STATE OF LOUISIANA	*	**NO. 2002-KA-2010**
VERSUS	*	**COURT OF APPEAL**
ARTHUR SPARKS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 422-614, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *

JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris Sr. and Judge Michael E. Kirby)

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AFFIRMED.

STATEMENT OF THE CASE

The defendant, Arthur Sparks, was charged with one count of attempted armed robbery, a charge to which he pled not guilty. Although the defendant moved to suppress the evidence, statements, and identification made in this case, the court denied these motions. The defendant's first trial, held in August 2001, ended in a mistrial. On September 20, 2001, a twelve-person jury found him guilty as charged. The court subsequently sentenced him to serve thirteen years at hard labor "without benefits." The State filed a multiple bill, and after a hearing the court adjudicated him a second offender. The court vacated the defendant's original sentence and resentenced him to serve twenty-seven years at hard labor without benefit of probation or suspension of sentence as a second offender. The defendant later moved for and obtained an out-of-time appeal.

STATEMENT OF THE FACTS

At trial Mr. Ambrose Mmonu, the manager of the Subway Shop at 4111 Bienville Street, testified that he was working at 10:15 a.m. on May 22, 2001, with his two employees when a man, later identified as the defendant, entered the shop. The man was wearing a white tee shirt, jeans, a cap,

sunglasses, and white tennis shoes. He asked for a job application form. As Mr. Mmonu was reaching for the application, the man pulled out a gun. Mr. Mmonu described the gun as "short" and old. The man began shouting, "Give me all the money," and when Mr. Mmonu opened the cash register in compliance, the gunman said there was not enough money there. The gunman said he wanted to go to the safe. Mr. Mmonu directed one of his employees to take the gunman to the safe. When they went to the back of the shop, Mr. Mmonu ran out of the restaurant. He found his other employee was already outside and on the telephone reporting the incident. Within seconds, the robber came from around the back of the building and ran down Conti Street. A man in a truck with a police logo came by, and Mr. Mmonu told him of the robbery. The man began to follow the gunman. The man driving the truck called the police on his cell phone and reported their exact location. The police apprehended the defendant, and Mr. Mmonu identified him as the man who pulled out a gun and demanded the money from the cash register at the Subway Shop.

Ms Cheneta Compton, an employee of the Subway Shop, testified that the shop had opened a bit early for the Jesuit students, but the first person in there was a man asking for a job application form. Her boss, Mr. Mmonu, was in the process of handing him a form when the man pulled out a gun.

Ms Compton immediately ran out the front door. She did get a look at the gun which she described as old and rusty. She remembered the gunman wearing a white shirt, white hat, sunglasses, and blue jeans. Ms Compton went into the nearby Dollar Zone Store and asked someone to call the police. When she walked outside again, she saw the gunman exiting the back of the Subway Shop. He was holding his hat in his hand. Ms Compton said that the third employee, Ms. Latisha Jackson, no longer works for Subway.

Detective Chris Billiot testified that he arrested the defendant on the neutral ground near the corner of Jefferson Davis Parkway and Conti Street after receiving a call that a subway shop had been robbed. The detective described the robber as a bald-headed man wearing a dark shirt and dark pants. When the detective apprehended the defendant, he said, "Okay. Okay. But I didn't take any money." The defendant admitted he attempted to rob the Subway Shop. In the 500 block of North Scott Street a baseball cap, sunglasses, a gun, and a cigarette lighter were found. At trial the detective read a statement the defendant gave after he was arrested. In the statement, he said he needed money to pay his mother's electricity bill, and he intended to borrow it from a coworker but could not. As he came upon the Subway Shop, he found a gun on the neutral ground. He walked into the shop without a plan to rob the business, but he snapped. He then got nervous and

ran outside without taking anything.

Mr. Eddie J. Logan, III, a carpenter for the NOPD, testified that on May 22, 2001 he was driving a police truck when he was flagged down on the corner of Carrollton Avenue and Conti Streets by a man who complained that his business had just been robbed. Mr. Logan drove down Conti Street looking for the man. As he drove near two warehouses on North Scott Street, he noticed a man wearing blue jeans and a navy blue shirt put something down into the bushes and then walk casually toward Conti Street. Mr. Logan drove around the corner and then backed up, got out of his truck and went to the spot in the bushes to retrieve what had been placed there. He found a hat, sunglasses, a gun, and a cigarette lighter. Mr. Logan took the evidence to his truck and drove around looking for the man who set it down. When he did not find him right away, he turned on his radio and found where the Officer Billiot was. Mr. Logan turned the evidence over to him. Mr. Logan identified the defendant as the man he observed placing the evidence in the bushes.

The defendant, a longshoreman, testified that he lives with his mother. He has a prior conviction for manslaughter in 1989. His version of events on May 22, 2001 is as follows. He was walking on Bienville Street toward his home when he was suddenly surrounded by policemen. He was ordered

to get down on the ground and he was handcuffed. He was asked about a gun and told that the Subway Shop had just been robbed. He told them he had no gun and knew nothing of the robbery. He was taken to the police station, and from there he called his sister who had just been released from the hospital. His sister became hysterical when he told her he was charged with armed robbery. One of the detectives spoke to the defendant's sister and told her that if the defendant cooperated he would get a lenient sentence. The defendant told the court that he was guilty only of lying in his supposed confession when he told the officers that he tried to rob the Subway Shop. He explained that he made a false statement because he is a convicted felon and the police told him they had three witnesses who could identify him. He also said he has full custody of a year old daughter and a son who was thirteen days old on May 22, 2001. The defendant said he thought by making a false statement he would receive only one or two years in prison.

