STATE OF LOUISIANA	*	**NO. 2001-KA-1729**
VERSUS	*	**COURT OF APPEAL**
NELSON AVERY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 418-903, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge James F. McKay III, Judge Terri F. Love)

PLOTKIN, J., DISSENTING.

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CONVICTION AND SENTENCE VACATED; REMANDED

The defendant Nelson Avery was charged by bill of information on January 8, 2001, with one count of purse snatching in violation of La. R.S. 14:65.1. The defendant pleaded not guilty at his January 18, 2001 arraignment.

On March 27, 2001, a six-person jury found the defendant guilty of simple robbery. On June 28, 2001, the defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence after being adjudged a third time felony offender. The trial court granted the defendant's motion for appeal on May 29, 2001.

STATEMENT OF FACT

Gwnedd Gilman testified that on December 11, 2000, she was riding her bike home from a coffee shop in the French Quarter. Attached to the front of the bike was a basket that contained a bag the victim described as a tote bag that contained a journal, pens, money and other miscellaneous items. As Ms. Gilman approached the area around Pirate's Alley the defendant approached from the opposite direction, also riding a bike. The defendant stopped Ms. Gilman by kicking the basket on her bike. Ms.

Gilman testified at trial that the defendant demanded that she give him her pocketbook. When Ms. Gilman hesitated the defendant grabbed the tote bag out of the basket. Ms. Gilman grabbed the bag, and the defendant responded by hitting Ms. Gilman in the face and running down Pirate's Alley.

Brett Thomas testified that he was standing in Pirate's Alley with Rene Laizer and Mara Cooper at approximately 12:30 a.m. on December 11, 2000, when he heard a woman screaming at the end of the alley. Mr. Thomas, Mr. Laizer, and Ms. Cooper all testified that they looked up and saw Ms. Gilman screaming and that a man was running down the alley with what appeared to be a purse under his arm. Three men who yelled, "Stop that man", were chasing the man. Mr. Thomas tackled the defendant. The defendant responded by trying to hit Mr. Thomas and swinging a box cutter at him. In the meantime, Mr. Laizer dialed 911 on his cell phone.

New Orleans Police Officer Floyd Wagar, who was assigned to the Eighth District, was dispatched to the scene, where Mr.Thomas and Mr. Laizer were holding the defendant down on the ground. Officer Wagar testified that Ms. Gilman's purse, currency, and I.D. were recovered on the scene, and Ms. Gilman identified the defendant as the person who had taken her bag. The defendant's bike and box cutter were also recovered. Ms. Gilman's money was photocopied and the bag was taken as evidence.

ERRORS PATENT

A review of the record shows that an error occurred in the defendant's sentence, which will be discussed in assignment of error number two. There are no other errors patent.

ASSIGNMENT OF ERROR NUMBER 1

The defendant complains that simple robbery is not a statutorily responsive verdict for purse snatching. Specifically, he alleges that simple robbery, as a responsive verdict to purse snatching is a legal impossibility according to Louisiana law.

La.C.Cr.P. art. 814 gives the list of responsive verdicts, and purse snatching is not included in the list. Because purse snatching is not listed in La.C.Cr.P. art. 814, La.C.Cr.P. art. 815 applies. Article 815 states that in all cases not provided for in Article 814, the following verdicts are responsive: (1) Guilty; (2) Guilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense is a misdemeanor; or (3) Not Guilty. A lesser offense is included in the charge of the greater offense if all of the elements of the lesser crime are included in the definition of the greater crime. State v. McCoy, 337 So.2d 192, 196 (La. 1976).

La. R.S. 14:65 defines simple 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, but not armed with a dangerous weapon. La. R.S. 14:65.1 defines purse snatching as the theft of anything of value contained within a purse or wallet at the time of the theft, from the person of another or which is in the immediate control of another, by use of force, intimidation, or by snatching, but not armed with a dangerous weapon.

