STATE OF LOUISIANA	*	**NO. 2000-KA-0003**
VERSUS	*	**COURT OF APPEAL**
HENRY FARLOUGH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 388-602, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay, III, Judge Michael E. Kirby)

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AFFIRMED IN PART, VACATED IN PART AND REMANDED IN PART

STATEMENT OF CASE

On March 24, 1997, the defendant, Henry Farlough, was charged by bill of information with one count of simple burglary in violation of La. R.S. 14:62 and one count of theft between one hundred and five hundred dollars in violation of La. R.S. 14:67. The defendant pled not guilty to the charges at his arraignment on March 26, 1997. On the same day, the defendant filed discovery and suppression motions. The trial court conducted a motion hearing on April 7, 1997 and thereafter, denied defendant's motions to suppress evidence and identification and found probable cause. The defendant was found guilty as charged on both counts after a jury trial on February 2, 1998. The trial court denied defendant's motion for new trial on March 18, 1998. The State subsequently filed a multiple bill of information alleging defendant to be a second felony offender. A multiple bill hearing was held on July 2, 1998. The trial court took the matter under advisement. On August 13, 1998, the trial court adjudicated the defendant to be a second felony offender. At the sentencing hearing on September 4, 1998, the trial

court sentenced defendant, under the multiple offender statute, to seven years at hard labor without benefits on the simple burglary conviction. The defendant was sentenced to two years at hard labor on the theft conviction. Defendant's motion to reconsider sentence was denied by the trial court on October 14, 1998. The trial court granted defendant's motion for appeal.

STATEMENT OF FACT

At 8:00 a.m. on March 1, 1997, Jerrilyn Hanemann, who resided at 101 Sherwood Forest Drive, was in her kitchen when she heard her dog barking in the yard. She looked outside and saw the defendant walking out of her garage with her son's bicycle. Ms. Hanemann went outside and confronted the defendant. She asked him what was he doing in her yard. The defendant dropped the bicycle and ran. Ms. Hanemann followed the defendant. She caught up with the defendant at the intersection of Carrollton Avenue and City Park Avenue. Ms. Hanemann told the defendant he had no right to enter her yard. The defendant told the witness that he did not have anything that belonged to her. He reached into a plastic bag and showed her the contents. There was a pair of socks, eyeglasses and a wallet. Ms. Hanemann grabbed the wallet to check the defendant's identification. The wallet was brand new. There was no identification card in the wallet. At that time, a man pulled in a vehicle and offered help to Ms. Hanemann. The

defendant took the wallet and ran off. A woman who was standing nearby offered Ms. Hanemann her telephone to call the police. Ms. Hanemann called the police and returned to her house. Officer Gilmore arrived at her house shortly thereafter. Ms. Hanemann gave the officer a description of the defendant. Approximately ten minutes later, another police officer showed up with the defendant in the police car. Ms. Hanemann positively identified the defendant as the person who was attempting to take her son's bicycle from her garage. The witness also identified the defendant at trial.

Officer Brian Gilmore testified that he responded to the call. When he met Ms. Hanemann, she told him that an unknown black male entered her garage and attempted to leave with her son's bicycle. Ms. Hanemann provided the officer with a description of the perpetrator. Officer Gilmore broadcast the description over the police radio. The defendant was located by Officers Crawford and Rodasky. They took him back to the scene, and Ms. Hanemann positively identified the defendant as the perpetrator.

Officer Michael Crawford heard the dispatch about the burglary. He subsequently heard the suspect's description provided by Officer Gilmore. As the officer was driving around looking for the suspect, the officer noticed the defendant, who fit the description of the perpetrator. The officer detained the defendant and relocated to the victim's house. The victim

positively identified the defendant as the perpetrator. The officer placed the defendant under arrest and searched the plastic bag. The bag contained a pair of socks, eyeglasses and a wallet. On the way to the victim's house, the defendant told the officer that he did not take the bike. He ran off when the lady came out.

Detective Glen Homan, who was also working on March 1, 1997, received a call to speak with Ms. Jackie Schoen at her residence at 1038 City Park Avenue. After speaking with Ms. Schoen, the officer learned of the theft of prescription eyeglasses from the front porch of the Schoen residence. The eyeglasses were found in the property room at Central Lockup among the defendant's personal items. The officer took a photograph of the glasses and showed the photograph to Ms. Schoen. She identified the eyeglasses as belonging to her. The officer then returned to Central Lockup and rebooked the defendant with theft of eyeglasses. On March 10, 1997, the officer obtained a court order allowing the return of the eyeglasses to Ms. Schoen.

