NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0476**
VERSUS	*	**COURT OF APPEAL**
GARY A. DESDUNES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 423-465, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF CHIEF JUDGE WILLIAM H. BYRNES III, JUDGE TERRI F. LOVE, JUDGE MAX N. TOBIAS, JR.)

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AFFIRMED.

On 26 July 2001, the defendant, Gary A. Desdunes ("Desdunes"), was charged by bill of information with possession of stolen property valued at over $500.00, a violation of La. R.S. 14:69. He was arraigned and pled not guilty. A six-member jury found him guilty as charged on 23 August 2001. The trial court sentenced Desdunes to six years at hard labor. He filed a motion for reconsideration of sentence, which the trial court denied. Desdunes then filed a motion for appeal. The State filed a multiple bill accusing Desdunes of being a third offender, but the record on appeal does not indicate that it has been heard.

ERRORS PATENT

A review of the record for errors patent reveals none.

STATEMENT OF THE FACTS

Gary Schaffer ("Schaffer") was renovating a house at 620 Second Street in New Orleans. On 10 May 2001, doors were stolen from the

renovation project. A neighbor, Stephanie Oliver ("Oliver"), had seen three men drive up in front of the house in a blue-green Ford Ranger truck with squeaky brakes in the late afternoon and take five or six doors. She assumed the doors were being restored. At the time, Oliver got a good look at all three men, but she was unable to identify any of the perpetrators in a photographic line up presented to her by the police.

Schaffer went to various restoration shops and found the doors at Strip-Ease of New Orleans, Inc., on Dublin Street. He recognized them because one had been partially burned in a fire, and a dog had chewed another. The owner of Strip-Ease, Clarence Farr ("Farr"), gave him the name and driver's license number of the person who had sold him the doors, Desdunes. Schaffer went to the police, and New Orleans Police Detective Denis James arranged a photographic lineup. Farr identified Desdunes in the lineup, and Desdunes was arrested.

Farr testified that on 10 May 2001 at four o'clock in the afternoon he had purchased six doors from Desdunes for $120.00. Farr also testified that, in accord with his usual business practice, at the time of the sale, he entered the date, time, description of the items purchased, the amount paid, the seller's name, driver's license number, and a brief physical description of the seller in a business ledger. Farr testified that he had purchased from

Desdunes in the past; in fact, Desdunes came into the store with more objects to sell the day after Schaffer had been by looking for the stolen doors. At that point, Farr obtained Desdunes' license plate number on the Ford Ranger. At trial, Farr identified the 10 May 2001 ledger entry and also a photocopy of the canceled check in the amount of $120.00 made out to Gary Desdunes for the six doors.

ASSIGNMENT OF ERROR ONE

Desdunes argues that the evidence was insufficient to support the conviction. The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Rosiere*, 488 So.2d 965 (La. 1986). 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).

The elements of possession of stolen objects valued at over $500.00 are the following: (1) the item was stolen; (2) the item was worth more than five hundred dollars; (3) the defendant knew or should have known that the property was stolen; and, (4) the defendant intentionally received the property. *State v. Riley*, 98-1323 (La. App. 4 Cir. 8/4/99), 744 So.2d 664, *writ denied* 2000-2441 (La. 6/1/01), 793 So.2d 182.

Here, Desdunes argues that the State failed to prove that the doors were valued at over $500.00.

Schaffer testified that the doors were in the house when he purchased it in the late 1980's. The doors were cypress and were "fancier" than the typical kind of door. He said that he knew the value of the doors because he was in the business of renovating houses, and that they were worth between $200.00 and $250.00 a piece, and the hardware was worth between $90.00 and $100.00 a set. Farr said the six doors, in the condition they were in when he purchased them, were worth $120.00 to $130.00 a piece. He also said that the doors still contained their hardware. Repaired and stripped, the doors would sell for $175.00 a piece plus the price of the hardware. Kelly

Wilkerson ("Wilkerson"), an employee of The Bank, a renovation store in New Orleans, testified that she bought and sold cypress doors. She had been employed at The Bank for thirteen years, but had been in the business her whole life. She testified that her store had done the repairs to the burned door and the chewed one, and charged $125.00. The doors were indeed cypress, antique, and valuable because of their unusual size and detail. Wilkerson valued the doors at $175.00 a piece.

As such, the State presented ample evidence that the doors were worth more than $500.00. *State v. Carthan*, 99-512 (La. App. 3 Cir. 12/8/99), 765 So.2d 357, *writ denied* 2000-0359 (La. 1/12/01), 778 So.2d 547.

This assignment is without merit.

ASSIGNMENT OF ERROR TWO

Before Wilkerson testified, Desdunes argued that she should not be allowed to testify as an expert because the business of buying and selling doors is not a science, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), 113 S.Ct. 2786 (1993.)

