

**STATE OF LOUISIANA**

\*

**NO. 2001-KA-1996**

**VERSUS**

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**COURT OF APPEAL**

**TROY DELONE**

\*

**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 413-798, SECTION "B"  
Honorable Patrick G. Quinlan, Judge

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**Judge Steven R. Plotkin**

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(Court composed of Judge Steven R. Plotkin, Judge Patricia Rivet Murray,  
Judge Terri F. Love)

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**AFFIRMED.**

The issues in this appeal are whether the evidence was sufficient to support the conviction, whether the trial court erred in denying the defendant's motion to for a mistrial, whether the sentence was excessive and whether the trial court erred in adjudicating the defendant a third offender. For the reasons below, we affirm.

**PROCEDURAL HISTORY**

The defendant was charged by bill of information with two counts of armed robbery in violation of La. R.S. 14:64, and with intimidation of a witness in violation La. R.S. 14:129.1(a). The bill also charged two co-defendants, Bradley Newman and Ternell Thomas, with armed robbery in count three of the information. Defendant pled not guilty as to all charges. The trial court found probable cause and denied defendants' motions to suppress the identifications.

The case went to trial and the jury found defendant guilty as charged on the two counts of armed robbery, and guilty of the responsive verdict of attempted intimidation of a witness. The State filed a multiple bills as to all counts and after a multiple bill hearing the defendant was found to be a third

felony offender as to

each count. Defendant waived all legal delays, and the court sentenced defendant to life in prison without benefit of parole as to count one, armed robbery; five years in prison as to count two, attempted intimidation of witnesses to be served concurrently with the sentence in count one; and life in prison without benefit of parole on count three, armed robbery, to be served consecutively with counts one and two. Defense counsel objected to the sentences as excessive.

### **STATEMENT OF FACTS**

On the night of October 15, 1999, Cindy Cole exited a cab and was entering her apartment with her two young children when the defendant came out of an adjacent abandoned house and entered her apartment. The defendant held Ms. Cole at gunpoint and demanded money, threatening to kill Ms. Cole or a member of the household if he did not get what he wanted. Ms. Cole gave the defendant \$320, all the money she had in the house. After describing the defendant to a neighbor, she was told his street name was T-Roy. A few days later, Ms. Cole reported the crime to the project office, noting this delay was due to fear of reprisal. An incident report was made by Officer Roland Doucette. Cole stated that she had seen the defendant on numerous previous occasions and that on one occasion he used her

telephone. A few days later, Cole viewed a photographic lineup and identified Troy Delone as the perpetrator. Delone was arrested on October 20, 1999 at his mother's house. The police conducted a search incident to arrest of the bedroom where Delone was found sleeping at the time of the arrest and a limited search of the mother's home with her permission. No evidence was recovered. The police also conducted a search of defendant's girlfriend's apartment and again, no

weapons or stolen property was recovered.

On February 6, 2000, at approximately 5:50 a.m. Cindy Cole asked her younger brother, Prosper Cole, to go to the store with her to get some formula for her baby. Prosper Cole went outside of the apartment ahead of Cindy Cole. Troy Delone emerged from an adjacent abandoned house with a gun demanding Prosper enter the building. Ms. Cole stated that upon exiting her apartment, she saw Delone pointing a gun at her brother. She noted that Delone's two accomplices were in the doorway of the abandoned apartment and that one of them had a gun. Once Prosper Cole was inside, Delone took his jacket and his shoes, a chain and some money. Delone wanted his pants as well, which Prosper Cole began to remove until the one of the other two said, "No, its too cold, pull them back up."

Delone told Prosper Cole to run whereupon he ran out the back door and Cindy Cole ran back into her house. Ms. Cole then phoned the police. Ms. Cole and another sibling then walked to a nearby store where Prosper had fled, calling Cindy upon his arrival. While returning the Coles observed the three assailants standing in a dark area watching them return home. The three attackers remained outside the Cole home until police arrived.

