NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0083**
VERSUS	*	**COURT OF APPEAL**
MARQUIETTE D.WATTS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-548, SECTION "F"
Honorable Dennis J. Waldron, Judge
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Judge David S. Gorbaty
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(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

Marquiette D. Watts appeals his conviction for theft of goods valued at over $500, claiming that the trial court erred in allowing introduction of certain demonstrative evidence that prejudiced the jury, and that the State did not prove beyond a reasonable doubt all elements of the crime charged. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF THE CASE:

On July 11, 2000, the State filed a bill of information charging the defendant-appellant with one count of violating La. Rev. Stat. 14:67.10 relative to theft of goods valued at more than $500.00. A six-person jury found Watts guilty as charged on July 20, 2000. The State subsequently filed a multiple bill charging the defendant as a second offender. On August 4, 2000 the defendant entered a plea of guilty to the multiple bill and was sentenced to serve five years at hard labor without the benefit of probation or suspension of sentence. Watts' motion to reconsider sentence was denied.

This appeal followed.

STATEMENT OF THE FACTS:

On June 14, 2000, Detective Daniel Wharton of the New Orleans Police Department Seventh District was working a security detail at the Dillard's department store in New Orleans. At approximately 11 a.m., Detective Wharton was watching the video cameras, including the camera in the men's department close to the exit. Detective Wharton saw Watts walking with an empty bag, which aroused the detective's suspicion because of past experience. Watts walked to a display of Nautica shirts, which was next to the door to the outside, and began putting shirts into the bag he was carrying. After he placed several shirts into the bag, he ran out of the store and jumped into the passenger side of a vehicle without paying for the shirts. Detective Wharton was able to observe Watts getting in the car from a video camera affixed to the outside of the building. Detective Wharton ran outside but was unable to see where the car had gone. However, a bystander gave him the license plate number of the vehicle, and the detective was able to run the license plate number and obtain the name of the registered owner. He then went to the address shown for the owner of the vehicle. As he pulled up to the address approximately one hour after the incident, he saw Watts walking out of the front door carrying the same bag he had in the store.

Detective Wharton called for back-up as Watts went immediately back into the house. When the back-up unit arrived, the officers knocked on the door of the residence and were admitted by the resident, who was a friend of Watts. Inside, Detective Wharton arrested Watts and seized from the bedroom the bag that Watts had been carrying. The bag still contained the stolen shirts.

After Detective Wharton obtained the stolen merchandise from the house, he returned to Dillard’s with Watts and the merchandise. The detective completed a Dillard’s civil recovery form in which he itemized each piece of merchandise by the “SKU” numbers and the price as reflected on the price tags still attached to the shirts. Detective Wharton testified at trial that one of the shirts was on sale for $27.50; the price for that shirt was obtained by scanning the tag after Watts told him it was on sale. The total value of the stolen shirts was $507.00.

In addition to Detective Wharton’s testimony, the State introduced a videotape from the surveillance camera at Dillard’s. The State also presented the testimony of Richard Jackson, the operations manager of the Clearview Dillard’s. He testified that all of the Dillard’s stores followed the same practices and procedures, including placing items on sale. He identified the civil recovery form completed by Detective Wharton and

stated that the price of any stolen merchandise should be as of the date of the theft, including a sale price if the item is on sale. The form reflected that ten items were stolen for a total value of $507.00. Mr. Jackson also identified three shirts that he had brought with him; these were the same type as those listed as stolen, although they were not the actual items. Mr. Jackson admitted that, if a customer had purchased the shirts, the price would be determined by scanning the price tag. However, he also stated that a sale sticker should be placed over the original price.

The defense presented no witnesses at trial.

ASSIGNMENT OF ERROR NO. 1:

In his first assignment of error, Watts argues that the trial court erred in allowing the State to introduce three shirts which were not the actual items allegedly stolen. He argues that this demonstrative evidence was irrelevant; furthermore, because the jury was shown a photograph of the actual shirts, the evidence was repetitive.

The trial transcript indicates that during Mr. Jackson's testimony, the trial court noted for the record that there had been a discussion about the shirts during a recess. At that point, defense counsel made a formal objection for the record, stating that they were not the same shirts and the source of them was unknown. The trial court overruled the objection on the

ground that the objection went to the weight of the evidence, not its admissibility.

