NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1391**
VERSUS	*	**COURT OF APPEAL**
ELVIN R. HOLLINS, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 427-144, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

BYRNES, C.J., DISSENTS

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AFFIRMED

By bill of information the State charged the defendant Elvin Hollins, Jr. on January 4, 2002 with one count of simple robbery in violation of La. Rev. Stat. 14:65. On February 21, 2002, a jury found him guilty of attempted simple robbery. Hollins subsequently filed a motion for post verdict judgment of acquittal, and on April 29, 2002, the court granted the motion. The State immediately noted its objection and now appeals from this ruling.

FACTS:

At trial, Yoav Amir, a cab driver, testified that at approximately 5:30 a.m. on December 12, 2001, he picked up the defendant Elvin Hollins in the French Quarter. Hollins initially indicated he wanted to be taken to Martin Luther King Boulevard. On the way, Hollins told Amir he had only a $50 bill, and Mr. Amir indicated he could make change. Amir testified that Hollins then directed him to a location near the corner of Clio and Magnolia Streets, where he asked Amir to stop the cab. Hollins then shoved a folded bill toward him, and Amir took two $20 bills from his pocket and handed

them to Hollins. Hollins snatched the money out of Amir's hand, threw the folded bill toward Amir, quickly exited the cab, and rapidly walked away. Amir testified that when he unfolded the bill and realized it was a $1 bill, he got out of the cab and started to follow Hollins. However, fearing Hollins might be armed, he reentered the cab.

Amir testified he drove a couple of blocks until he encountered two police officers. He told them what had happened and pointed to Hollins, whom he could still see walking away. The officers told him to stay there while they detained Hollins. Amir testified he did not go with the officers, but he drove to the area where they finally apprehended Hollins, and he positively identified Hollins on the scene as the man who took the two $20 bills out of his hand.

Both officers whom Amir encountered that morning testified at trial, and both positively identified Hollins as the man they stopped. Both officers testified Hollins started running when they approached him, and after giving chase, they caught him. However, they did not find the two $20 bills on him, nor did they find the money in the area through which Hollins had run.

All three witnesses testified Hollins was wearing a white T-shirt and dark long pants on the morning he was arrested. The defense introduced the clothing Hollins was purportedly wearing when he was booked, and these

clothes consisted of a grey and rose T-shirt and shorts. One officer theorized the clothing must have gotten mixed with other clothing worn by another person who was booked at the same time.

DISCUSSION:

In its sole assignment of error, the State of Louisiana argues the trial court erred by granting the motion for post verdict judgment of acquittal. The trial court granted this motion pursuant to La. Code Crim. Proc. art. 821 (B), which provides: "A post verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the state, does not reasonably permit a finding of guilty." As noted in *State v. Whins*, 96-0699, p. 3 (La.App. 4 Cir. 4/9/97), 692 So.2d 1350, 1352-1353:

> Article 821 is the correct vehicle for asserting that the State failed to prove an essential element of the offense. *State v. Allen*, 440 So.2d 1330 (La.1983). This article tracks the language of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in setting the standard pertaining to motions for post-verdict judgment of acquittal. *State v. Smith*, 441 So.2d 739 (La.1983); *State v. Voorhies*, 590 So.2d 776 (La.App. 3d Cir.1991). [footnote omitted]

In *State v. Sellers*, 2001-1903, p. 4 (La.App. 4 Cir. 4/10/02), 818 So.2d 231, 234, this Court set forth the general test for determining sufficiency of evidence:

> 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. Cummings*, 95-1377 (La.2/28/96), 668 So.2d 1132, 1134. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. A 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. *State v. Smith*, 600 So.2d 1319, 1324 (La.1992).

Hollins was charged with simple robbery and was convicted of attempted simple robbery. La. Rev. Stat. 14:65 defines simple robbery as follows:

> Simple robbery is 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.

An attempt is defined by La. Rev. Stat. 14:27 as being committed when "[a] person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object." Thus, in order to support a conviction for attempted simple robbery, the State must show an act proving the intent to take something of value belonging to another person by *use of force or intimidation.*

At the hearing on the motion for post verdict judgment of acquittal,

defense counsel argued that the evidence was not sufficient to support the jury's verdict of attempted simple robbery because there was no evidence that the taking was accomplished by means of force or intimidation; rather, counsel argued, the taking was a "snatching," similar to that of a purse snatching, which does not require that there be a taking involving force or intimidation. Counsel argued that at best, because no wallet or purse was involved, the only crime committed by Hollins was a theft, which was not a responsive verdict to simple robbery, the crime for which he was charged. The court agreed and granted the motion.

On appeal, the State argues the trial court erred by so ruling. The State first argues that the defendant should have been estopped from raising the issue of insufficiency of evidence because he agreed that attempted simple robbery could be presented to the jury as a responsive verdict to simple robbery. In support, it cites a case where the jury returned a statutorily-provided lesser included verdict, which did not fit the facts presented at trial, and the reviewing court found the defendant could not raise a sufficiency issue on appeal because he did not object to the court charging the jury with the responsive verdict. See *State ex rel. Elaire v. Blackburn*, 424 So.2d 246 (La. 1982). However, in *Elaire* the Court found the defendant's claim had no merit because the evidence was sufficient to

support the greater charged offense. Here, by contrast, the defendant's claim at the post-verdict motion hearing was that the evidence would not have been sufficient to support either the charged crime **or** the jury's verdict because there was no evidence of force or intimidation. Thus, contrary to the State's assertion, we find *Elaire* is not applicable to this case.