Prosper Cole told police that he had never seen any of the three individuals before but that he had only moved in with his sister two months

before the robbery. Cindy and Prosper were separately shown photographic lineups of the defendants and each identified the three defendants as the attackers. Prosper testified that his identification of Delone was almost immediate upon viewing the lineups. Prosper stated that Delone was the only one talking during the robbery and that Delone was the closest to him.

Cindy Cole testified that after the identification following the February robbery, the father of her child brought Delone to her home where the defendant denied committing the offense and offered to pay her back for what was taken from her. Ms. Cole stated that a few days later, as she was walking across the courtyard to her building, the defendant approached her and asked if she was going to go to court. Cole ignored him. Delone then stated if she were to go to court he was going to kill everybody in her house from the children on up.

Former co-defendant, Bradley Newman testified that he did not know Troy Delone and that he was not with him on February 6, 2000. When asked why he had pled guilty to the felony of simple robbery, he stated that he did so in order to get out of jail.

Upon taking the stand, Troy Delone denied participation in either robbery as well as denying that he had ever had a conversation with either Prosper or Cindy Cole regarding those events. Delone put forth an alibi for

both dates in question. Delone stated that he recalled the date and time of the first incident, when he was at a bar known as Club Escape. The defense did not introduce any corroborating evidence or witnesses supporting Mr. Delone's assertion. As to the February 6 incident Delone testified that he was again at Club Escape, this time celebrating a friend's birthday. He stated that he became so intoxicated that his friends had to carry him home where he remained until late on February 6, 2000. Delone's girlfriend and the mother of his child, Tiffany Woods, testified in support of Delone's alibi as to February 6, 2000. She stated that Delone was brought to her apartment at about 2:00 a.m. on the morning of the robbery. Woods stated that Delone was intoxicated upon his arrival and that he passed out immediately. She stated that he remained there until the following day.

### **ERRORS PATENT**

A review of the record for errors patent reveals none.

### **ASSIGNMENT OF ERROR NUMBER 1**

The Defendant asserts the evidence was constitutionally insufficient to support a guilty verdict as to any of the charges and therefore the State failed to establish beyond a reasonable doubt that defendant committed the crime in question.



The Due Process Clause of the Fourteenth Amendment protects a person accused of a crime from being convicted unless the State proves every element of the offense charged beyond a reasonable doubt. This constitutional protection is the basis of a reviewing court's duty to determine the sufficiency of the evidence used to convict a defendant. *State v. Monds*, 631 So.2d 536 (La. App. 4 Cir.1994). In deciding whether evidence is constitutionally sufficient 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 find the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). Soon after *Jackson* was decided by this nation's high court, the Louisiana Supreme Court adopted the logic, applying it to appellate review of convictions in this state and has been the standard ever since. *State v. Mussall*, 523 so 2d. 1305, 1309 (La. 1988).

When applying the *Jackson* doctrine, the appellate court cannot disregard this duty by sustaining a conviction "simply because the record contains evidence that tends to support each fact necessary to constitute the crime." *State v. Mussall*, 523 So.2d 1305, 1311 (La.1988); *State v. Monds* 631 So.2d 536, 539 (La. App. 4 Cir. 1994). If the reviewing court finds that no rational trier-of-fact, viewing all the evidence from a rational pro-

prosecution viewpoint, could have found the defendant guilty beyond a reasonable doubt, the conviction cannot stand constitutional muster. *Mussall* 523 So.2d at 1311. When identity is disputed, the state must negate any reasonable probability of misidentification as part of satisfying its burden of establishing every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Smith*, 430 So.2d 31, 45 (La.1983).

The reviewing court, however, is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *Id.* at 1324 (La.1992); *Mussall* 523 So. 2d 1308 (La. 1988). “The court is not to substitute its judgment of what the verdict should be for that of the jury, but at the same time the jury cannot be permitted to speculate if the evidence is such that reasonable jurors must have a reasonable doubt.” *Id.* at 1309. Although a conviction based solely on the identification testimony of one witness may withstand a sufficiency of the evidence test, it will do so only “[i]n the absence of internal contradiction or irreconcilable conflict with the physical evidence . . .” *State v. Gipson*, 645 So.2d at 1198, (La. App. 2 Cir. 1994).