This Court in State v. Mosley, 485 So.2d 658 (La. 4th Cir. 1986), stated:

> Louisiana courts have distinguished the term "snatching" in R.S.14:65.1 from the legal definition of the "use of force or intimidation." "Snatching" does not require a face-to-face confrontation and is distinguished from the use of force or intimidation by the statute's very wording. Since the offense of purse snatching may be committed by a "snatching" as distinguished from the use of force or intimidation, as required by the offense of simple robbery, it followed that the commission of the offense of purse snatching would not necessarily result in the commission of the offense of simple robbery. Accordingly, the offense of simple robbery is not responsive to the charge of purse snatching. (Citations omitted)

The State proved beyond a reasonable doubt that the defendant committed the crime of simple robbery. The defendant took Ms. Gilman's bag by the use of force or intimidation. The defendant forced Ms. Gilman to

stop her bike by kicking the basket, and when she stopped he demanded the bag. The defendant then struck Ms. Gilman in the face at least once when she hesitated in giving him the bag. However, the State chose to charge the defendant with purse snatching, rather than simple robbery. As we are constrained by our holding in Mosley, we must conclude that simple robbery is not responsive to purse snatching, and that the trial court erred by so charging the jury. We therefore vacate the defendant's conviction and sentence and remand the matter for retrial.

As we have remanded the matter to the trial court for retrial it is incumbent upon this Court to address the issue of double jeopardy.

The court in Mayeux, 485 So.2d 256 (La. App. 3 Cir. 1986), found that a non-responsive verdict is an error patent on the face of the record which does not require an objection. In Mayeux, the defendant was charged with aggravated battery and convicted of attempted aggravated battery. On appeal, the Third Circuit found that the verdict was invalid because attempted aggravated battery was not listed in La. C.Cr.P. art. 814(A)(14). The appellate court ordered the defendant discharged on the basis that the return of the erroneous responsive verdict constituted an acquittal on the original charge. State v. Mayeux, 485 So. 2d 256 (La. App. 3rd Cir. 1986).

The State sought writs in the Supreme Court. That court found that retrial of the defendant was not barred by the principal of double jeopardy because the crime for which he was convicted, attempted aggravated battery, was an unspecified crime in Louisiana and could not have the same effect as a conviction for aggravated assault, which is a specified crime albeit not a listed responsive verdict under La. C.Cr.P. art. 814. Mayeux, 498 So. 2d at 703. The court further opined that, "the Fifth Amendment does not bar retrial when a jury's verdict, containing a nonwaivable defect, must be set aside by an appellate court. The jury rendered an illegal verdict. . . . It amounted simply to conviction of a non-crime. As such it could operate neither as a conviction nor acquittal." Id. at 705.

This Court relied on Mayeux, fully discussing its subsequent history and application, in State v. Nazar, pp. 3-5, 96-0175 (La. App. 4 Cir. 5/22/96), 675 So. 2d 780, 782-83:

> On retrial the defendant was convicted as charged and his conviction and sentence were affirmed on appeal. State v. Mayeux, 526 So. 2d 1243 (La. App. 3rd Cir. 1988), writs denied, 531 So. 2d 262 (La. 1988). The defendant sought habeas corpus relief in federal district court which reversed the conviction based on double jeopardy, Mayeux v. Belt, 737 F.Supp. at 960-61. The U.S. District Court concluded that the jury in the first trial was given a full opportunity to return a verdict on the greater charge, but instead found the defendant guilty of attempt. The court had instructed the jury that a verdict of attempt could be returned if the jurors were not convinced that Mayeux was guilty of aggravated battery. The jury acquitted Mayeux of aggravated battery and the second

trial unconstitutionally put him in jeopardy a second time. Although the verdict was invalid, there was no reason why it could not operate as an acquittal of the charge of aggravated battery. Id.

Mayeux was discussed recently in State v. Campbell, 94-1268 (La. App. 3 Cir. 5/3/95), 657 So. 2d 152, affirmed in part and reversed in part, 95-1409 (La. 3/22/96), 1996 WL 125998 [670 So. 2d 1212]. There the defendants were charged with jury tampering and convicted of attempted jury tampering. The Third Circuit relied on the federal district court opinion in Mayeux, 737 F.Supp. at 957, and reversed the convictions, entered acquittals, and discharged the defendants. The Third Circuit declared: "While we would prefer to follow the ruling of the Louisiana Supreme Court in State v. Mayeux, supra, we refuse to waste the limited judicial resources of this state in vain and futile acts." Id. at 156.

