NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1390

STATE OF LOUISIANA

VERSUS

LARENZO LOMAX

Judgment Rendered: MAR 22 2013

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 515218

Honorable Allison H. Penzato, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Larenzo Lomax, was charged by felony bill of information with two counts of armed robbery, in violation of La. R.S. 14:64. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a "Motion to Suppress the Confession," which the district court denied. The defendant also filed a motion for post-verdict judgment of acquittal and a motion for new trial, both of which the district court denied. He was sentenced to sixty years at hard labor without the benefit of probation, parole, or suspension of sentence on both counts, to run concurrently. The defendant now appeals, alleging two assignments of error. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

On October 31, 2011, the defendant came running into the Whitney Bank on Marigny and Florida Streets in Mandeville, Louisiana. He was dressed in black from head to toe and was also wearing a mask and red gloves. The defendant had a Mardi Gras bag and demanded that the bank tellers put money into the bag. He pointed a gun towards the tellers, cocked it, and told them to "hurry up" and that he was not "playing around." After the first teller filled up his bag, he told her to hand the bag to the teller behind her and said, "Now have her fill the bag." That teller froze, so the bank manager pushed her out of the way and filled the bag with money and a dye pack.[1] The money from the two tellers' drawers totaled approximately $15,000.00. After the defendant left, the manager ran and locked the door.

The bank employees could not identify the defendant as the robber, but testified that the person who robbed the bank sounded like a black male, was skinny, and approximately 5'7"-5'8".

[1] According to the testimony from trial, the dye pack activates once it is removed from the safety plate inside the bank teller's drawer. A transmitter inside of the bank activates the system. Once the signal is broken by the person going outside of a certain range of the bank, the pack deploys and releases red smoke, tear gas, and red dye.

Almost immediately thereafter, Earsley Hart, Jr., was driving down Florida Street when he saw a black man run across the street from Whitney Bank. Hart saw "orangeish smoke" coming out of a bag the man was carrying. According to Hart, the man he saw running was approximately 5'10" and had a medium build. Hart testified that the man was wearing dark clothing and had a multi-color or Mardi Gras color bag.

Kathleen Jatho worked at a daycare near the Whitney Bank. On the day of the robbery, she was sitting in her car in the daycare parking lot when she saw a man running near her car. The man was wearing dark pants and a white T-shirt underneath an unbuttoned blue and white checkered shirt. He appeared to be around 5'9" and was carrying something that looked like a sweater. Jatho testified that the man trailed the side of a building, and the next thing she saw was a dark colored car leaving from that building. Jatho did not notice anyone else in the car. At trial, she identified the defendant as the person she saw running.

The next day, the defendant went into Winn Dixie and attempted to send money through Western Union. Katrina Holden, the in-store coordinator for Winn Dixie, noticed that the money the defendant handed her to complete the transaction had a pink or red stain on it and that the palms of the defendant's hands were also stained a pink or red color. She reported this to the store director who called 911. Holden stalled the defendant for as long as she could, then completed the transaction. She saw the defendant head toward the exit door, and the next thing she saw was an officer entering the store with a rifle.

The defendant was arrested by the St. Tammany Parish Sheriff's Office. Police obtained a search warrant for the defendant's house, where they found red and black gloves, bullets, a bathtub stained red, and money stained red. The police found $1,242.00 in the attic of the defendant's house and $12,879.00 in the master bedroom and closet. A majority of the bills were stained with pinkish-red dye.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the district court erred in failing to suppress his statements. Specifically, the defendant contends that he made several contradictory and inculpatory statements during the investigation of this case under the influence of "inducements or promises, as well as veiled threats."[2]

On the trial of a motion to suppress, the state has the burden of proving admissibility of a purported confession or statement by the defendant. La. Code Crim. P. art. 703D. In addition to showing that the **Miranda** requirements were met, the state must affirmatively show that the statement or confession was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises in order to introduce into evidence a defendant's statement or confession. La. R.S. 15:451. The state must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La. App. 1st Cir. 1984), writ denied, 464 So.2d 1375 (La. 1985). In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

The defendant contends that he was promised leniency if he cooperated with the officers, that he lacked sleep at the time he gave his statements, and that he was under duress when questioned about the possible involvement of his fiancée. The defendant did not testify at the hearing on the motion to suppress. He testified at trial that he was tired and scared during his interviews and that he was trying to protect his fiancée even though he denied any involvement on her part. He also

[2] The contents of these statements are more fully described in the discussion of the sufficiency of the evidence in the second assignment of error.

testified that the officers conducting the interviews were befriending him and were not mean to him, but denied contacting detectives on November 3, 2011, for further discussion.