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court set forth a five-factor test to determine whether an

identification was reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness; and, (5) the length of time between the crime and the confrontation. *See also Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977); *State v. McNeal*, 765 So.2d 1113, 1117 (La. App. 4 Cir. 2000).

Applying the *Biggers* analysis, there was not a substantial likelihood of misidentification. Ms. Cole identified Delone in a photographic lineup soon after the October 15<sup>th</sup> robbery. All testimony presented strongly suggests that Ms. Cole immediately identified the defendant rather than wavering as to whether Delone was her assailant. Testimony by both Ms. Cole and Detective Carambat show that as soon as the robbery was over and prior to the arrival of the police, Ms. Cole identified Troy Delone to her neighbors and to the project manager. After the February 6<sup>th</sup> robbery, Ms. Cole, again, immediately identified Delone as the assailant even prior to being shown a police line up. Prosper Cole testified that he picked the defendant's picture out from the lineup shown to him immediately and without any doubt in his mind that he had chosen the man that robbed him. Both of the Coles had ample time to view the suspect as he stood before

them with a gun. Since he was the center of attention, it is unlikely that the victims were looking at anything but the defendant during the robbery.

Further, Delone did nothing to hide or cover his face. The record demonstrates that both Prosper and Cindy Cole were very sure during identification and during the trial that they had identified the correct man.

The only factor, which militates towards the possibility of misidentification, is one conflicting point. Detective Doucette testified that in his police report where Cindy Cole identified her attacker, Ms. Cole had stated that her attacker had gold teeth. Troy Delone denies ever having gold teeth. At trial, Ms. Cole denied that she described her attacker as having three gold teeth. Neither Cindy nor Prosper Cole ever mention any of their attackers having gold teeth outside of this one disputed statement.

At trial, it is the jury's responsibility to determine a witness's credibility, weighing the testimony of a witness against all the evidence and testimony by other witnesses. *State v. Williams*, 98-1947 (La. App. 4 Cir. 8/23/00), 769 So.2d 629. The record in this case shows that the defense put forth all its evidence and testimony disputing Ms. Cole's identification including any possible statements concerning Delone's gold teeth. The jury then weighed all the evidence and testimony and decided that Ms. Cole's testimony concerning her identification was more credible.

After viewing the record as a whole, it is clear that the jury did not abuse its discretion in coming to such a conclusion. There was sufficient evidence for the jury to find, beyond a reasonable doubt, that defendant committed the offenses. Both Cindy and Prosper Cole had ample opportunity to view the defendant during the commission of these offenses. Cindy Cole saw Delone on several prior occasions and stated that she had seen him around the neighborhood prior to the October robbery. After the robbery, Ms. Cole was able to view Delone at close range both as he came to her door offering to cover her losses and while making the alleged threats towards her family. As stated, during the commission of each of these crimes, the defendant made no attempt to cover his face. Based on Delone's position as ringleader and the verbal interchange between himself and the victims, it is reasonable to assume that the Coles' focused their attention on Delone during the commission of the crime. This assignment of error is without merit.

## **ASSIGNMENT OF ERROR NUMBER 2**

Defendant contends the trial court erred in denying defendant's motion for mistrial after it was discovered that Cindy Cole's initial identification had

not been properly assessed at the motion to suppress the identification.

Recently, in *State v. Harris*, the Louisiana Supreme Court summarized the relevant jurisprudence as follows:

The rules of discovery are intended to eliminate unwarranted prejudice arising from surprise testimony to permit the defense to meet the State's case, and to allow proper assessment of the strength of its evidence in preparing a defense. The failure of the State to comply with discovery rules does not bring automatic reversal; rather, prejudice must be shown. When the defendant is lulled into misapprehension of the strength of the State's case through the failure of the prosecution to timely or fully disclose and the defendant suffers prejudice, basic unfairness results which constitutes reversible error.

