

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1295
consolidated with
NO. 2013 KA 1296

*UBW
JEW
RJ*

STATE OF LOUISIANA

VERSUS

BILLY JOSEPH FAYE

Judgment Rendered: FEB 18 2014

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On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne,
State of Louisiana

Trial Court No. 620769 c/w 627669

The Honorable George J. Larke, Jr., Judge Presiding

* * * * *

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* * * * *

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

CRAIN, J.

The defendant, Billy Joseph Faye, was charged by grand jury indictment with armed robbery, a violation of Louisiana Revised Statute 14:64. He waived his right to a jury trial and, after a *Faretta* hearing, was allowed to represent himself, with standby counsel. *See Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). Following a bench trial, the defendant was found guilty as charged. He was sentenced to fifty years imprisonment at hard labor. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On September 14, 2011, a man wearing a welder's cap and sunglasses walked into the Plaza Latina (the Plaza), on Grand Caillou Road in Houma. When the last customers left the store, the man approached the cashiers, Maribel Gutierrez and Genesis Cartini, and said, "[T]his is a robbery." He unbuttoned his shirt to reveal the handle of a gun in his waistband. When Cartini, who did not speak English, did not respond, the man touched the gun. Gutierrez explained to Cartini in Spanish that they were being robbed. Cartini then took \$196.00 from the cash register and placed it in a plastic shopping bag. The man took the bag containing the money, left the store, and got into a green Nissan Sentra driven by a woman. Gutierrez called 911 and described the man as a 5' 7" white male with a beard, wearing glasses, and carrying a gun.

The Houma Police Department provided the media with a still photograph of the green Sentra taken from surveillance footage obtained from the nearby East Houma Library. About two weeks after the robbery, a Crime Stoppers tip implicated the defendant as a suspect. Further, according to the tip, the defendant's girlfriend, Catherine Castillo, owned a green Nissan Sentra. Houma Police

Detective Travis Theriot showed Gutierrez a six-person photographic lineup, which included a photo of the defendant, and she immediately identified the defendant as the person who robbed her.

Detective Theriot arrested the defendant in Picayune, Mississippi, at the office of the defendant's parole officer. He also interviewed Castilo, who had traveled to Mississippi with the defendant shortly after the robbery, and was living with the defendant in a Pascagoula motel room. Castilo identified the Sentra in the still photo as hers, and identified the robber in the Plaza video footage as the defendant. Castilo asked Detective Theriot if he wanted the gun and the boots that were used in the robbery, and gave consent to search the motel room. Detective Theriot found a pair of steel-toe boots, a welding cap, and a BB handgun. Castilo testified at trial that the defendant frequently drove her car, and that he used her car on the day of the robbery. She also admitted that she had prior convictions for forgery and theft. Castilo was not implicated in the armed robbery.

The defendant testified at trial that he did not rob the cashiers at the Plaza and that he had never driven Castilo's green Sentra. He stated that the boots found in the motel room were his, but that the gun was not. He also testified that he had previous convictions for armed robbery and simple escape.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the evidence was insufficient to support the conviction for armed robbery. Specifically, the defendant contends that his identity as the perpetrator was not established by the State.

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 fact finder 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.

Louisiana Revised Statute 14:64A defines the crime of armed robbery as “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.” Armed robbery is a general intent crime; therefore, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts that have been declared criminal. *State v. Payne*, 540 So. 2d 520, 523-24 (La. App. 1 Cir.), *writ denied*, 546 So. 2d 169 (La. 1989).

In his brief, the defendant asserts that this is a case of mistaken identity. He contends that although the State proved Castilo’s Sentra was used in the robbery, there was no evidence he was driving the car when the robbery occurred or at any other time. He further contends that Gutierrez’s identification of him as the robber is unreliable. Moreover, he asserts that the State failed to prove that Gutierrez was present when the robbery occurred since she cannot be seen in the Plaza video footage of the robbery.

The defendant argues that Gutierrez gave inconsistent descriptions of the robber, which indicates that she was too upset during the robbery to have been a reliable witness, if she was indeed present. For example, Gutierrez described the robber as bald, however she also described the robber as wearing a welder’s hat, and therefore could not have known if he was bald. Gutierrez also initially described the robber as having a beard, but at trial testified that the robber did not have facial hair.

Gutierrez testified that she and Cartini were working as cashiers at the Plaza when the robbery occurred. She explained that she was at the counter when the robber approached, and was standing just outside of the area shown on the video footage. She testified that she saw the gun the robber was carrying, and explained

to Cartini that they were being robbed. She further testified that she made the 911 call reporting the robbery.

On cross-examination, when the defendant asked Gutierrez how she knew the perpetrator was bald if he was wearing a welding cap, she responded “[b]ecause he didn’t have hair in the front.” She also indicated that she reported to the police that the armed robber had a beard. Castilo testified that she never saw the defendant with a full beard, but that he had some facial hair at the time of the robbery. The defendant’s photographic lineup picture corroborated Castilo’s testimony.

Notwithstanding her description of the robber as “bald” and having a “beard,” when shown the photographic lineup, Gutierrez immediately identified the defendant as the robber. Additionally, she identified the boots recovered from the motel room as the boots the defendant was wearing when he robbed her. Despite any possible discrepancies, Gutierrez was wholly certain the defendant was the armed robber. She identified the defendant in court as the person who robbed her (and Cartini), stating that she could not forget him, that she was one hundred percent positive, and there was no doubt in her mind that the defendant was the perpetrator. Castilo was likewise unwavering in her identification of the defendant as the robber.

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. *See State v. Mitchell*, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. Thus, we cannot reweigh the evidence to overturn a fact finder’s determination of guilt. *See Taylor*, 721 So. 2d at 932.

Furthermore, 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. 1 Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, a single witness’s testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. *State v. Higgins*, 03-1980 (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 testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Orgeron*, 512 So. 2d 467, 469 (La. App. 1 Cir. 1987), *writ denied*, 519 So. 2d 113 (La. 1988).

The testimony and physical evidence contained in the record established the defendant as the perpetrator of the armed robbery. Castillo, the defendant’s girlfriend, testified she was living with the defendant at a motel on the day of the robbery. That morning, she observed the defendant leave in her green Sentra, stop and pick up an unknown female, then go toward Houma. When Castillo was shown a still photograph of a green car implicated in the crime, she identified the car as hers. When she was shown the video footage of the robbery, she identified the defendant as the perpetrator. Further, the police seized the defendant’s work boots, a welding cap, and a gun from the motel room that the defendant and Castillo were living in shortly after the robbery.

The trial court heard all of the testimony and viewed all of the physical evidence and, notwithstanding any conflicting testimony, found the defendant

guilty. The trial court's finding of guilt reflects the reasonable conclusion that based on the physical evidence, eyewitness testimony, and other testimony, the defendant, while armed with a gun, was the person who robbed Gutierrez. In finding the defendant guilty, the trial court reasonably rejected the defendant's theory of misidentification. *See State v. Captville*, 448 So. 2d 676, 680 (La. 1984).

The record evidence negates any reasonable probability of misidentification and supports the trial court's finding of guilt. 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 the armed robbery. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*).

CONVICTION AND SENTENCE AFFIRMED.