At the hearing on the motion to suppress, the officers involved in the arrest and questioning of the defendant testified. The testimony of each officer directly contradicts the defendant's testimony that he was tired, scared, or under duress during the interviews.

Deputy Stephen Paretti with the St. Tammany Parish Sheriffs Office testified that he was dispatched to the Winn Dixie on November 1, 2011, where he arrested the defendant. He advised the defendant of his **Miranda** rights and did not threaten or coerce the defendant in any way. Deputy Paretti also testified that the defendant never asked for an attorney or indicated that he wanted to stop talking.

Detective Eddie Vanison with the Mandeville City Police Department testified that he advised the defendant on November 1, 2011, that he was still subject to **Miranda**, and also gave the defendant a **Miranda** warning himself. According to Detective Vanison, the defendant never asked for a lawyer or indicated that he wanted to stop talking. The defendant was given food, drinks, and cigarettes. The defendant was told that he would be better off if he cooperated, but he was not threatened or coerced in any way. On November 3, 2011, the defendant contacted Detective Vanison wanting to talk further. Detectives Vanison and Joseph Downs picked up the defendant, provided him with food, and again advised him of his **Miranda** rights. On November 15, 2011, the defendant was interviewed for a third time and again given his **Miranda** rights. The defendant made phone calls that day that were recorded. While the defendant was on the phone, the detectives were in and out of the room.

Detective Joseph Downs with the Mandeville City Police Department was involved in the November 1, November 3, and November 15 interviews with the defendant. He testified that the defendant was advised of his **Miranda** rights and

never asked for an attorney or indicated that he wanted to stop talking. Detective Downs also stated that the defendant was not abused, threatened, or coerced in any way. The defendant was provided with food and drink. Detective Downs testified that he told the defendant that if he cooperated, the detective would let people know, but did not discuss any court leniency or reduced sentence with the defendant.

The district court gave reasons for denying the motion to suppress. In its reasons, the court stated that the defendant was advised of his **Miranda** rights on each of the occasions that he was interviewed and executed waivers each day. It also pointed out that the testimony presented at the hearing on the motion to suppress established that the defendant was not threatened, coerced, or offered any promises or inducements in exchange for his statements. The defendant also was not deprived of nourishment in any respect. The court stated that the defendant had no expectation of privacy in the phone calls that he made on November 15, 2011, because he was in a room with law enforcement officers who were nearby and able to hear his conversations.

The admissibility of a confession is, in the first instance, a question for the district court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession will not be overturned unless they are not supported by the evidence. **State v. Sanford**, 569 So.2d 147, 150 (La. App. 1st Cir. 1990), writ denied, 623 So.2d 1299 (La. 1993). The district court must consider the totality of the circumstances in deciding whether a confession is admissible. Testimony of the interviewing officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 2004-1718 (La. App. 1st Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544. Further, when a district court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the district court's discretion, i.e., unless such ruling is

not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. As a general rule, this court reviews district court rulings under a deferential standard with regard to factual and other trial determinations, while legal findings are subject to a *de novo* standard of review. **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

