NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 0262

STATE OF LOUISIANA

VERSUS

DALVIN AMIR SEWELL

Judgment rendered December 23, 2014.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 03-12-0403
Honorable Trudy White, Judge

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DALVIN AMIR SEWELL

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

PETTIGREW, J.

Defendant, Dalvin Amir Sewell, was charged by grand jury indictment with armed robbery, a violation of La. R.S. 14:64.[1] He pled not guilty and, following a jury trial, was found guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1. The trial court denied defendant's subsequent written motion for postverdict judgment of acquittal and motion for new trial. Thereafter, the trial court sentenced defendant to three years at hard labor, without the benefit of parole, probation, or suspension of sentence. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

In or around July 2010, Edward Daniels was robbed while visiting a friend, Darius Byrd (who was deceased at the time of trial). During the afternoon, Byrd and the victim were standing in the driveway outside of Byrd's Baton Rouge residence when a red Ford Expedition pulled up. Reagan Taylor, who the victim testified he knew from school and the neighborhood, exited the vehicle from the back passenger door while other occupants waited in the vehicle. As Taylor, the victim, and Byrd began to converse, other occupants of the vehicle exited from the front and back passenger side armed with guns. At that point, Taylor pulled a gun out, pointed it at the victim's face, and demanded that he give him everything he had. In compliance, the victim gave Taylor the contents of his pockets, which specifically included his medication (consisting of prescribed hydrocodone) and cash (approximately between $300.00 and $400.00). During a subsequent investigation into the offense, the victim positively identified Taylor as one of the perpetrators. Derricka Leduff, Byrd's sister, observed the incident from inside of the residence and positively identified Taylor and defendant, Dalvin Amir Sewell, as perpetrators.

[1] Also charged in the indictment was codefendant Reagan Taylor, who was tried in the same proceeding as defendant. Taylor was convicted of armed robbery, and this court previously affirmed his conviction and sentence. See **State v. Taylor**, 2013-1629 (La. App. 1 Cir. 7/30/14) (unpublished).

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, which we address first, defendant alleges that the evidence presented at trial was insufficient to support his guilty verdict for first degree robbery. Defendant contends that the State did not meet its burden of proving beyond a reasonable doubt that he committed armed robbery or first degree robbery, or that he acted as a principal in the commission of an armed robbery.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. 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 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. 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 (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.

Armed 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. La. R.S. 14:64(A). 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 the 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). A "dangerous weapon" is defined as any instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. La. R.S. 14:2(A)(3).

The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. **State v. Pierre**, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (per curiam). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. Under this theory, the defendant need not have actually performed the taking to be found guilty of a robbery. **State v. Huey**, 2013-1227, p. 4 (La. App. 1 Cir. 2/18/14), 142 So.3d 27, 30, writ denied, 2014-0535 (La. 10/3/14), ___ So.3d ___. Further, a defendant convicted as a principal need not have personally held a weapon to be found guilty of armed robbery. **State v. Dominick**, 354 So.2d 1316, 1320 (La. 1978). One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime, depending upon the mental element proved at trial. **State v. Holmes**, 388 So.2d 722, 726 (La. 1980).

Armed robbery and first degree robbery are general intent crimes. In general intent crimes, 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, 523-524 (La. App. 1 Cir.), writ denied, 546 So.2d 169 (La. 1989). To convict a defendant of armed robbery, the State is required to prove: (1) a taking; (2) of anything of value; (3) from a person or in the immediate control of another; (4) by the use of force or intimidation; (5) while armed with a dangerous weapon. **Huey**, 2013-1227 at 4, 142 So.3d at 30. To convict a defendant of first degree robbery, the State is required to prove: (1) a taking; (2) of anything of value; (3) from a person or in the immediate control of another; (4) by the use of force of intimidation; (5) when the

offender leads the victim to reasonably believe he is armed with a dangerous weapon. **State v. Robins**, 2004-1953, p. 5 (La. App. 1 Cir. 5/6/05), 915 So.2d 896, 899.

