NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 2145

STATE OF LOUISIANA

VERSUS

WONDRELL TEQUORY WOMACK

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 07-07-0403, Section 8
Honorable Trudy M. White, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

JUL 11 2014

Judgment rendered _____

PARRO, J.

Defendant, Wondrell Tequory Womack, was charged by bill of information with one count of armed robbery of William Walden (count 1), a violation of LSA-R.S. 14:64; one count of attempted second degree murder of Nardi Primo (count 2), a violation of LSA-R.S. 14:27 and 30.1; one count of armed robbery of Nardi Primo (count 3), a violation of LSA-R.S. 14:64; one count of armed robbery of Mark Florsheim (count 4), a violation of LSA-R.S. 14:64; and one count of possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1 (count 5). Defendant pled not guilty to all charges, and after a jury trial, was found guilty as charged on count 1 and original count 4.[1] In regard to count 1, the state subsequently filed a habitual offender bill of information, to which defendant stipulated to his status as a second felony habitual offender.[2] Thereafter, the trial court adjudged him to be a second felony habitual offender as to count 1, and sentenced him, on each count, to forty-nine years and six months at hard labor, without benefit of probation, parole, or suspension of sentence, with each sentence to run concurrently with one another. The defendant moved for reconsideration of the sentences, but the motion was denied. He now appeals, assigning error to the sufficiency of the evidence. For the following reasons, we affirm the convictions, habitual offender adjudication, and sentences.

FACTS

A. Armed Robbery of William Walden (Count 1)

On the night of March 18, 2007, Jarred Murphy returned to his apartment located at 1724 South Brightside View following his shift at the Outback Steakhouse located on Acadian Drive in Baton Rouge, Louisiana. When he returned home, Murphy, his girlfriend, and his roommate, William Walden, watched television for some time. At approximately 2:30 a.m., while watching television alone, Murphy heard a knock at the front door. When he opened the door, two black males were present, one of whom was armed with a semi-automatic handgun. Murphy immediately noticed the gun,

[1] Original counts 2, 3, and 5 were not brought to trial and were subsequently dismissed on November 14, 2011.

[2] Predicate no. 1 was set forth as the defendant's May 10, 2004 guilty plea to simple burglary, under Nineteenth Judicial District Court Docket No. 10-03-0042.

forced the door shut, and locked it. After locking the door, Murphy ran to alert Walden. As he was headed down the hall towards Walden's bedroom, Murphy heard the front door being kicked in. About the same time as Murphy was able to wake his roommate, the two intruders approached the bedroom door, which both Murphy and Walden attempted to shut. Eventually, after a struggle, the two assailants were able to break the door and enter the room, where they ordered Murphy and Walden to lie down, and held them at gunpoint. After rummaging through the apartment, the two assailants stole cash and various electronic devices, including Walden's cell phone. The intruders returned to Murphy and Walden, ordered them to remain still, and then left the apartment through the front door. Once the roommates were certain the intruders had left, they exited through the apartment's back door, hurried to a neighbor's residence, and called the police.

Initially, Officer Charlson responded to the call but, on the day after the incident, Detective Carl Mayo of the Baton Rouge Police Department travelled to the scene in the early hours of March 20, 2007, where he interviewed the roommates regarding the facts and circumstances of the robbery. During the course of their discussions, the roommates provided physical descriptions of the two robbers: 17 to 20 years old, black males, with one about 5'7" and the other about 5'9". Detective Mayo subsequently learned from the roommates that the lead gunman had a "roundish face" and was slightly overweight. After inspecting the scene, Detective Mayo spoke with individuals that defendant had called while using Walden's cell phone a few minutes after the robbery. Based on this information, Detective Mayo learned defendant's name and, using an older booking photograph, generated a photographic lineup and met with Murphy and Walden a few days after the incident. Detective Mayo testified that Murphy showed no hesitation in selecting defendant's photograph from the photo array, and was "one hundred percent" certain of his selection. Detective Mayo further testified Walden chose defendant's picture in less than ten seconds and was also completely certain of his decision. Using this information, Detective Mayo then participated in defendant's arrest.

B. <u>Armed Robbery of Mark Florsheim (Original Count 4)</u>

On the night of May 19, 2007, at approximately 2:30 a.m., after spending some time at a friend's apartment, Mark Florsheim returned to his town home located at 5323 Heatherstone Drive in Baton Rouge, Louisiana. Once he parked his vehicle, Florsheim walked towards the back door, and proceeded to enter his residence. However, as he was in the process of opening the door, Florsheim was attacked by four unknown men. Florsheim was taken inside, his wallet and keys were removed from his pockets, and he was escorted to the living room where he was ordered to sit on a couch. Three of the men began searching both levels of the apartment, while the fourth robber held Florsheim on the couch at gunpoint. Florsheim testified that he had the opportunity to look at and observe the gunman for a few minutes. Eventually, the four robbers reunited in the living room, where they "hog-tied" Florsheim with a black cord, placed a t-shirt over his eyes, placed a sock in his mouth, and exited the town home. Florsheim was able to untie himself, and returned to the garage where he noticed his Infinity SUV was missing. He then called the police.

