NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1617

STATE OF LOUISIANA

VERSUS

ELLIS PAUL DARDAR

Judgment rendered April 26, 2013.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 515181-1
Honorable Reginald T. Badeaux, III, Judge

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ELLIS PAUL DARDAR

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J.

Defendant, Ellis Paul Dardar, and a codefendant[1] were charged by bill of information with one count of attempted first degree robbery, a violation of La. R.S. 14:27 and 14:64.1. He pled not guilty and, after a jury trial, was found guilty as charged. The trial court denied defendant's motions for new trial and post verdict judgment of acquittal and sentenced him to three years at hard labor, but it suspended the entirety of that sentence and placed defendant on three years probation, with special conditions. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

Shortly before 11:00 p.m. on November 7, 2011, Mutadad Rabee exited the Quick Check convenience store on Fremaux Avenue in Slidell to have a cigarette. As manager of the store, Rabee was preparing to close for the evening. A coworker remained in the store to serve customers while Rabee took his break.

As Rabee smoked his cigarette, he observed a female exit a Cadillac and walk into the store. Soon thereafter, he noticed a suspicious man peering in the store's direction from behind a nearby tree. The man looked from around the tree at least three times and hid himself each time. Rabee noticed that the man was wearing a red and black jacket and had a red bandanna around his face. When Rabee called out to the man to ask him what he was doing, the man fled into a nearby wooded area. Rabee instructed his coworker to call the police, and he began to pursue the man.

Officer Brad Hoopes of the Slidell Police Department was responding to the call of a potential robbery at the Quick Check when he noticed a male walking next to the roadway on Broadmoor Street, only a short distance from the store. In close pursuit, Rabee identified the man to Officer Hoopes as the person he had seen near his store.

[1] The codefendant is identified in the record as Marc Adam Kuchler. The record also reflects that Kuchler pled guilty as charged to one count of attempted first degree robbery on May 29, 2012. He is not a party to the instant appeal.

Officer Hoopes handcuffed the man, identified at trial as defendant, and informed him of his **Miranda**[2] rights before questioning him.

Defendant initially stated that he was walking from his friend Mike's house, but he could not provide Officer Hoopes with any information about this friend, including his phone number, address, or the physical location where he lived. He eventually admitted to Officer Hoopes that he had been attempting to "play a prank" on the clerk at the convenience store, and he admitted to dropping a jacket and bandanna in the nearby woods. Defendant also informed Officer Hoopes that he had disposed of a pair of glasses and a BB handgun in the same area. After a brief search, investigating officers recovered all of these items. Defendant also informed Officer Hoopes that his juvenile sister and her husband were in a green Cadillac and that they were part of the plan to "play a prank" on the convenience store clerk. Defendant, his sister, and his brother-in-law were all arrested at the scene.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant argues that the evidence presented at trial was insufficient to support his conviction for attempted first degree robbery. Specifically, he contends that the State failed to establish that he made an attempt to commit the robbery or that he was going to attempt to make the convenience store clerk believe that he was armed with a dangerous weapon.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after 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. See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309

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

(La. 1988). The **Jackson** standard of review, incorporated in Article 821(B), 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 fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

First degree 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, when the offender leads the victim to reasonably believe he is armed with a dangerous weapon. La. R.S. 14:64.1(A). Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; it shall me immaterial whether, under the circumstances, he would actually accomplish his purpose. La. R.S. 14:27(A). Thus, in order to prove an attempted first degree robbery, the State had to prove that defendant: (1) had a specific intent to commit the crime of first degree robbery, and (2) did an act for the purpose of and tending directly toward the commission of first degree robbery.

In the instant case, the State introduced the testimony of Officer Hoopes, who spoke extensively with defendant after his initial detainment, and a recorded statement taken by Detective Daniel Seuzeneau. Defendant detailed how he had come into town to paint a truck for a friend of his brother-in-law. He became upset when he was paid only a fraction of the agreed-upon price, so he, his brother-in-law, and his sister discussed ways to make additional money. They eventually decided on a robbery.

Defendant described to Officer Hoopes and to Detective Seuzeneau how the three of them went to Academy Sports and bought the most realistic-looking BB handgun that they could find. Defendant's sister changed into a provocative outfit at her house, and they all then headed to the Quick Check. Defendant's sister was to enter the store, approach the counter to buy something, and send defendant a signal by scratching her head when the cash register drawer opened. At that time, defendant

would enter the store and "pull a prank." He repeatedly referred to his intended action as a "prank," even though he admitted during his taped interview with Detective Seuzeneau that he intended to take money from the convenience store.

Defendant did not testify at trial but, on appeal, he argues that he made no attempt to commit the robbery and that the State failed to prove that he was going to attempt to make the convenience store clerk believe that he was armed with a dangerous weapon. 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 that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). In the instant case, the jury clearly rejected the hypothesis of innocence presented by the defense.