The trial court stated:

> I'm inclined to agree with [defense counsel] that this – to the extent that it may not be a science but it may well involve her experience in this area. In other words, her knowledge of the product, if I think that's what you are trying to say, I think you can establish that with

> questioning without necessarily having to qualify her as a particular expert. If she has some experience in this field, establish that, lay the foundation in the presence of the jury so then you can give a basis if you want her to give an opinion as to what she thinks the value of these things may be.

After further argument, Wilkerson testified that she had in fact examined the doors, and had done the repairs on the burnt one and the chewed one.

In *State v. Brauner*, 99-1954 (La. App. 4 Cir. 2/21/01), 782 So.2d 52, *writ denied* 2001-1260 (La. 3/22/02), 811 So.2d 920, this court reviewed the law on point, stating:

> In *State v. Lewis*, 95-0209 (La. App. 4 Cir. 4/13/95), 654 So.2d 761, this court held that trial judges have great latitude in deciding whether a prospective expert has the competence, background, and experience to qualify as an expert. The court further stated that the trial courts are vested with great discretion in determining the competency of an expert witness, and the rulings on the qualification of a witness, as an expert will not be disturbed unless there was an abuse of discretion.
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> Defendant cites *State v. Foret*, 628 So.2d 1116 (La. 1993), as support for his argument. In *Foret*, the defendant was charged with molestation of a juvenile. The defense presented witnesses who testified that the victim had recanted her accusation. In response, the State presented two expert witnesses. One was the victim's physician, who testified, as did Dr. Tropez-Sims, which (sic) the lack of positive physical evidence gleaned from a physical examination of the victim was not unusual in that type of case. The State also presented the victim's psychologist who testified as to the characteristics of Child Sexual Abuse Accommodation Syndrome (CSAAS), which included a recanting phase, which occurs when a victim has been separated from her family due to the allegations of abuse in her home. When asked by the prosecutor if in his

opinion the victim had been sexually abused, the psychologist responded that her behavior was consistent with the "dynamics" of sexual abuse and that therefore he concluded that she had been sexually abused.

On appeal, the issue before the Court was whether the trial court erred by allowing the introduction of this evidence when the State waited until the morning of trial to inform the defense about the psychologist's report and of its intention to have the psychologist testify. In its opinion, however, the Court considered the actual propriety of allowing the doctor to testify concerning CSAAS and to render an expert opinion based upon the principles of CSAAS. In determining whether the psychologist's testimony would qualify as an expert opinion under La. C.E. art. 702, the Court adopted the test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786 (1993), "which set forth a means for determining reliability of expert scientific testimony and answered many questions as to proper standards for admissibility of expert testimony." *Foret*, 628 So.2d at 1121. The Court further stated:

> The court replaced [the "general acceptance" test of *Frye [v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)] with a new standard that requires the trial court to act in a "gate keeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id*. This requirement stems from a belief that the rules on expert testimony serve to relax "the usual requirement of first-hand knowledge" to ensure reliability on the part of a witness. 509 U.S. at 593, 113 S.Ct. at 2796. This relaxation is justified so long as "the expert's opinion (has) a reliable basis in the knowledge and experience of his discipline." *Id.*
>
> The reliability of expert testimony is to be ensured by a requirement that there be "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id*. This connection

is to be examined in light of "a preliminary assessment" by the trial court "of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue." *Id.* The court went on to make some suggestions as to how a court could fulfill its gate-keeping role. These involve whether or not the technique had been subjected to peer review and/or publication, the "known or potential rate of error", the existence of "standards controlling the technique's operation", the technique's "refutability" or, more simply put, testability, and, finally, an incorporation of the Frye general acceptance in the scientific community as only a factor in the analysis. 509 U.S. at 595, 113 S.Ct. at 2797.

The court also stated that other rules of evidence govern this testimony, mainly F.R.E. 403's balancing test that will exclude probative evidence if outweighed by its potential for unfair prejudice. [footnote omitted] The Court noted the possibility that the expert's testimony can be quite misleading and prejudicial if this gate keeping role is not properly satisfied, requiring a flexible approach and a careful evaluation of the methodology surrounding the testimony and its conclusions:

> Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment - often of great consequence - about a particular set of events in the past. We recognize that in practice, a gate-keeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That,

> nevertheless, is the balance struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes. *Id.*, 113 S.Ct. at 2798. *Foret*, 628 So. 2d at 1122.
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> The Court held that in order to qualify as expert testimony admissible under art. 702, the testimony must "rise to a threshold level of reliability" as per *Daubert. Foret*, 628 So. 2d at 1123.

Brauner, pp. 22-25, 782 So. 2d at 67.

In the instant case, Wilkerson testified that she personally examined the doors. Furthermore, as a person who for many years had been in the business of evaluating doors and architectural pieces from old houses, Wilkerson's testimony was both relevant and reliable. We find that the trial judge acted as the appropriate gatekeeper and did not abuse his great discretion in allowing Wilkerson to testify as to the value of the stolen doors.

This assignment of error is without merit.

CONCLUSION

For the reasons stated above, Desdunes' conviction and sentence are affirmed.

AFFIRMED