At trial, Daniels testified that he and Byrd were talking to Taylor when "four to five people" exited the red Ford Expedition with guns in their hands. He stated that Taylor then pulled his own pistol and instructed him to give up everything he had. Daniels stated that he complied, handing over his medication and his cash. Daniels testified that he was able to identify Taylor as one of the perpetrators because he had known him before the incident. However, he was unable to identify defendant as one of the perpetrators with any degree of certainty. Daniels explained that his inability to identify anyone else involved likely stemmed from the fact that he was unable to focus on the others with a gun pointed in his face.

Leduff testified that she was inside her house, which was also Byrd's residence, during the incident. She stated that defendant and Taylor pulled up in a red SUV while Daniels and Byrd were outside talking. Leduff had met both defendant and Taylor prior to the incident because they were her brother's friends, and she knew both of their names. She testified that defendant and Taylor hopped out the vehicle, pulled Daniels and Byrd to the side, and began to argue with them. She could not hear what was being said, but she interpreted the males' gestures to be hostile. When asked if defendant or Taylor had anything in their hands, she testified, "It looks like it." When asked to clarify her statement, she specified that Taylor had the object, and she described it as "[a] gun."[2] Leduff stated that she did not see the perpetrators take any items. She estimated that the incident lasted only about one minute. On cross-examination, Leduff testified that Byrd later told her Taylor had taken a gun from Daniels in the incident, but she did not state she witnessed this action. The defense did not present any witnesses.

[2] Although Leduff later reiterated that she had seen Taylor with a gun, she eventually admitted on cross-examination that she saw him only with "something in his hand."

Even an artificial gun constitutes a dangerous weapon when the interaction between the offender and the victim created a highly-charged atmosphere whereby there was a danger of serious bodily harm resulting from the victim's fear for his life. See **State v. Craddock**, 2010-1473, p. 5 (La. App. 1 Cir. 3/25/11), 62 So.3d 791, 794, writ denied, 2011-0862 (La. 10/21/11), 73 So.3d 380. See also **State v. Cittadino**, 628 So.2d 251, 255 (La. App. 5 Cir. 1993) (where a victim's belief that a toy pistol pointed at her face was a real gun and that the defendant was going to kill her was sufficient to support a conviction for armed robbery). A lay witness may testify as to opinions rationally based on his perception. La. Code Evid. art. 701. No weapon need ever be seen by the victim, or witnesses, or recovered by the police for the trier of fact to be justified in finding that the defendant was armed with a dangerous weapon. **State v. Page**, 2002-689, p. 16 (La. App. 5 Cir. 1/28/03), 837 So.2d 165, 176, writ denied, 2003-0951 (La. 11/7/03), 857 So.2d 517. Moreover, it is not necessary in every armed robbery case to introduce the money or other items taken. The testimony of the victim is sufficient to establish the elements of the offense. **State v. Glover**, 98-2632, pp. 8-9 (La. App. 1 Cir. 9/24/99), 754 So.2d 1044, 1048, writ denied, 99-3200 (La. 4/7/00), 759 So.2d 94.

The trier of fact is free to 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. 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, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. The fact that the record contains evidence that 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).

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 trier of fact. See **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). After a thorough review of the record, we find that the evidence supports the jury's verdict.

While Leduff did not see the victim relinquish any items, she observed the offense from inside of the residence, and she testified without hesitation or confusion regarding the identity of the two perpetrators whom she saw in the victim's vicinity. Further, while the instant offense took place around July 2010, the investigation did not begin until the police initiated an investigation into the September 2010 homicide of Byrd. Therefore, it is not surprising that no money or other physical evidence was recovered in the investigation of this offense, and this lack of physical evidence is not dispositive in addressing the sufficiency of the evidence presented at trial. Finally, while Leduff was unsure about whether the item held by Taylor was a gun, Daniels testified unequivocally that Taylor held him at gunpoint as he demanded valuables, which he relinquished.

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 defendant was guilty of being a principal to armed robbery. However, the jury found defendant guilty of a legislatively approved responsive verdict to armed robbery -- first degree robbery. See La. Code Crim. P. art. 814(A)(22).

