

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2002-KA-2148**  
**VERSUS** \* **COURT OF APPEAL**  
**JOSEPH HARRIS** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 419-368, SECTION "C"**  
**Honorable Sharon K. Hunter, Judge**  
\* \* \* \* \*  
**Judge Patricia Rivet Murray**  
\* \* \* \* \*

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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**AFFIRMED**

The defendant, Joseph Harris, was charged by bill of information with first degree robbery in violation of La. R.S.14:64.1. Mr. Harris was tried before a twelve-member jury and was found guilty of the lesser included offense of simple robbery, in violation of La. R.S. 14:65. Mr. Harris was sentenced to seven years. This appeal follows. For the reasons that follow, we affirm his conviction and sentence.

**FACTS**

On December 2, 2000, Almalina Hernandez worked the night shift (from 9 p.m. until 9 a.m.) as a cashier at the Shell service station on the corner of Michoud Boulevard and Chef Menteur Highway. During night shifts, she worked locked inside a bulletproof booth that surrounded the checkout counter and that had an automatic switch near the cash register that allowed her to electronically lock and unlock the exit door. That night, Mr. Harris, whom Ms. Hernandez recognized because he often frequented the store, was present twice during her shift. First, at about 11:00 p.m., he was

hanging around the store when Mr. Thoung Nguyen, the station owner, came to bring some change to Ms. Hernandez. Second, at about 2:30 a.m., he reentered the store.

On the latter occasion, Mr. Harris snuck inside as another customer was exiting. After grabbing a bottle of MD 20/20 liquor, he walked up to the register and asked for some other liquor that was kept behind the counter. As Ms. Hernandez was retrieving the liquor, he walked to the cooler and retrieved a 7-Up and a bottle of wine. When he returned to the counter, he took out his wallet and pretended like he was going to pay for the items. Instead, he asked her “Where’s the money?” Ms. Hernandez, who was inside the protective booth, told him that she was not going to give him any money. He responded by telling her “I’m going to kill you” and reaching into his pocket. She then activated the alarm, which temporarily cut the phone line. When the dial tone returned, she called the owner, Mr. Nguyen, who lived nearby; she also called “911” to inquire when the police were coming. Mr. Nguyen told her that he was on the way; the “911” operator told her that the police were *en route*. Ms. Hernandez also flipped the switch that automatically locked the exit door, trapping Mr. Harris inside

the store. Ultimately, Mr. Harris exited the store by kicking in the bottom panel of the exit door. Fleeing on foot, he took with him two six packs of Heineken beer and the bottle of MD 20/20 liquor he was drinking.

During the time he was trapped inside (which according to Ms. Hernandez was about ten minutes), Mr. Harris ate the store's food and drank its alcohol. Although he continued to make demands on Ms. Hernandez that she give him the money, she continued to refuse his demands. Despite that she was in the protective booth, Ms. Hernandez testified that she was intimidated by his threats and remained inside the booth until she was certain he had exited the store. At that time, she exited the store and saw Mr. Harris proceeding to the Chevron gas station located on the adjacent corner. She started to follow him, but Mr. Nguyen arrived when she reached the street corner.

Mr. Nguyen confronted Mr. Harris at the Chevron station, and asked him if he had robbed his store. Mr. Harris answered that he had and then threatened to shoot Mr. Nguyen. Meanwhile, Officer Stephen Gillian of the New Orleans Police Department arrived.

Officer Gillian testified that when he arrived Ms. Hernandez, who was

in the middle of the intersection, flagged him down and pointed him to Mr. Harris, and that she informed him that Mr. Harris was the person that just robbed the Shell service station. Officer Gillian relocated to the Chevron station where he found Mr. Nguyen confronting Mr. Harris. With the help of additional officers, Officer Gillian arrested Mr. Harris. No weapon was found on Mr. Harris at the time of his arrest. Officer Gillian retrieved two six packs of Heineken near the Chevron station where he arrested Mr. Harris. Officer Gillian stated that although Mr. Harris produced a receipt for the beer from the Chevron station, it was for only one six pack and the time on the receipt was 3:40 a.m., which was after the time of the Shell robbery.

Mr. Nguyen's testimony at trial corroborated that of Ms. Hernandez and Officer Gillian. Also at trial, the state introduced and played for the jury the surveillance video taken by the Shell station camera.

### **DISCUSSION**

Although Mr. Harris asserts three assignments of error on appeal, the first one is now moot. His first assignment of error is that the district court failed to rule upon his three post trial motions--motion to reconsider sentence, motion for post-verdict judgment of acquittal, and motion for new trial. Recognizing the merit of this assignment, we issued an order on March

10, 2003 remanding this matter to the trial court so that these motions could be ruled upon. Complying with that order, the trial court denied the motions and re-sentenced Mr. Harris to seven years. As the trial court has not only ruled on these motions, but also re-sentenced Mr. Harris, this assignment of error is moot.