One of the police officers who responded to the scene was Detective Brian Higginbotham of the Baton Rouge Police Department's Armed Robbery Division. Upon arriving at the scene, Detective Higginbotham interviewed Florsheim regarding the circumstances of the incident. Florsheim described the robber who held him at gunpoint as a very tall, heavyset, black male. Detective Higginbotham, who was also investigating similar armed robberies in the area, where three to four black men had forced their way into a residence in the same manner, later described the instant robbery to Detective Mayo, the lead detective in the Walden matter. Detective Higginbotham subsequently obtained the booking photo of defendant, and five days after the armed robbery, met with Florsheim to conduct a photographic lineup. Florsheim indicated it took him less than thirty seconds to identify defendant as the individual who held him at gunpoint.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant argues the evidence presented at trial was insufficient to support the convictions on count 1 and original count 4, because the state failed to prove beyond a reasonable doubt his identification as the robber. He does not challenge the occurrence of the offenses, but rather agrees that Murphy, Walden, and Florsheim were indeed robbed by armed assailants who forced their way into the respective residences.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard for appellate review of the sufficiency of the evidence to uphold a conviction is whether, after 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, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). Obviously, the defendant's identity as a perpetrator of the crime is an essential element of the crime that must also be proven beyond a reasonable doubt. See **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732. 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, LSA-R.S. 15:438 provides that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. When the key issue in a case 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 in order to meet its burden of proof. **State v. Millien**, 02-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 509. However, positive identification by only

one witness may be sufficient to support a defendant's conviction. **State v. Coates**, 00-1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1225.

To prove the crime of armed robbery, the state must prove that the defendant: (1) took something of value belonging to another from the person of another or that was in the immediate control of another, (2) by use of force or intimidation, and (3) while armed with a dangerous weapon. See LSA-R.S. 14:64(A). As noted earlier, defendant does not challenge that the crimes occurred, but rather that the state failed to present sufficient evidence to establish his identity as the robber.

Regarding the Walden robbery, Murphy testified that when he initially opened the door, the exterior light was operating, and he "immediately" viewed the assailants and looked at their faces. Further, when the two intruders reached Walden's bedroom, both roommates stated that the room's light was functioning and they were able to observe the men. While in the bedroom, both victims were able to view the intruders' faces, particularly in light of the fact that neither had masks, hoods, or other objects obstructing their faces. Further, when Murphy was presented with the photo lineup by Detective Mayo, he was able to, "without a doubt," "definitely identify" the defendant within thirty seconds. Walden indicated he identified the defendant within ten to fifteen seconds "[b]ecause it's definitely who I saw in my room with a gun." Lastly, Murphy positively identified the defendant at trial, noting he was "one hundred percent" certain of the identification.

Concerning the Florsheim robbery, the victim testified that as he remained seated on the couch, he observed and looked at the gunman for approximately five minutes. Further, he remembered the gunman's face "very well." Additionally, the lights were on in the room where Florsheim was held at gunpoint, further enhancing his ability to view the defendant. Lastly, when Florsheim met with Detective Higginbotham for the photo lineup less than one week after the robbery, Florsheim took less than thirty seconds to identify defendant and was certain of his selection. Most notably, when questioned on the certainty of his photo lineup selection, Florsheim testified:

> Because when I was looking at him, I was looking at his eyes, this whole area. When someone has a gun on you and you're looking at their face, you

remember it very well. I immediately knew that was it when I saw the photo lineup.

The defendant also argues that he was generated as a suspect based on two telephone calls made from Walden's cell phone on the night of the crime. He argues in his brief that, "[t]he fact that [he] may or may not have made these telephone calls is immaterial because cell phones are randomly stolen and sold throughout the parish on a daily basis." Walden's cell phone was stolen during the first robbery, and Walden subsequently checked to determine whether the phone had been used. Walden presented to Detective Mayo his phone history printout, and Detective Mayo contacted two numbers identified after the Walden robbery; one belonging to Kendra Knighten and the other to Vera Dawson. When Detective Mayo spoke with Knighten, she indicated that defendant was the father of one of her children, and that on the night of the Walden robbery, she was contacted in the early morning hours by defendant using an unknown phone number. Detective Mayo noted the robbery was reported at 3:10 a.m., and the Knighten phone call was made at 3:15 a.m. Further, Detective Mayo determined that defendant contacted Dawson on several occasions using Walden's and Knighten's cell phones. Using this information, Mayo located an older booking photograph of defendant, noted he "closely resembled the person who was described by the victims," and subsequently generated a photographic lineup.