Various cases from this and other appellate courts in Louisiana have discussed what constitutes force or intimidation for purposes of La. Rev. Stat. 14:65. In *State v. Clark*, 2000-818 (La.App. 3 Cir. 12/6/00), 780 So.2d 418, *writ denied,* 2001-0992 (La. 3/22/02), 811 So. 2d 922, the court found the defendant's actions, jumping into the deliveryman's car and demanding his money, were indicative of force or intimidation. In *State v. Honeycutt*, 95-0509 (La.App. 4 Cir. 7/26/95), 659 So.2d 538, *writ denied,* 2000-2449 (La. 6/22/01), 794 So.2d 782, and 2000-2493 (La. 6/22/01), 794 So.2d 783, this Court found the relative difference in the sizes and ages of the defendant and the victim, as well as the defendant's threatening tone when he demanded the victim's property and his use of a cloth to cover his arm and thereby imply he had a weapon, were sufficient evidence that the taking was accomplished through intimidation. In *State v. Hill*, 598 So.2d 1269 (La.App. 4 Cir. 1992), the victim snatched money from the victim's hand. The victim was an elderly man, while the defendant was a much younger

woman. When the victim tried to take back his money, the victim slapped him. In addition, her companion pulled a gun on the victim. This Court found these actions showed a forceful taking.

In three cases involving money taken from cashiers, the appellate courts found the defendants' actions constituted intimidation. In *State v. Jones*, 2000-190 (La.App. 5 Cir. 7/25/00), 767 So.2d 808, the defendant demanded that the cashier give him the money in the register. The cashier testified she moved back from the register to allow the defendant to remove the money because she was afraid. The appellate court found the evidence proved the defendant took the money from the register through intimidation of the cashier. Likewise, in *State v. McCall*, 577 So.2d 764 (La.App. 2 Cir. 1991), the court found intimidation where the defendant asked the much smaller female cashier for change, walked with her to the cashier's side of the counter, forcibly opened the cash drawer all the way, and took the money out of the register. In addition, the victim testified she moved out of his way because she was frightened.

In *State v. Robinson*, 97-269 (La.App. 5 Cir. 5/27/98), 713 So.2d 828, the defendant gave the cashier a $50 bill, and when the cashier tried to give him his change, he belligerently insisted that he had given the cashier a $100 bill. The cashier picked up the $50 bill the defendant had given him, placing

the $50 bill in one hand and the change from it in the other, and told the defendant he would have to wait for the manager. The defendant grabbed the money from both of the cashier's hands and fled. On appeal, the court found that the defendant's use of street slang and his frightening appearance (as described both by the victim and by a witness) were sufficient to show intimidation.

Two courts found evidence of intimidation where the defendants posed as police officers and took property from the defendants. In *State v. Russell*, 607 So.2d 689 (La.App. 4 Cir. 1992), the victims were stopped by the defendant and his companion who falsely indicated they were policemen. The men forcibly removed both victims from their car, frisked one of them, and then took jewelry from the other on the pretext that the items had been reported stolen. This Court found the defendant's actions showed the taking was accomplished through intimidation. Likewise, in *State v. Thomas*, 447 So.2d 1053 (La. 1984), the defendant pulled over the victims, falsely claimed to be a police officer, and told the victims they would be in real trouble if the "officer" found drugs in the car. The defendant then searched the car, and the victims later found money missing from the dashboard of the car and from a purse sitting in the car. On review of the defendant's conviction, the Court found the defendant's "general demeanor and aura of

authority" constituted the intimidation needed to support his robbery conviction.

By contrast, in a case similar to the present one, this Court found the evidence did not show the defendant committed a taking by either force of intimidation. In *State v. Florant*, 602 So.2d 338 (La.App. 4 Cir. 1992), the victim was standing in the French Quarter when he was approached by the defendant, who offered to give him a shoeshine. The victim rejected the offer, but the defendant kept nagging him, and the victim finally agreed to allow the defendant to shine his shoes. While the defendant was shining the shoes, the victim's family joined the victim and took pictures. When the defendant completed the job, the victim took out a $20 bill, indicating he had no change. The defendant snatched the bill from the victim's hand, told the victim he had been "had," and walked away. On appeal of the defendant's simple robbery conviction, this Court found the evidence did not support the finding of a taking by either force of intimidation. This Court quoted language from *State v. Mason*, 403 So.2d 701, 704 (La. 1981), where the Supreme Court stated:

> By providing a more severe grade of theft for those instances in which a thief uses force or intimidation to accomplish his goals, the legislature apparently sought to emphasize the increased risk of danger to human life posed when a theft is carried out in face of the victim's opposition.

Florant, 602 So.2d at 340-341. This Court found there was no evidence "that the victim of the theft was subject to any 'increased risk of danger to human life' when the defendant snatched the twenty dollar bill from his hand"; rather, this Court found the defendant "cheated and defrauded [the victim], but he did not commit simple robbery as defined by LSA-R.S. 14:65." *Id.* at 341. This Court found the appropriate charge in this case would have been theft, which is not responsive to simple robbery.

Hollins' actions in the present case are much more similar to those of *Florant* than to those of the defendants in the other cases discussed above. There was no testimony that the cab driver allowed Hollins to take the two $20 bills because he was intimidated by him; indeed, Amir testified that when he discovered the bill Hollins gave him was only a $1 bill, he initially exited his cab to follow Hollins, but changed his mind because he belatedly feared *at that point* that Hollins might have a weapon. The mere snatching of the money out of Amir's hands did not constitute a force committed against Amir. See *Florant*. We find the State presented no evidence at trial that the taking of the money from the cab driver was accomplished either through force or intimidation. Thus, we find the trial court correctly granted Hollins' motion for post verdict judgment of acquittal.

Accordingly, we affirm the ruling of the trial court.

AFFIRMED