2002 WL 264912 (La. 2/26/02). A trial court's discretion in rulings relating to discovery and the dynamics of a trial is considerable. *State v. Taylor*, 98-2243 (La. App. 4 Cir. 1/26/00), 759 So.2d 112.

Near the outset of Detective Doucette's testimony and prior to any mention within earshot of the jury, the defendant requested a bench conference and the jury was removed from the courtroom. The judge and all counsel reviewed the hearing transcript from the motion to suppress the identification and it was determined that although Cindy Cole referred to viewing a photographic lineup with Detective Doucette, the lineup itself was never introduced or discussed. Apparently the confusion arose because Cindy Cole viewed two separate lineups. The trial court ruled that a hearing

would be held on that lineup prior to continuing the trial testimony. Trial counsel for defendant objected to conducting the hearing during the trial. Furthermore, counsel objected stating, “I have prepared my defense based on what's been brought before me until now, and I've never seen this line-up, therefore I didn't prepare a defense around it.”

The prosecutor objected to defendant raising the issue mid-trial, stating that defense counsel was on notice of the lineup from the police reports and the photocopies of the lineups, which were provided in discovery. The court noted this fact and stated that the defense is expected to have read the police report concerning the charged offense. After the hearing was conducted, counsel renewed his objection and the court stated, “This Court does not allow defense to try and sandbag or lay in the gap when defense realizes the State might have been making a mistake.”

On appeal, defendant suggests that defense counsel was not prepared to present a defense to the identification testimony concerning the first robbery. However, defendant does not attempt to differentiate a possible defense to the second lineup that would not also be applicable to the first lineup. In fact, the defense attorney’s main complaint seems to be that introduction of this identification would make him seem like a fool in the eyes of the jury because he told the jury in his opening that there was no

photo identification from the first incident. The defense did not introduce any evidence showing that the identification was hidden by the State or that it was not easily available to them.

The trial court noted that it failed to find any significant prejudice based on Ms. Cole's testimony concerning the number of times she had an opportunity to view the defendant even prior to the first robbery. The record fails to indicate that defense counsel was actually surprised by the existence of the first lineup. The record does not show that the court abused its discretion in denying defendant's motion for mistrial. Thus, this assignment of error is without merit.

### **ASSIGNMENT OF ERROR NUMBER 3**

Defendant contends that the consecutive two life sentences are excessive. At the time of the offense, Louisiana Revised Statute 15:529.1

(A)(2)(b)(ii) provided:

If the third felony or either of the two prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.



Defendant was adjudicated a third felony offender on each count of armed robbery. Armed robbery is by definition, a crime of violence. Accordingly, the statute prescribed a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

The appellant does not allege error in the adjudication. Rather, he argues that the two life sentences are unconstitutionally severe as applied to his case.

An appellate court reviews sentences for constitutional excessiveness under La. Const. Art. I, §20. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment or is the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. Courts have the power to declare a sentence excessive even if it falls within the statutory limits. *State v. Sepulvado*, 367 So. 2d 762 (La.1979). The trial court has the authority to reduce a mandatory minimum sentence provided by the multiple offender statute for a particular offense and offender if the sentence would be constitutionally excessive. *State v. Pollard*, 644 So. 2d 370 (La. 1994). Because the Habitual Offender Law has been held constitutional, the minimum sentences it imposes upon multiple offenders are presumed to be constitutional. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672. To

rebut the presumption of constitutionality, the defendant must clearly and convincingly show that he is exceptional in that, because of unusual circumstances, the defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. *State v. Young*, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 531.

As noted above, the appellant's life sentence is prescribed by statute and is thus presumed constitutional. It is therefore incumbent upon defendant to rebut the presumption. Defendant argues that because his previous convictions were non-violent and relatively minor the sentences are excessive. Defendant was previously convicted of three felonies, possession of cocaine, attempted possession of a firearm by a convicted felon, and criminal damage to property.