As noted in *State v. Duncan*, 99-0778, pp. 12-13 (La.App. 4 Cir. 4/19/00), 761 So.2d 586, 593:

> This Court discussed the admissibility of demonstrative evidence in *State v. Richardson*, 96-2598, pp.4-5 (La. App. 4 Cir. 12/17/97), 703 So. 2d 1371, 1373:
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>> To be admissible, demonstrative evidence must be identified and authenticated. La. C.E. art. 901. As a foundation for admitting demonstrative evidence, it must be established that the object sought to be introduced is more probably than not connected with the case. *State v. Tatum*, 506 So. 2d 584 (La. App. 4th Cir. 1987); *State v. Matthews*, 95-1245 (La. App. 4th Cir. 8/21/96) 679 So. 2d 977, 984, *writ denied*, 96-2332 (La. 1/31/97), 687 So. 2d 403. A lack of positive identification of demonstrative evidence or its chain of custody goes to the weight of the evidence, not to its admissibility, and the connection of that evidence to the case is a factual matter to be determined by the trier of fact. *State v. Lewis*, 452 So. 2d 720 (La. App. 4th Cir. 1984).
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>> In *State v. Manieri*, 378 So. 2d 931 (La. 1980), our Supreme Court held that it was error to allow the introduction of a weapon which was "similar" to the weapon used during the commission of the charged crime. It reasoned that "the jurors naturally tend to infer a connection between the weapon and the [crime] simply from a mere viewing of the material object, although such a connection is not proved." *Id.* at 933. In that case, the State introduced knives similar to the knife used to kill the victim. However, the court found that the erroneous introduction of the knives

> did not prejudice the defendant because there was no attempt to associate the knives introduced by the State with the knife used by the defendant. In *State v. Villavicencio*, 528 So. 2d 215 (La. App. 4th Cir. 1988), *writ denied*, 533 So. 2d 14 (La. 1988), the defendant argued that the court committed reversible error when it allowed the State to introduce a rifle into evidence that was indisputably not used in the commission of the crime for which the defendant stood trial. We found that it was error to admit the rifle into evidence because it was irrelevant to the case and a jury could improperly infer a connection between the rifle and the crime. *Id.* at 217. However, we held that the error did not constitute reversible error because there was no attempt by the State to link the rifle with crime and because there was ample evidence to convict the defendant of the murder without the introduction of the rifle. Likewise, in *State v. Everridge*, 523 So. 2d 879 (La. App. 4th Cir. 1988), the defendant claimed that the trial judge erred in allowing a gun into evidence that had not been used in the crime. Again, we found that introduction of the gun constituted error, but that such error was not reversible error. In that case, there also was no attempt by the State to link the gun with the crime and, furthermore, the State did not seek to exploit the admission of the gun. *Id.* at 881.

In *Duncan*, the State attempted to introduce a baseball bat that was not the one actually used in the crime, the original bat having been burned up in a fire, but the trial court would not allow it to do so. However, during closing argument the trial court allowed the State to use the bat as a demonstrative aid. This Court found that, because the State did not attempt

to link the baseball bat with the actual weapon used in the crime, there would have been no prejudicial error even if the trial court had admitted the demonstrative bat into evidence.

In the instant case, Mr. Jackson testified that the three shirts were the same type listed on the civil recovery form. The shirts were specifically introduced "for demonstrative purposes" to allow Mr. Jackson to show the jury the price tags and how they are changed when an item is on sale. A photograph of the ten shirts actually stolen by the defendant was admitted into evidence, and there was no attempt by the State to claim that the shirts brought to court by Mr. Jackson were the actual stolen merchandise. In light of *Duncan*, the admission of the shirts for demonstrative purposes was not prejudicial to Watts.

ASSIGNMENT OF ERROR NUMBER 2:

In his second assignment of error, Watts contends that the State failed to prove an essential element of the offense, to wit, the actual retail value of the stolen shirts.

In *State v. Ash*, 97-2061, pp. 4-5 (La.App. 4 Cir. 2/10/99), 729 So.2d 664, 667-68, this Court set forth the standard of review applicable to a claim that the evidence produced was constitutionally insufficient to support a

conviction:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. *State v. Mussall*, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *Id.* The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. *State v. Cashen*, 544 So.2d 1268 (La. App. 4 Cir. 1989). 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 proved such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This 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*, 504 So.2d 817 (La. 1987).