The defendant argues the photographic lineups presented to Murphy, Walden, and Florsheim were suggestive. Although defendant filed a pre-trial motion to suppress the photo lineups, the motion was denied, and he did not object during trial when the lineups were offered into evidence. On appeal, defendant does not challenge the admissibility of the lineups, but rather their sufficiency.

An identification procedure is suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. **State v. Thibodeaux**, 98-1673 (La. 9/8/99), 750 So.2d 916, 932, cert. denied, 529 U.S. 1112, 120 S.Ct. 1969, 146 L.Ed.2d 800 (2000). Strict identity of physical characteristics among the persons depicted in a photographic array is not required; however, there must be sufficient resemblance to reasonably test the identification. **State v. Johnson**, 00-0680 (La. App. 1st Cir.

12/22/00), 775 So.2d 670, 677, writ denied, 02-1368 (La. 5/30/03), 845 So.2d 1066. Even if the identification could be considered to be suggestive, that alone does not indicate a violation of the accused's right to due process. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **Johnson**, 775 So.2d at 677; **State v. Reed**, 97-0812 (La. App. 1st Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572. The question for the reviewing court is to determine whether the procedure is so conducive to irreparable misidentification that due process was denied. **State v. Bright**, 98-0398 (La. 4/11/00), 776 So.2d 1134, 1145.

The photographic lineups presented to Murphy and Walden were identical. Both contained six color photographs of black males, with defendant's picture filling the fourth position on the bottom row. Further, the background and lighting on all six photographs appeared to be the same. When Detective Mayo presented the lineups to Murphy and Walden, he advised that he had developed a suspect, and that individual's picture was included, but that the suspect may or may not be the perpetrator of the offense. He instructed the victims to look at the shape of the nose, mouth, and jawline, and not to pay attention to facial features that might change, such as facial hair. Detective Mayo testified that he tried to make the lineups as fair as possible and used pictures of individuals with similar characteristics. Additionally, Detective Mayo did not instruct Murphy and Walden that they had to select a photograph, and he did not direct their attention to any particular picture. Murphy testified that when Detective Mayo showed him the lineup, he recalled Detective Mayo stepping back. Murphy testified that "[i]mmediately as I looked at four, I could definitely identify, but I made sure to look at all of the individuals." Walden stated at trial that he identified defendant within ten to fifteen seconds, and that he "looked at everybody and definitely recognized him."

With regard to the Florsheim lineup, Detective Higginbotham generated the lineup with the use of a computer, and used the same photographs that were used in the Murphy and Walden lineups. Detective Higginbotham also instructed Florsheim that the suspect was in the lineup, but like Detective Mayo, informed Florsheim that the

suspect may or may not be the perpetrator of the crime, and that if he did not feel comfortable with the identification, not to feel obligated to make a selection. Further, Detective Higginbotham did not indicate any particular person that Florsheim should focus on. Detective Higginbotham noted that it took Florsheim thirty to forty seconds to make a decision, and that he took his time, as Detective Higginbotham observed Florsheim moving his head across all the pictures. Defendant argues that the photograph used during this lineup was suggestive, as the background and lighting were different than the other five photographs. Upon review of the lineup photographs, defendant's picture is indeed lighter and brighter; however, Detective Higginbotham explained that this particular photograph was an extremely recent photograph, as it was taken during defendant's booking into the parish jail, two days after the Walden robbery. Detective Higginbotham chose this photograph as it would have most closely depicted defendant's appearance at the time of the Florsheim robbery. Based on the evidence presented at trial, we find that the photographic lineups were not suggestive and did not lead to any form of misidentification.

While additional information, such as fingerprints, certainly would have been probative, the evidence actually elicited at trial was sufficient to establish defendant's identity as the perpetrator of the offenses. Defendant was not only positively identified by one witness, but by three. Each testified they clearly viewed defendant and were able to positively identify him in the photo lineups and during trial.

The verdicts rendered against the defendant indicate the jury accepted the testimony of Murphy, Walden, Florsheim, Mayo, and Higginbotham, and rejected the defendant's attempts to discredit these witnesses. The defendant argues that the fact he was in possession of a cell phone stolen from the victim of count 1 was immaterial because cell phones are randomly stolen and sold throughout the parish on a daily basis. However, 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. 1st Cir.), writ denied, 514 So.2d

126 (La. 1987). No such hypothesis exists in the instant case. Further, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may 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. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. This court is 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. Additionally, in reviewing the evidence, we cannot say the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662. An appellate 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**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Therefore, these particular arguments are without merit.

Based on the record, any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of armed robbery, and the defendant's identity as the perpetrator of count 1 and original count 4. Accordingly, we affirm the convictions, habitual offender adjudication, and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.