Viewed in the light most favorable to the prosecution, the evidence establishes that defendant, upset by being shortchanged in pay for a legitimate job, schemed with his sister and brother-in-law to commit a robbery. To facilitate that robbery, these individuals purchased the most realistic-looking BB handgun they could find in order to intimidate their target. Defendant even admitted that they chose to target a cashier of Middle-Eastern descent because of his thought that such a person would scare more easily. Defendant and his co-conspirators then formed a plan in which his sister would enter the store and signal to defendant when the cash register drawer was open so that he could enter the store at that time. This plan advanced to the point that defendant's sister actually did enter the store while defendant concealed himself behind a tree while obscuring his face. The plan was only aborted when defendant was approached by Rabee and fled the scene.

In light of this evidence, we cannot say that the jury's verdict of guilty of attempted first degree robbery was irrational under the facts and circumstances presented to it. See **Ordodi**, 2006-0207 at 14-15, 946 So.2d at 662. The jury clearly believed that defendant had formed the specific intent to commit a first degree robbery and that he performed at least one act in furtherance of and tending toward the

commission of that offense. A reviewing court errs by substituting its appreciation of the evidence and credibility of witnesses 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 jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

We also disagree with defendant's contention that the State failed to prove that he intended to make the convenience store clerk believe that he was armed with a dangerous weapon. This contention is premised largely upon the fact that the store clerk never saw the BB handgun.

The second circuit addressed a similar factual situation in **State v. Frazier**, 37,010 (La. App. 2 Cir. 4/9/03), 843 So.2d 562, writ denied, 2003-1333 (La. 11/21/03), 860 So.2d 542. In **Frazier**, the defendant was walking into a convenience store while pulling a ski cap down over his face when he was spotted by an officer who was also walking into the same convenience store. Seeing the officer, the defendant ran back in the direction from which he came and began to flee. He was eventually apprehended and found to be in possession of a handgun. The second circuit affirmed his conviction for attempted armed robbery, noting that "[i]t is immaterial that Frazier did not know which cashier he was actually going to rob, or that she did not yet see him." **Frazier**, 37,010 at 4, 843 So.2d at 564. Instead, the court noted that his act of walking toward the store while armed and donning a ski cap were more than mere preparation and tended directly toward the commission of the crime of armed robbery. *Id.*

Defendant here, similar to the defendant in **Frazier**, had already performed several acts in furtherance of and tending toward the commission of the crime of first degree robbery. His purchase of a weapon, which very nearly resembled an actual handgun, was clearly sufficient to allow the jury to conclude circumstantially that he intended to use that item to intimidate the store clerk into giving him money out of a reasonable fear that he was armed with a dangerous weapon. Analogous to **Frazier**, the fact that the store clerk never actually saw that weapon is immaterial to defendant's guilt of attempted first degree robbery.

Accordingly, the evidence is sufficient to support defendant's conviction for attempted first degree robbery. This assignment of error is without merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant argues that the trial court erred in including the language of La. R.S. 14:27(B)(1) in its jury instructions because of his contention that an unloaded BB gun is not a dangerous weapon.

Under La. Code Crim. P. art. 807, the State and the defendant shall have the right before argument to submit to the court special written charges for the jury. A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent.

The language of La. R.S. 14:27(B)(1), included as a jury instruction over defendant's objection, is as follows:

> Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

We note that the trial judge also defined "dangerous weapon" for the jury in accordance with La. R.S. 14:2(A)(3).

On appeal, defendant argues that this jury instruction impermissibly lowered the burden of proof for the prosecution because he was allowed to be convicted of attempted first degree robbery for lying in wait with an unloaded BB gun, which he argues is not a dangerous weapon. However, we recognize that a BB or pellet gun has been held to be a "dangerous weapon," i.e., an "instrumentality which, in the manner used, is calculated or likely to produce death or great bodily harm." La. R.S. 14:2(A)(3). See **State v. Watson**, 397 So.2d 1337, 1342 (La.), cert. denied, 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981); **State v. Hensley**, 2004-617, p. 7 (La. App. 5 Cir. 3/1/05), 900 So.2d 1, 7, writ denied, 2005-0823 (La. 6/17/05), 904 So.2d 683; **State v. Kelly**, 576 So.2d 111, 119 (La. App. 2 Cir.), writ denied, 580 So.2d 666 (La. 1991).

We agree with the second circuit's statement in **State v. Woods**, 494 So.2d 1258, 1261-1262 (La. App. 2 Cir. 1986), wherein that court noted that the likelihood of

serious harm from such an unloaded BB gun can come from the threat perceived by victims and bystanders. The court explained that the highly-charged atmosphere of a pistol robbery is conducive to violence regardless of whether the pistol is loaded or workable because the danger created invites rescue and self-help.

Here, we find that the trial court did not err or abuse its discretion in providing the jury with the State's requested instruction. If the jury indeed found defendant guilty of attempted first degree robbery on its perception that he lay in wait with a dangerous weapon, that conclusion would be supportable by the jurisprudence holding that even an unloaded BB gun can, in certain circumstances, be a dangerous weapon.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.