Ms. Jacqueline Schoen testified that on the morning of March 1, 1997, she went for a walk. She left her eyeglasses on top of a newspaper on her front porch. When she returned from her walk, the glasses were gone. Ms. Schoen called the police after she heard about the burglary of Ms. Hanemann's house. Ms. Hanemann lives approximately one block away.

Detective Holman returned her eyeglasses to her. The witness identified the glasses in a photograph. She stated the glasses were worth between two hundred fifty dollars and two hundred seventy-five dollars. The witness testified that she did not give the defendant permission to take her eyeglasses.

ERRORS PATENT AND COUNSEL'S ASSIGMENT OF ERROR NUMBER 2

A review of the record reveals that the trial court imposed an illegal sentence on the burglary conviction. After adjudicating the defendant to be a multiple offender, the trial court sentenced the defendant to serve seven years at hard labor without "benefits." However, the trial court did not specify which benefits defendant was prohibited from receiving. Under La. R.S. 14:62 and La. R.S. 15:529.1, a multiple offender is prohibited from receiving the benefits of probation and suspension of sentence. There is no prohibition against parole. Accordingly, the defendant's sentence must be amended to provide that sentence is to be served without benefit of probation or suspension of sentence. The prohibition against the benefit of parole should be deleted.

DISCUSSION

COUNSEL'S ASSIGNMENTS OF ERROR NUMBERS 1, 3 AND 4

The defendant attacks his multiple bill adjudication in these assignments. He contends that the State failed to produce sufficient evidence to support his adjudication as a second felony offender. He alleges that the multiple bill of information was never filed into the record, and he was never arraigned on the multiple bill. The defendant further argues that his multiple bill adjudication should be reversed as the record is devoid of any exhibits introduced at the multiple bill hearing.

A review of the appellate record reveals that the defendant is correct that the record lacks the multiple bill of information filed in the case as well as documents introduced into evidence at the multiple bill hearing. The certified documents evidencing defendant's prior conviction were not included in the appellate record. It is not possible to determine if the State met its burden of proof at the multiple bill hearing without these documents. Therefore, the defendant's adjudication and sentence under the multiple offender statute must be vacated. La. Const. art. I, §19 (1974); State v. Ford, 338 So.2d 107 (1976).

These assignments have merit.

DEFENDANT'S PRO SE ASSIGNMENTS OF ERROR NUMBERS 1,2 AND 9

In his first pro se assignment, the defendant contends that the trial

court erred in denying his motion to suppress evidence. He argues the trial court should have suppressed the eyeglasses taken from him at the time of his arrest. The defendant also suggests that the State should not have charged him with the theft of the glasses when the State knew the eyeglasses were inadmissible evidence. The defendant suggests that the trial court and the District Attorney prejudiced the trial by introducing suggestive and unverified evidence.

In reviewing a trial court's judgment concerning a motion to suppress, which it has based on live testimony, "the trial court's purely factual findings must be accepted unless clearly erroneous, or influenced by an incorrect view of the law, and the evidence must be viewed [in the light] most favorable to the party prevailing below." U.S. v. Coleman, 969 F.2d 126, 129 (5th Cir.1992) (quoting U.S. v. Muniz-Melchor, 894 F.2d 1430, 1433-34 (5th Cir.1990), cert. denied, Muniz-Melchor v. U.S., 495 U.S. 923, 110 S.Ct.1957, 109 L.Ed.2d 319), quoting U.S. v. Maldonado, 735 F.2d 809, 814 (5th Cir.1984)).

A search is per se unreasonable when it is conducted without a warrant issued upon probable cause, subject to a few exceptions. State v. Raheem, 464 So.2d 293, 295 (La. 1985). A search made incident to a lawful arrest is one such exception. Chimel v. California, 395 U.S. 752, 89 S.Ct.

2034, 23 L.Ed.2d 685 (1969). State v. Wilson, 467 So.2d 503, 517 (La.1985), cert. denied, Wilson v. Louisiana, 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246. As this Court recently noted in State v. Parker, 622 So.2d 791 (La. App. 4 Cir. 1993), writ denied, 627 So.2d 660 (La. 1993), the search of the defendant is legal if there is probable cause for his arrest. Id. at 793 (citing Chimel, supra, and Wilson, supra). However, as the Supreme Court observed in Sibron v. State of New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), a search incident to a lawful arrest may not precede the arrest and serve as part of its justification. Id. at 67. State v. Melton, 412 So.2d 1065, 1067 (La.1982).