After a careful review of the record, including the recorded statements, we do not find that the district court abused its discretion in denying the motion to suppress. The testimony, the recorded statements, and the waiver forms clearly establish that the defendant was advised of his **Miranda** rights and that he executed a waiver of those rights. Further, the evidence indicates that the defendant knowingly and intentionally waived his rights. The detectives' testimony at the hearing, which the district court found credible, showed that the defendant appeared to understand his rights and demonstrated a desire to speak to the police and explain his version of the events. The district court also found credible the detectives' testimony that they did not coerce the defendant into admitting to robbing the bank or changing his story. The detectives testified that they told the defendant he would be better off if he cooperated, but did not promise the defendant that his cooperation would lead to court leniency or a lesser sentence. Statements by the police to a defendant that he would be better off if he cooperated are not promises or inducements designed to extract a confession. **State v. Lavalais**, 95-0320 (La. 11/25/96), 685 So.2d 1048, 1053, cert. denied, 522 U.S. 825, 118 S.Ct. 85, 139 L.Ed.2d 42 (1997). The test for voluntariness of a confession requires a review of the totality of the circumstances under which the statement was given. **Maten**, 899 So.2d at 721. We conclude, as did the district court, that under a totality of the circumstances, the defendant's confessions were not involuntary. Therefore, the district court did not err or abuse its discretion in denying the motion to suppress.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that there was insufficient evidence to support his convictions of armed robbery. He contends that his own contradictory statements were the only direct evidence of his involvement in the robbery of the Whitney Bank tellers. He also contends that the evidence only proved that he was in possession of stolen money.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); see also La. Code Crim. P. art. 821(B). When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

Where the key issue raised by the defense 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. **State v. Johnson**, 99-2114 (La. App. 1st Cir. 12/18/00), 800 So.2d 886, 888, writ denied, 2001-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness is sufficient to support a conviction. **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163. Moreover, it is the jury who weighs the respective credibility of the witnesses, and this court generally will not second-guess those

determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

Louisiana Revised Statute 14:64(A) provides that "[a]rmed 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."

The defendant does not dispute the fact that two counts of armed robbery were committed at Whitney Bank on October 31, 2011, or that he was in possession of stolen money thereafter. Rather, he challenges the nature of his involvement. Throughout the recorded interviews the police conducted with the defendant, he gave many different accounts of what happened on October 31, 2011. During his first interview, the defendant stated that he was not in Louisiana at the time of the robberies. He then stated that two of his friends were responsible for the robberies, and he was at his home while the robberies took place. He later told the detectives that he actually did know about the robberies, was going to get a portion of the money, and took part in cleaning the money. However, the defendant still denied taking part in the actual robberies. He stated that he grew up with the two friends who were involved and that they had stayed at his mother's home with him in California. But, later on in the interview, the defendant stated that he did not know their last names and that one of them was actually from Detroit. The defendant also stated that when he saw the police officers at Winn Dixie, he contacted his two friends to notify them, but he previously told the police that he was on the phone with his fiancée at that time even though she had no knowledge of what was going on.

In an interview on November 3, 2011, the defendant changed his story again. This time, he stated that he actually entered the bank. The defendant told the police that he discarded the clothes that were involved in the robberies and only kept the gloves. In his last interview, on November 15, 2011, the defendant

indicated that he was only the driver and one or both of his two friends entered the bank. He also made phone calls that day, which were recorded. In one call to his mother, the defendant indicated that the officers wanted him to turn in the others involved in the robberies and wanted him to "admit to everything."

At trial, the defendant testified that on the day of the robberies, he went to get a daiquiri and saw a man running across the street with a bag in his hand. He saw the man approach a parked car and throw out the bag. The defendant looked into the bag, took it, and returned to his home with it. He tried to clean the money and iron it out. He then went to Winn Dixie and attempted to wire some of the money to his fiancée who was in California at the time.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of 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 fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460.

We note that a finding of purposeful misrepresentation, as in the case of material misrepresentation of facts by the defendant, reasonably raises the inference of a "guilty mind." Lying has been recognized as indicative of an awareness of wrongdoing. **State v. Captville**, 448 So.2d 676, 680 n. 4 (La. 1984). The facts in this case established acts of material misrepresentation by the

defendant. The defendant lied about his involvement in the robberies and made several inconsistent statements.

Based on our review of the evidence, we conclude that the jury reasonably rejected the defendant's hypothesis of innocence, namely, that he only found the stolen money and did not actually rob the bank tellers. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witness for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier of fact. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). After a thorough review of the record, we conclude that the evidence supports the convictions. 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 two counts of armed robbery. This assignment of error is without merit.

For the foregoing reasons, defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.