In **State ex rel. Elaire v. Blackburn**, 424 So.2d 246, 251 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983), the Louisiana Supreme Court recognized the legitimacy of a "compromise verdict," i.e., a legislatively approved responsive verdict that does not fit the evidence, but that (for whatever reason) the jurors deem to be fair, as long as the evidence is sufficient to sustain a conviction for the charged offense. If the defendant timely objects to an instruction on a responsive verdict on the basis that the evidence does not support that responsive verdict, the court overrules the objection, and the jury returns a verdict of guilty of the responsive

offense, the reviewing court must examine the record to determine if the responsive verdict is supported by the evidence and may reverse the conviction if the evidence does not support the verdict. However, if the defendant does not enter an objection (at a time when the trial judge can correct the error), then the reviewing court may affirm the conviction if the evidence would have supported a conviction of the greater offense, whether or not the evidence supports the conviction of the legislatively responsive offense returned by the jury. See **State ex rel. Elaire**, 424 So.2d at 251. Here, there was no objection to the instruction on the responsive verdict of first degree robbery. It is possible that the jury returned a verdict of guilty on this responsive offense as a "compromise" verdict, perhaps as a result of the lack of testimony that defendant was armed at the time of the incident. Regardless of the jury's ultimate reasoning, the evidence presented at trial was clearly sufficient to convict defendant as a principal to the charged offense, so it was also sufficient to support defendant's conviction for the responsive offense of first degree robbery.

This assignment of error is without merit.

MOTION IN LIMINE

In his first assignment of error, defendant argues that the trial court erred in denying his motion in limine, which sought to exclude references to the homicide of Darius Byrd. Specifically, he contends that these references amounted to impermissible other crimes evidence that were allowed to come before the jury in violation of La. Code Evid. art. 404(B)(1).

Prior to trial, defendant filed two motions in limine, seeking to exclude certain evidence from being introduced at trial. The first motion in limine sought to exclude statements made by Byrd to his sister in the immediate aftermath of the incident. The trial judge granted this motion in the middle of trial, but that ruling was reversed by this court in an unpublished writ action. See **State v. Sewell**, 2013-0512 (La. App. 1 Cir. 4/4/13) (unpublished). Defendant does not raise an argument on appeal with respect to this motion in limine.

In his second motion in limine, defendant sought to exclude any reference to the fact that Darius Byrd was killed in an apparent homicide. He argued that any such reference "would lead the jury to immediately connect Mr. Byrd's death with the armed robbery he allegedly witnessed, as well as associating the defendant with Mr. Byrd's death." Following pretrial arguments on this motion, the trial court denied defendant's motion in limine, finding that references to Byrd would "not be highly prejudicial."

Detective Elvin Howard, of the Baton Rouge Police Department, testified at trial that around September 25, 2010, he was assigned to investigate Byrd's homicide. During his investigation, Detective Howard discovered that Byrd had witnessed the apparent armed robbery of Daniels a few months earlier. Daniels himself testified that Byrd was a murder victim. Leduff also testified that she initially spoke to the police in connection with their investigation of Byrd's homicide. None of the State's witnesses ever testified that defendant or his codefendant were suspects in Byrd's homicide investigation. In connection with Detective Howard's testimony describing his investigation, defense counsel entered a continuing objection to any reference to Byrd's homicide.

Generally, evidence of other crimes, wrongs, or acts committed by the defendant is inadmissible due to the substantial risk of grave prejudice to the defendant. Under Article 404(B)(1), however, such evidence may be admitted for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of other bad acts is not admissible simply to prove the bad character of the accused. La. Code Evid. art. 404(B)(1). Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. **State v. Williams**, 96-1023, p. 30 (La. 1/21/98), 708 So.2d 703, 725, cert. denied, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998).

Prior to trial, the State argued that it was necessary to lay a foundation regarding how Detective Howard came to be involved in the investigation of the robbery of Daniels. The trial court found that allowing the State to do so would not be prejudicial

to defendant's case. While the evidence elicited by the State regarding Byrd's murder certainly referenced another crime, that evidence did not reference another crime committed or alleged to have been committed by defendant. At no point during the State's case did any witness testify that defendant or his codefendant were suspects in Byrd's murder.

After a through review of the record, we find that the trial court did not err or abuse its discretion in denying defendant's motion in limine seeking to exclude evidence of Byrd's murder. The evidence was introduced at trial solely to explain how Detective Howard came to investigate the robbery of Daniels; it is not subject to the mandatory mistrial provision of La. Code Crim. P. art 770(2) because it was not a reference to another crime committed or alleged to have been committed *by the defendant* as to which evidence is not admissible. Nothing in the way this evidence was actually presented at trial led to an implication that defendant was under investigation for Byrd's murder.