In the case at bar, the defendant had been arrested for attempted burglary when the police officers searched him and his bag and found the glasses. The officers placed defendant under arrest after Ms. Hanemann positively identified the defendant as the person she saw taking her son's bicycle out of her garage. As the glasses were found in a search incident to a lawful arrest, the trial court correctly denied the defendant's motion to suppress evidence.

These assignments are without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 3

The defendant further complains that Officer Gilmore failed to protect

exculpatory evidence. He argues that Officer Gilmore should have called a crime lab technician to take fingerprints from the bicycle the defendant was allegedly attempting to steal. The defendant argues that his fingerprints would not have been found on the bicycle. The police officer had no obligation to call for a crime lab technician to attempt to take fingerprints off of a bicycle when the victim observed and positively identified the perpetrator.

This assignment is without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 4

The defendant also suggests that Detective Clint Lauman violated the defendant's right to a fair trial when the officer removed the eyeglasses from N.O. P.D.'s Central Evidence and Property office. The testimony reveals that the officer removed the eyeglasses pursuant to a valid court order. Further, the officer took photographs of the glasses before they were removed from the property office. See La. R.S. 15: 436.1 (A)

This assignment is without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 5

The defendant alleges that trial court erred when it ordered defendant to trial with counsel who was not acquainted with the defendant's case. However, a review of the record indicates that the defendant did not object

to trial counsel or seek a continuance. Accordingly, this issue has not preserved for review on appeal. See. La. C.Cr.P. article 841.

This assignment is without merit.

DEFENDANT'S PRO SE ASSIGNMENTS OF ERROR NUMBERS 6 AND 7

The defendant argues that his trial counsel was ineffective for allowing key prosecution witnesses to be dismissed from trial. The defendant further suggests that his trial counsel violated the defendant's right to a fair trial when counsel acknowledged in open court during pre-trial motion hearings that the defendant had prior convictions in California.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. State v. Prudholm, 446 So.2d 729 (La. 1984); State v. Johnson, 557 So.2d 1030 (La. App. 4 Cir. 1990); State v. Reed, 483 So.2d 1278 (La. App. 4 Cir. 1986). Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. State v. Seiss, 428 So.2d 444 (La.1983); State v. Ratcliff, 416 So.2d 528 (La. 1982); State v. Garland, 482 So.2d 133 (La. App. 4 Cir. 1986); State v. Landry, 499 So.2d 1320 (La. App. 4 Cir. 1986).

There is not sufficient evidence in the appellate record to rule on these claims of ineffective assistance of counsel. These issues are more appropriately considered in an application for post conviction relief.

These assignments of error are without merit.

DEFENDANT'S PRO SE ASSIGNMENTS OF ERROR NUMBERS 8 AND 10

The defendant contends that the trial court erred when it ignored the defendant's objection to the State's failure to prove ownership, value and depreciation of the eyeglasses. The defendant also argues that the State did not produce sufficient evidence to prove that a theft of the eyeglasses occurred.

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred

according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. La. R.S. 15:438 is not a separate test from Jackson v. Virginia, supra, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, supra.

La. R.S. 14:67 defines theft as "the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations." In the case at bar, Ms. Schoen testified that she left her glasses on her front porch while she took a walk around her neighborhood. When she returned, her glasses were gone. The eyeglasses were found in the defendant's possession after he was arrested for committing a burglary in Ms. Schoen's neighborhood. Ms. Schoen testified at trial that the glasses belonged to her. She also stated that the glasses were valued between two hundred fifty dollars and two hundred seventy-five dollars. Ms. Schoen testified that she did not give the defendant permission to take her eyeglasses. Such testimony was sufficient to support the

defendant's conviction for theft of property valued between one hundred dollars and five hundred dollars.

These assignments are without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 11

The defendant further alleges that the trial court erred when it allowed a wife of a police officer to remain on the jury although defendant had filed a challenge for cause. The record is devoid of any evidence to suggest that any such objections were made during voir dire and jury selection. Accordingly, review of this alleged error has not been preserved for appeal. La. C.Cr.P. article 841.

This assignment is without merit.