Before addressing the assignment of error, we note a potential error patent. When the defendant was sentenced, his twenty-seven year term was imposed without benefit of probation or suspension of sentence. The defendant was convicted of La R.S. 14:27(64). Under La. R.S. 14:64, a sentence must be imposed without benefit of **parole**, probation, or suspension of sentence, and R.S. 14:27 requires that a defendant be

sentenced in the same manner as for the offense attempted. Therefore, the defendant received an illegally lenient sentence. However, under La. R.S. 15:301.1(A), correction of the sentence is self-activating and there is no need to remand for a ministerial correction of the sentence. See State v. Williams, 2000-1725 (La.11/29/01), 800 So.2d 790.

ASSIGNMENT OF ERROR

In a single assignment of error, the defendant, through counsel, argues that the evidence is insufficient to support the conviction because the State failed to negate the reasonable probability of misidentification.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> 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); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. 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. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[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 (La.1992) at 1324.
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> In addition, 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 proven 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 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).

98-0011 at pp. 13-14, 744 So.2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-228.

In addition, when identity is disputed, the State must negate any reasonable probability of misidentification in order to satisfy its burden under Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560

(1979). State v. Edwards, 97-1797, pp. 12-13 (La. 7/2/99), 750 So.2d 893, 902; State v. Woodfork, 99-0859, pp. 4-5 (La. App. 4 Cir. 5/17/00), 764 So. 2d 132, 134.

The defendant was convicted of attempted armed robbery, a violation of La. R.S. 14:27(64). Therefore, the state had to prove beyond a reasonable doubt that defendant attempted to take something of value belonging to another, from the person of another, or in the immediate control of another, by the use of force or intimidation, while armed with a dangerous weapon.

The defendant does not challenge any aspect of the sufficiency except the identification of himself as the robber. He claims that the three witnesses gave contradictory and inconsistent descriptions of the defendant's dress and their different versions of the event are irreconcilable.

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 physical evidence…." State v. Gipson, 26,433, p.2 (La. App. 2 Cir. 10/26/94), 645 So.2d 1198, 1200.

In State v. Brealy, 2000-2758 (La. App. 4 Cir. 11/7/01), 800 So. 2d 1116 this Court examined the reliability of an identification according to the test set out in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977),

where the Supreme Court listed five points of consideration; they are as follows:

> (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.

800 So. 2d at 1121.

In the case at bar, the defendant was identified by two victims and a witness. Ambrose Mmonu stated that he was standing across the counter from the gunman while being ordered to open the cash register. Mr. Mmonu said twice that he looked directly at the man asking him for an application form. Because Mr. Mmonu saw the defendant clearly in the sandwich shop, then saw him leave the shop, and followed him until he was arrested, Mr. Mmonu was certain that he had positively identified his assailant. Finally, only a few minutes intervened between the first time Mr. Mmonu saw the defendant during the attempted robbery and the time when Mmonu saw the defendant when he was arrested.

Similarly, Ms Cheneta Compton testified that she saw the defendant when he entered the shop and watched while he threatened her boss with a gun. She saw the defendant leave the shop and run down the street. She identified the defendant moments later when he was arrested.

Mr. Logan also identified the defendant as the man he saw hide the items in the bushes on North Scott Street.

The defendant through counsel bases his misidentification argument on the fact that both Mr. Mmonu and Ms Compton testified that the defendant was wearing a white shirt during the robbery, yet when he was arrested, the defendant had on a navy blue shirt. This discrepancy was brought out in the testimony at trial and the jury heard it. Because the length of time between the attempted robbery and the arrest was so short, and the defendant was not ever out of sight, this discrepancy in the color of the defendant's shirt is not crucial.

The defendant also argues that the robber wore a hat and sunglasses, and the victims identified him while he was not wearing those items. Because both victims got a good close look at the defendant during the robbery, they were able to recognize him without the hat and sunglasses. Furthermore, Ms Compton said she saw the robber holding his hat in his hand as he was exiting the back of Subway Shop and heading toward Conti Street.

Finally, the defendant contends that the testimony of Mr. Mmonu and Mr. Logan cannot be reconciled because Mr. Mmonu claims to have never lost sight of the robber after he exited the Subway Shop until he was

arrested, and Mr. Logan said he followed the robber as he turned off Conti Street onto North Scott Street where the hat, gun, lighter and sunglasses were left. Mr. Logan said he also noted a man in shirt with a Subway logo following the suspect down Conti Street. Mr. Mmonu, who did not turn on Scott Street, watched the robber go there and hide his belongings. When the robber returned to Conti Street and walked toward Jefferson Davis Parkway, Mr. Mmonu continued to follow. There is no contradiction in the testimony of the two men.

We find that any rational juror, viewing all of the evidence in a light most favorable to the prosecution, could have found all of the essential elements of attempted armed robbery beyond a reasonable doubt. Ambrose Mmonu and Cheneta Compton both witnessed the attempted armed robbery and identified the would-be robber. Furthermore, according to police testimony, as soon as he was detained Arthur Sparks said, "I didn't take any money" and then made a full confession.

It is well settled that credibility decisions by the jury should not be disturbed unless such finding is clearly contrary to the evidence. *State v. Harris*, 624 So.2d 443 (La.App. 4 Cir. 1993). 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).

This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.