Defendant further notes, as the most important fact, that "although the trial court treated these offenses as 'consecutive' armed robberies, the convictions resulted from a trial by the same jury." Defendant notes further that Cindy Cole testified against defendant as to both counts. It is within a trial court's discretion whether to order sentences to run concurrently or consecutively. *State v. Cooley*, 98-0576 (La. App. 4 Cir. 12/2/99), 747 So.2d 1182, 1189-1190. Further, this Court found that "where convictions stem

from separate incidents involving different victims and occur over a lengthy period of time a trial court does not act outside of its discretion by ordering sentences to run consecutively. *Id.* See also, *State v. Tucker* 591 So. 2d 1208 (La. App. 2 Cir 1991) (Court Affirmed consecutive sentences of forty-five years each for two armed robberies and thirty years for first degree robbery where several robberies occurred over a one month period); *State v. Kentucky*, 93-776 (La. App. 5 Cir. 1/25/94), 631 So. 2d 1195 (reviewing court affirmed imposition of six consecutive fifty year sentences for six convictions of armed robbery and twenty-five years each on two convictions for attempted armed robbery.)

In, *State v. Cooley*, the defendant was convicted of four counts armed robbery, two counts first degree robbery and one count attempted first degree robbery involving six separate victims over the span of five months. In that case this court held that La.. C.Cr.P. Article 883 “presumes that such unrelated acts will result in consecutive sentences” unless the trial court directs otherwise. 747 So. 2d at 1190. This Court further held that the sentencing court does not need to justify sentencing the defendant to consecutive terms but only needs to take affirmative action where it sentences the defendant to concurrent terms. *Id.* Therefore, the burden is on the defendant to show that the sentences are excessive.

In the present case, the only relationship between the two incidents of armed robbery is the last name of the victims. The two convictions result from robberies to separate victims (though Cindy Cole was present in the second incident, she was technically a bystander and not the victim of the actual robbery) and the robberies were nearly four months apart. They should not be considered as being "based on the same act or transaction, or constituting parts of a common scheme or plan." The defendant was arrested after the first incident and then subsequently committed the second armed robbery. This case is nearly identical to *Cooley*. Further, the defendant has put forth no evidence showing why his situation is exceptional. The three prior incidents that Delone was involved in included robbery, possession of a weapon by a felon, and possession of crack cocaine. These are hardly minor offenses. Two of the offenses Delone was convicted of in the present case involved robbery at gun point and threats to the victims and their family members if compliance was not had. The defendant was convicted separately of intimidating a witness when he threatened the lives of Ms. Cole and her family. Because of the severity of the offenses, the defendant has failed to demonstrate convincingly that he is a victim of the legislature's failure to "assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the crime, and the circumstances of the case."

*State v. Young*, 663 So. 2d at 531. Therefore this assignment of error by the defendant has no merit and must be rejected.

### **PRO SE SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER 1**

Defendant contends that his multiple bill convictions on all three counts should be vacated. He cites the rule that convictions on more than one count entered on the same day should be treated as one conviction for purposes of the habitual offender statute. *See State v. Sherer*, 411 So.2d 1050 (La. 1982). However the "key issue is not whether the convictions occurred on the same date but whether the convictions arose out of the same criminal episode." *State v. Hawthorne*, 2000-1258 (La. App. 4 Cir. 11/8/00), 772 So.2d 924, 927, *citing State ex rel. Porter v. Butler*, 573 So.2d 1106 (La.1991). *See also State v. Ward*, 94-0490 (La. App. 4 Cir. 2/29/96), 670 So.2d 562. Defendant was convicted of three distinct criminal events that occurred on three separate dates. Therefore the trial court properly sentenced him as a habitual offender on all three counts.

### **CONCLUSION**

For the foregoing reasons, we find that the evidence was sufficient to support the conviction and the trial court did not err in denying the defendant's motion to for a mistrial. The sentence was not excessive and the trial court properly adjudicated the defendant a third offender.

Therefore, the defendant's conviction and sentence are affirmed.

**AFFIRMED.**