DEFENDANT'S PRO SE ASSIGNMENT OF ERROR NUMBER 12

Lastly, the defendant argues that the on scene identification by Ms. Hanemann was suggestive and prejudicial. The defendant in the present case was identified by the victim in an "one-on-one" encounter which occurred only a short time after the crime. This type of "one-on-one" confrontation between a suspect and the victim is generally not favored but is permissible when justified by the overall circumstances, particularly when the accused is apprehended within a relatively short period of time after the occurrence of the crime and has been returned to the crime scene. State v.

Walters, 582 So.2d 317 (La. App. 4 Cir. 1991), writ denied, 584 So.2d 1171 (La. 1991); State v. Peters, 553 So.2d 1026 (La. App. 4 Cir. 1989). These identifications have been upheld because prompt confrontation between the defendant and the victim promotes fairness by assuring the reliability of the identification (while the victim's memory is fresh) and the expeditious release of innocent suspects. State v. Robinson, 404 So.2d 907 (La. 1981); State v. Muntz, 534 So.2d 1317 (La. App. 4 Cir. 1988); State v. Jackson, 517 So.2d 366 (La. App. 5 Cir. 1987).

The present case is typical of one-on-one identifications. For example in State v. Valentine, 570 So.2d 533 (La. App. 4 Cir. 1990), a restaurant was robbed in the middle of the night by a man wearing a ski mask. The victims called the police, and the defendant was apprehended shortly thereafter, only two blocks from the scene of the robbery. The police officer took the defendant to the scene to be identified by the two victims. The victims separately viewed the defendant who was seated in the back of the car. This Court upheld the identification of the defendant because there was no showing of unreliability or suggestiveness. See also, State v. Peters, 553 So.2d 1026 (La. App. 4 Cir. 1989); State v. Cryer, 564 So.2d 1328 (La. App. 4 Cir. 1990); State v. Smith, 577 So.2d 313 (La. App. 4 Cir. 1991); State v. Muntz, 534 So.2d 1317 (La. App. 4 Cir. 1988).

In State v. Brown, 519 So.2d 826 (La. App. 4 Cir. 1988), the victim coincidentally viewed the defendant as he was being led into the police station where the victims had gone to report the robbery. The identifications occurred shortly after the robbery, and the trial court's denial of the motion to suppress the identifications was upheld by this Court.

Likewise, in State v. Guillot, 526 So.2d 352 (La. App. 4 Cir. 1988), writs denied, 531 So.2d 481 (La. 1988), the victim and a witness identified the defendants as they were being led to a police car parked in front of a bar where the crime occurred. The spontaneous identifications occurred within two hours of the crime and, again, this Court upheld the admissibility of these identifications.

When there is possibility that identification procedures were suggestive, five factors should be considered in determining whether the suggestive identification gave rise to a substantial likelihood of misidentification: 1)the victim's opportunity to view the defendant at the time the crime was committed; 2)the degree of attention paid by the victim during the commission of the crime; 3)the accuracy of any prior description; 4)the level of the victim's certainty displayed at the time of the identification; and 5)the length of time elapsed between the crime and identification. Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 50

L.Ed.2d 140 (1977).

The identification of the defendant at the police station and in handcuffs will not necessarily render the identification procedures suggestive or indicate that there is a "substantial likelihood of misidentification". See State v. Valentine; State v. Robinson, 404 So.2d. 907 (La. 1981); State v. Muntz; State v. Jackson; State v. Williams, 536 So.2d 773 (La. App. 5 Cir. 1988), writ denied, 95-1325 (La. 11/13/95), 662 So.2d 465; State v. Amos, 550 So.2d 272 (La. App. 4 Cir. 1989); State v. Cryer; State v. Walters.

In the present case, Ms. Hanemann identified the defendant in one on one identification within five minutes of the burglary. She positively identified the defendant as the person who was taking her son's bicycle out her garage. Ms. Hanemann had ample opportunity to view the defendant during the offense. She watched him from her kitchen taking the bicycle out of the garage. She then confronted him in her yard and followed him some blocks before confronting him again. The description she gave to the police officers matched the defendant and assisted in his apprehension. The identification was not prejudicial, and there was no substantial likelihood of misidentification.

This assignment is without merit.

CONCLUSION

Accordingly, the defendant's conviction and sentence for theft between one hundred dollars and five hundred dollars is affirmed. Defendant's conviction for burglary is affirmed. The defendant's adjudication and sentence under the multiple offender statute is vacated and the matter is remanded for resentencing.

AFFIRMED IN PART, VACATED IN PART AND REMANDED IN PART