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his final assignment of error, defendant alleges that the State engaged in an improper rebuttal argument. Given that his trial counsel failed to object to this allegedly improper rebuttal argument, defendant also argues that his trial counsel was ineffective for failing to object to this argument.

Under La. Code Crim. P. art. 774, the scope of closing arguments is limited to evidence admitted, to the lack of evidence, to conclusions of fact that the State or defendant may draw therefrom, and to the law applicable to the case; and the State's rebuttal is confined to answering the defendant's arguments. Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. See **State v. Martin**, 539 So.2d 1235, 1240 (La. 1989) (holding closing arguments that referred to "smoke screen" tactics and "commie pinkos" inarticulate but not improper); **State v. Copeland**, 530 So.2d 526, 545 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989) (holding

prosecutor's showing a gruesome photo to the jury and urging members to look at it if they became "weak kneed" during deliberations was not improper). Further, even if the prosecutor exceeds the bounds of proper argument, a reviewing court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. **State v. Casey**, 99-0023, p. 17 (La. 1/26/00), 775 So.2d 1022, 1036, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

In the instant case, defendant takes issue with statements made by the prosecutor in his rebuttal argument. Those statements are as follow:

> And I'm going to tell you one more thing and, frankly, this is the most interesting thing that I found throughout the closing arguments of Mr. Tucker and Mr. Messina. And I'll tell you – and I apologize for my handwriting, and I hope you can all read it. Okay. Can everybody read what that says? It says innocent. How many times did you hear Mr. Messina or Mr. Tucker say the word innocent? Neither one of them stood before you and said my client is innocent. Think about that. Think about it. These two men were paid to do everything they can to defend these guys and never once said they [sic] their clients were innocent, not a single time, not once. ... They did not stand up here in the one moment that they had to fight the hardest for those two guys and they didn't tell you they were innocent. Think about that. That's amazing. I can come to one conclusion that has meaning and that is they couldn't do it with a straight face because they know that I have proven my case. They know that I've presented evidence, so their only hope is to try to poke holes around the edges. Their hope was not to convince you that their clients are innocent. Their hope is to make an attempt to cloud the issue and hope that you are blinded by their little magic tricks, by look over here, all the action is going on over here. ... But, frankly, their words betray them – their lack of words betray them. If Dalvin Sewell and Reagan Taylor were innocent, their attorneys would be climbing the rooftops, ringing the bells, screaming out loud these are innocent men and they did not do it. They did not do it.

Defendant contends that this rebuttal argument had the effect of insinuating to the jury that the defense had a duty to prove that he was not guilty.

Defense counsel did not object to these statements at the time they were made. However, this issue was raised in defendant's motion for new trial, which was denied by the trial court. Therefore, we elect to address the merits of this issue rather than defendant's substitute allegation of ineffective assistance of counsel.

After a thorough review of the record, we are convinced that the prosecutor's comments did not suggest that defendant had the burden of proving his innocence or that the State did not have to prove all the elements of the charged offenses beyond a

reasonable doubt. See **State v. Spears**, 525 So.2d 329, 334 (La. App. 1 Cir.), writ denied, 532 So.2d 175 (La. 1988). The prosecutor's rebuttal statement appears calculated as a rebuttal to defense counsels' arguments that the State failed to meet its burden of proof. In fact, the prosecutor continues in his rebuttal argument to say, "I've carried my burden. I've proven my case." This statement reiterated to the jury that the State had the ultimate burden of proving defendant's guilt. Nothing in the prosecutor's comments deprived defendant of his presumption of innocence or impermissibly shifted the burden of proof to the defense.

Even if we were to find that the prosecutor's rebuttal remarks exceeded the scope of Article 774, we would not be "thoroughly convinced" that this argument influenced the jury and contributed to the verdict. See **Casey**, 99-0023 at 17, 775 So.2d at 1036. Following the State's rebuttal, the jury was instructed on the burden of proof applicable to defendant's case. Much credit should be accorded to the good sense and fair-mindedness of jurors who have seen the evidence. **State v. Dilosa**, 2001-0024, p. 22 (La. App. 1 Cir. 5/9/03), 849 So.2d 657, 674, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.