NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0867

STATE OF LOUISIANA

VERSUS

HARLEY WHITE

Judgment Rendered: FEB 18 2014

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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. 500307

The Honorable William J. Knight, Judge Presiding

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Walter P. Reed, District Attorney, Covington, Louisiana and Kathryn W. Landry Baton Rouge, Louisiana	Attorneys for Plaintiff/Appellee, State of Louisiana
Lieu T. Vo Clark Mandeville, Louisiana	Attorney for Defendant/Appellant, Harley White

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

The defendant, Harley White, was charged by bill of information with one count of sexual battery, a violation of Louisiana Revised Statute 14:43.1.[1] He pled not guilty and, following a jury trial, was found guilty as charged. After denying the defendant's motions for postverdict judgment of acquittal and new trial, the trial court sentenced the defendant to forty years at hard labor, with the first twenty-five years to be served without the benefit of probation, parole, or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence.

The State subsequently filed a multiple offender bill of information.[2] Following a hearing, the defendant was adjudicated a second-felony habitual offender. The trial court vacated the forty-year sentence and resentenced the defendant to seventy-five years at hard labor, with the first twenty-five years to be served without the benefit of probation, parole, or suspension of sentence.[3] The defendant now appeals, contending that the evidence was insufficient to support his conviction and therefore the trial court should have granted his motion for post-verdict judgment of acquittal, and that the sentence is excessive. We affirm the conviction and the habitual offender ajudication. We vacate the defendant's habitual offender sentence and remand for resentencing.

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[1] The bill of information also charged the defendant with one count of simple kidnapping, a violation of Louisiana Revised Statute 14:45. That count was severed prior to trial.

[2] The defendant's predicate offense was set forth as a November 7, 1979 conviction for aggravated rape in the 228th District Court for the County of Harris, Texas, under docket number 301,233.

[3] The minutes indicate that the sentence was imposed without benefit of parole, probation, or suspension of sentence. However, the sentencing transcript reflects that the trial court imposed the sentence with only the first twenty-five years to be served without benefit of parole, probation, or suspension of sentence. Where a discrepancy exists between the minutes and the transcript, the transcript prevails. *State v. Lynch*, 441 So. 2d 732, 734 (La. 1983).

FACTS

On October 21, 2010, eight-year-old N.T. was walking with friends when he was lured to the defendant's home by the defendant's promise of giving N.T. money. The defendant then grabbed N.T. and pulled him into the house. The defendant brought N.T. into the living room and touched N.T.'s penis over his clothes. While the defendant was in the bathroom, the children who had been walking with N.T., including his brother, entered the house and helped N.T. escape. As he was running home, N.T. heard the defendant say, "If you tell anyone, [I'll] kill you." N.T. did not tell his parents.

One of the children reported the incident to his mother, who called N.T.'s parents. N.T.'s parents reported the incident to the Slidell Police Department and notified officers that they had recently received notice that a registered sex offender was living in the neighborhood.

Sergeant Brian Nicaud with the Slidell Police Department investigated the incident. He spoke with N.T.'s father and set up an appointment for N.T. to be interviewed at the Children's Advocacy Center (CAC). In the interview, N.T. consistently maintained that he was touched over his clothes on his private and was able to get away because his friends came in and got him.

After N.T.'s interview, Sergeant Nicaud showed N.T. a six-person photographic lineup. N.T. did not want to look at the photographs and appeared visibly shaken. In an attempt to put him at ease, Sergeant Nicaud asked N.T. which one of the photographs was not the person who grabbed him. N.T. eliminated five of the six photographs. The remaining photograph was that of the defendant. Sergeant Nicaud asked N.T. if the person in the remaining photograph was the person who grabbed him, and N.T., who appeared afraid to look at the photograph, said, "I don't know."

Sergeant Nicaud also showed the photographic lineup to N.T.'s brother, who quickly identified the defendant as the person who grabbed N.T. The other children involved refused to view the photographic lineup.

N.T.'s mother testified that she received a notification in the mail weeks before the incident that the defendant was a registered sex offender. She was unsure whether the notice contained a photograph. She testified that she did not show N.T. the registration that she received in the mail.

SUFFICIENCY OF THE EVIDENCE

In his first and second assignments of error, the defendant argues that the trial court erred in denying his motion for post-verdict judgment of acquittal where the evidence is insufficient to prove beyond a reasonable doubt his identity as the perpetrator of the instant offense. Specifically, he argues that conflicting testimony concerning the identity of the man who grabbed N.T. creates reasonable doubt as to whether any of the identifications can be considered reliable.

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." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed. 2d 560 (1979). *See also* La. Code Crim. Pro. art. 821B; *State v. Mussall*, 523 So. 2d 1305, 1308-09 (La. 1988). The *Jackson* standard, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. *State v. Petitto*, 12-1670 (La. App. 1 Cir. 4/26/13), 116 So. 3d 761, 766, *writ denied*, 13-1183 (La. 11/22/13), 126 So. 3d 477; *State v. Patorno*, 01-2585 (La. App. 1 Cir. 6/21/02), 822 So. 2d 141, 144. When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by

viewing that evidence in the light most favorable to the prosecution. *State v. Wright*, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So. 2d 485, 487, *writ denied*, 99-0802 (La. 10/29/99), 748 So. 2d 1157, and *writ denied sub nom, State ex rel. Wright v. State*, 00-0895 (La. 11/17/00), 773 So. 2d 732. When analyzing circumstantial evidence, Louisiana Revised Statute 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *Petitto*, 116 So. 3d at 766; *Patorno*, 822 So. 2d at 144. The facts then established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *Wright*, 730 So. 2d at 487.