The Louisiana Supreme Court granted the State's application. The Court noted La. C.Cr.P. art. 598's double jeopardy provision that a defendant who is found guilty of a lesser degree of the offense cannot thereafter be tried for that offense. It noted its holding in Mayeux and the federal court decision which subsequently overturned Mayeux's second conviction after retrial on double jeopardy grounds. The Court declared: "We need not reconsider here the continuing validity of State v. Mayeux in light of its subsequent history." 1996 WL 125998. The Supreme Court distinguished Campbell, which involved a verdict of attempted jury tampering, which is not a non-crime under Louisiana law. According to the elements of the crime, attempted jury tampering is jury tampering. The Court did not state that the jury's return of the "lesser" verdict of attempt necessarily or implicitly acquitted the defendants of any material element of the charged crime. The Court concluded that the trial court's error in listing the responsive verdicts rendered the jury's verdicts "insolubly ambiguous" and due to the confusion the jury verdicts did not clearly convict or acquit the defendants. The Court affirmed the reversal of the defendants' convictions and sentences, but vacated the Third Circuit's order discharging the defendants and remanded the case to the district court for further proceedings. Id.

> The Louisiana Supreme Court sidestepped a discussion of its Mayeux opinion, which remains binding on this Court. Therefore, the trial court erred by changing its verdict to guilty of simple battery. The original verdict of guilty of attempted simple battery is a non-crime and invalid (just as Mayeux's guilty verdict of attempted aggravated battery was a [sic] for a non-crime). Although this Court finds the reasoning of the federal district court in Mayeux v. Belt, 737 F.Supp. at 957, persuasive, we follow State v. Mayeux, 498 So. 2d at 701, which holds that the verdict of guilty of a non-crime cannot serve as an acquittal or a conviction for double jeopardy purposes.

See also State v. Self, 2000-633 (La. App. 3 Cir. 11/14/00), 772 So. 2d 337.

In the case *sub judice*, at the State's behest and over the defense's objection, the trial court instructed the jury that simple robbery, a legislatively authorized crime, is responsive to purse snatching. As distinguished from Mayeux, in which the jury was instructed that in response to the crime charged, aggravated battery, a verdict of attempted aggravated battery, a non-crime, could be returned; in the instant matter the charge of simple robbery, although a lesser crime, is not responsive. Jurisprudentially, this Circuit has held in Mosely, that simple robbery is non-responsive to purse snatching and legislatively it is not designated as responsive in La. C.Cr. Pro. art. 814. Nevertheless, in the instant matter the jury did return a verdict of a crime under Louisiana law, La. R.S. 14: 65, simple robbery, despite the judicial error.

In consideration of the defendants constitutional rights under a double jeopardy theory, when a verdict of guilty of a lesser degree of the offense charged is returned, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment, and the defendant cannot thereafter be tried for those offenses on a new trial. La. C.Cr.Pro. art 598. Yet, the instant matter has a different fact situation. The verdict of guilty of simple robbery, which the jury returned is not a lesser degree of the offense charged but merely a lesser crime due to the nature of its penalties. The clear intent of the jury was to convict the defendant of a crime and not to acquit or absolve the defendant from any guilt. Therefore, we distinguish the case from Mayeux, and find that the defendant cannot be retried on the charge of purse snatching as he has been acquitted of that offense but may be retried under the charge of simple robbery should the State choose to amend the bill of information. Furthermore, the record reflects that there was sufficient evidence to convict the defendant of simple robbery.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error the defendant complains that his life sentence is excessive, and that the sentence is erroneous because he was entitled to be sentenced under the amended version of L.A. R.S. 15:529.1. We decline to address this issue in light of our vacating of the defendant's

conviction and sentence.

Due to the judicial error, we vacate the defendant's conviction and sentence and remand the matter to the trial court for further proceedings consistent with this opinion.

CONVICTION AND SENTENCE VACATED; REMANDED