Watts was charged and convicted of violating La. Rev. Stat. 14:67.10, which is the misappropriation or taking of anything of value which is held for sale by a merchant, and in this case, in the grade of theft of goods valued at more than $500.00. La. Rev. Stat. 14:2 (2) defines the phrase "anything of value" specifically in a shoplifting case as "the actual retail price of the property at the time of the offense." Watts' contention is that the testimony of Detective Wharton failed to establish that the "actual retail price" of the shirts totaled $507.00 because he admitted that he did not scan each price tag, and in light of the fact that one of the shirts actually scanned had a price much lower than that reflected on the tag. Mr. Jackson and Detective Wharton both testified that the fact that an item is on sale should be noted on the price tag attached to the item. Admittedly, in this case, apparently one shirt did not properly note the fact that the item was on sale. However, Detective Wharton testified that the reason Watts and the stolen merchandise were immediately transported back to Dillard's was so that the paperwork could be completed. He stated that sometimes items are on sale, so he had to make a determination of the price of each item. He also testified that the manager of the men's department was present as he ascertained the price of each item. Moreover, Detective Wharton testified that he had been working at Dillard's for over three years and that he saw the clothes every day. He

further testified that the shirts stolen were "brand new" having "just come into the store."

In *State v. Hudgins*, 400 So.2d 889 (La. 1981), the defendant contended that the store detective was not qualified to testify as to the value of the stolen merchandise. The detective provided the evidence of value by reading the price tags of the stolen items. The Supreme Court found that this testimony could be given such weight as the trial court, the trier of fact, saw fit. The Court upheld the trial court's determination of value as reflected on the price tags and found the evidence sufficient. In *State v. Smith*, 485 So.2d 646 (La.App. 4 Cir. 1986), this Court relied on *Hudgins* to find that the testimony of a store manager, without any supporting documentation, was sufficient to prove value. The absence of any documentation went strictly to the weight of the evidence. *See also State v. Jackson*, 96-2540 (La.App. 4 Cir. 11/26/97), 706 So.2d 494, *opinion vacated on other grounds,* 96-2540 (La.App. 4 Cir. 8/12/98), 718 So.2d 1001, and *State v. Sanders*, 558 So.2d 785 (La.App. 5 Cir. 1990), in which the courts found that the testimony of the security officers was sufficient to prove value.

Here, the jury apparently accepted the testimony of Detective Wharton regarding the value of the items as further reflected on the civil recovery form. The detective fully explained the basis for the amounts put

on the form, specifically, how he ascertained the values from the price tags and from scanning one item. As in *Hudgins*, the jury was free to give this testimony what weight it wished. The jury accepted this testimony regarding the value, and, thus the evidence was sufficient.

It should be noted that neither of the cases cited by Watts require reversal of the conviction in this case. In *State v. Herrera*, 98-677 (La.App. 5 Cir. 2/10/99), 729 So.2d 75, the testimony at trial showed that the prices of the stolen items were determined by scanning the tags. However, nothing in *Herrera* states that this is the only acceptable method for determining value.

Similarly, in *State v. Council*, 97-1221 (La.App. 5 Cir. 3/25/98), 708 So.2d 1283, the value was determined by scanning items. However, the issue was not the methodology employed. Instead, the issue was whether the State negated the possibility that the items were on sale. In finding the evidence sufficient, the court reviewed the State's evidence:

> Juliette Berkel (Berkel) testified she was employed as a security officer at K-Mart on February 20, 1997, the date of the incident. Berkel testified that she personally compiled a list of the stolen merchandise and the respective retail prices. She testified that the total value of the merchandise was five hundred forty-two dollars and ninety-two cents ($542.92). [Footnote omitted.] She explained that she arrived at that total by using the store's scanner, or "R.M.U.," which is a device that scans bar codes of merchandise and provides the appropriate retail value.
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> The defendant argues that the state had to prove none of the items were on sale that date since Berkel admitted that if

> sale prices had not been entered into the computer, the scanner would not provide the correct decreased price. However, she also testified she double-checked the items as did her manager and that the figure was accurate. That testimony as to the accuracy of the amount was uncontraverted [sic].

Id., pp. 2-3, 708 So.2d at 1284-85.

Nowhere in *Council* did the court hold that utilizing the scanner was the only method to prove value. Furthermore, the possibility that the method used may have resulted in an incorrect value did not, in and of itself, render the evidence of value insufficient.

ERRORS PATENT:

A review of the record for errors patent reveals none.

Accordingly, for the reasons assigned, Marquiette Watts' conviction and sentence are affirmed.

AFFIRMED