the record indicates the defendant did not make or file a motion to reconsider sentence following the trial court's imposition of a life sentence. Under LSA-C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. See State v. Mims, 619 So. 2d 1059 (La. 1993) (per curiam). The defendant, therefore, is procedurally barred from having this assignment of error reviewed because of his failure to file a motion to reconsider sentence after the trial court sentenced him as a habitual offender. See State v. Chisolm, 99-1055 (La. App. 4th Cir. 9/27/00), 771 So. 2d 205, 212, writs denied, 2000-2965, 2000-3077 (La. 9/28/01), 798 So. 2d 106, 108. See also State v. Duncan, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So. 2d 1141, 1143 (en banc per curiam).

The defendant further asserts that he should not have been sentenced to life under the habitual offender statute without a jury trial, citing Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Neither Apprendi nor Blakely addressed the issue of whether a defendant is entitled to a trial by jury in multiple offender proceedings. Moreover, Apprendi specifically exempted such proceedings by stating that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-2363. It is well settled that a multiple offender proceeding is a status, rather than a criminal, proceeding; therefore, the right to a jury trial does not apply as a matter of federal or state constitutional law. State v. McAllister, 366 So. 2d 1340, 1344 (La. 1978). Neither

Apprendi nor Blakely change this principle. State v Leblanc, 2004-1032 (La. App. 1st Cir. 12/17/04), 897 So. 2d 736, 743-744 writ denied, 2005-0150 (La. 4/29/05), 901 So. 2d 1063, cert. denied, 546 U.S. 905, 126 S. Ct. 254, 163 L. Ed. 2d 231 (2005).

This assignment of error also lacks merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.