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 a single witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and courts will generally not second-guess those determinations. *See State v. Hughes*, 05-0992 (La. 11/29/06), 943 So. 2d 1047, 1051.

The defendant does not dispute the fact that the instant offense occurred. Rather, he denies any involvement. He claims that the witnesses' testimony at trial was conflicting, and that, although N.T. identified him in court as the perpetrator, N.T. was unable to make a positive identification in the days following the incident. The defendant also argues that N.T. stated in his CAC interview that the man who grabbed him had gray and black hair while the video of the recorded statement given by the defendant a few days after the incident reveals no gray hair.

At trial, referring to the last of the six photographs in the photographic lineup, the State asked N.T. whether that was "the guy that did it." N.T. nodded affirmatively. The State then asked N.T. if he saw anyone in court that "did this to [him]," and N.T. identified the defendant. On cross-examination, defense counsel asked N.T. whether he was sure who grabbed him when he looked at the lineup, and N.T. nodded affirmatively.

N.T.'s brother testified that he was playing with N.T. on the day of the incident. He was eight years old at the time of trial and six years old at the time of the incident. He testified that he and two other children helped N.T. get out of the man's house who had pulled him inside. He stated that the man was in the bathroom when they went inside to help his brother get out. He testified that he never saw the man's face, but positively identified the defendant in a six-person photographic lineup shown to him by Sergeant Nicaud. He testified that he was telling the police the truth about what he saw when he signed the lineup. When asked if he recognized anyone in the courtroom, he responded that he did not.

One of the other children with N.T. and his brother at the time of the incident testified that a man told N.T. to come inside because he had a treat for him. The child testified that he saw the man grab N.T. and drag him into the house, then indicated that N.T. walked into the house. According to this child's testimony, the man kicked N.T. This child also testified that he kicked the man in the face, causing him to bleed.

The defendant testified at trial. He said that he lived on Pine Street in October 2010. He denied offering money or treats to a child, or threatening a child in any way while he lived there. He further denied forcing a child to come into his home. According to the defendant, he never saw any of the children who testified prior to trial.

The defendant's arguments question the fact finder's credibility determinations. The jury apparently chose to believe the State's witnesses. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. *State v. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So. 2d 929, 932. Appellate courts are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. *State v. Mitchell*, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. Thus, this court cannot reweigh the evidence to overturn a fact finder's determination of guilt on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*); *Taylor*, 721 So. 2d at 932.

Based upon the evidence presented, the jury reasonably and rationally rejected the defendant's hypothesis of innocence that he had been misidentified as the perpetrator of this crime. Viewing the evidence in the light most favorable to the State, we find that 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 sexual battery. Therefore, the evidence is sufficient to support the jury's verdict. These assignments of error have no merit. Accordingly, we affirm the defendant's conviction.

SENTENCING ERROR

The defendant does not challenge the habitual offender adjudication, but challenges his sentence as excessive. Louisiana Revised Statute 15:529.1A(2)(a) sets forth the sentencing requirements for a second-felony offender, as follows:

> A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
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> . . . .
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> (2)(a) If the second felony and the prior felony are sex offenses as defined in [Louisiana Revised Statute] 15:541, or the prior felony would be a sex offense as defined in [Louisiana Revised Statute] 15:541, except it occurred prior to June 18, 1992, or the conviction was obtained under the laws of any other state, the United States, or any foreign government, the person shall be sentenced to imprisonment at hard labor for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than three times the longest possible sentence prescribed for a first conviction, without benefit of probation, parole, or suspension of sentence.

The defendant's felony offenses are sexual battery and aggravated rape, making Section 529.1A(2)(a) applicable to his sentencing. Considering the present felony offense of sexual battery, the defendant was subject to a sentencing range of sixty-six to two-hundred-ninety-seven years, all without benefit of probation, parole, or suspension of sentence. La. R.S. 15:529.1A(2)(a). He was sentenced to seventy-five years imprisonment at hard labor; however, only the first twenty-five years were imposed without benefit of probation, parole, or suspension of sentence. Therefore, the sentence does not comply with the legislatively mandated sentencing range set forth in Louisiana Revised Statute 15:529.1A(2)(a), and is illegally lenient.

An illegal sentence may be corrected at any time by an appellate court on review. La. C.Cr.P. art. 882A. The defendant has no constitutional or statutory right to an illegally lenient sentence. *State v. Williams*, 2000-1725 (La. 11/28/01),

800 So.2d 790, 797. Therefore, we vacate the defendant's habitual offender sentence. Because any sentence within the sentencing range involves trial court discretion, we must remand the matter to the trial court for resentencing in accordance with law. *See State v. Haynes*, 04-1893 (La. 12/10/04), 889 So. 2d 224 (*per curiam*); *State v. Risner*, 12-1893, 2013WL2484249 (La. App. 1 Cir. 6/7/13) (unpublished decision).[4]

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED. HABITUAL OFFENDER SENTENCE VACATED, AND MATTER REMANDED FOR RESENTENCING.

[4] Because the sentencing error requires that we vacate the habitual offender sentence and remand the matter for resentencing, we pretermit discussion of the defendant's final assignment of error, which was that his habitual offender sentence is excessive.