### **SUFFICIENCY OF THE EVIDENCE**

Mr. Harris' second assignment of error is that the evidence is insufficient to support his simple robbery conviction. The standard for reviewing a claim of sufficiency of the evidence is well settled. Simply stated, all evidence, direct and circumstantial, must meet the reasonable doubt standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See *State v. Jacobs*, 504 So.2d 817 (La.1987).

Mr. Harris was convicted of simple robbery. Simple robbery is statutorily defined 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. To establish the crime of simple robbery, the state was required to prove the following four elements: (1) the taking of anything of value, (2) belonging to another, (3) from the person of another, and (4) by use of force or intimidation. *State v. Florant*, 602 So. 2d 338, 340 (La. App. 4 Cir. 1992).

Mr. Harris contends that the state failed to establish that the items taken were within Ms. Hernandez's immediate control and that the items were taken by use of force or intimidation. He argues that because Ms. Hernandez was in the protective booth, she had no control over the items. He further argues that her protective environment prevented her from being forced or intimidated. He still further argues that he was simply a regular customer who committed "not a simple robbery, but a theft." In support of that characterization of the crime, he cites *Florant, supra*, in which we reversed a simple robbery conviction because we found the "force or intimidation" element was not established.

Mr. Harris' reliance on *Florant, supra*, is misplaced. In that case the defendant duped the victim of \$20 in exchange for a shoeshine in Jackson Square; the defendant fled with the victim's \$20 bill, refusing the victim's request to give him change. We declined to find that the victim was intimidated based on the victim's characterization of the events—"that he felt 'humiliated, foolish, defrauded, and intimidated by the look in his eyes.'" *Florant*. 602 So. 2d at 341. In this case, Mr. Harris threatened to kill Ms. Hernandez with a weapon and repeatedly demanded that she give him the money. Because she was intimidated, she remained inside the protective booth until she was certain he had left the store. Unlike in *Florant*, the

record in this case supports the jury's implicit finding that Ms. Hernandez was intimidated.

There is no requirement, contrary to Mr. Harris' contention, that physical force be used in order satisfy the force or intimidation element of simple robbery. Rather, either "force or intimidation" is sufficient. La. R.S. 14:65. *See State v. Fortune*, 608 So. 2d 148, 150 (La. 1992)(finding proof of victim's intimidation sufficient to render taking a robbery and not merely a theft). Here, as noted above, the record supports the finding that intimidation was sufficiently established. Nor is there any merit to Mr. Harris' argument that the state failed to establish that Ms. Hernandez was in control of the items in the store. Clearly as cashier she had control of the items. But for Mr. Harris' threats, Ms. Hernandez could have exited the protective booth and prevented the taking.

As to the other elements of the crime, the record reflects that Ms. Hernandez identified Mr. Harris as the person who robbed the Shell gas station. Officer Gillian and Ms. Hernandez identified Mr. Harris as the person captured on the surveillance video robbing the Shell gas station. At trial, both Ms. Hernandez and Officer Gillian identified the clothing Mr. Harris wore during the robbery and when he was arrested shortly thereafter. The surveillance video showed Mr. Harris exiting the Shell station with two



six packs of Heineken beer, and Officer Gillian found two six packs of Heineken beer in the vicinity where he arrested Mr. Harris. *See State v. Austin*, 470 So.2d 406 (La. App. 3 Cir. 1985)(finding sufficient evidence based on witness' identifying defendant and identifying clothes taken from defendant's home as clothes worn by the perpetrator).

Given these facts, we find that the state proved beyond a reasonable doubt all the elements of simple robbery. We thus conclude the evidence was sufficient to sustain Mr. Harris' conviction.

### **EXCESSIVE SENTENCE**

Mr. Harris' final assignment of error is that his sentence was excessive. A sentence is constitutionally excessive if it is either grossly disproportionate to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Lobato*, 603 So. 2d 739, 751 (La. 1992). A grossly disproportionate sentence is one that "when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice." *Id.* An appellate court will not set aside a sentence absent a showing of manifest abuse of the trial court's broad discretion to impose sentences within the statutory range. *Id.* However, even a sentence within the statutory range can violate a defendant's constitutional right against excessive punishment. *State v.*

*Sepulvado*, 367 So. 2d 762, 767 (La. 1979).

In this case, Mr. Harris was convicted of simple robbery. Under La. R.S. 14:65, the maximum sentence for a simple robbery conviction is either a fine of not more than three thousand dollars, or seven years with or without hard labor, or both. As noted, Mr. Harris was re-sentenced on remand to the maximum term of seven years. He argues that the trial court erred in imposing the maximum sentence and cites in support of this argument the jurisprudence holding that maximum sentences are reserved for the most serious violations of the charged offense and for the worst offenders. He also argues that the trial court erred in failing to provide any reasons for imposing that sentence.

Although (as Mr. Harris argues) the trial court did not provide any reasons when he sentenced Mr. Harris initially, the court gave the following oral reasons when he re-sentenced him:

Taking into consideration that the State has provided [sic] that Mr. Harris is not a stranger to the crime of armed robbery or any type of violation with a gun, the Court is of the opinion that the seven years was a very lenient sentence. However, I feel as if my hands are tied on that. So the court is going to hereby impose that the defendant serve the seven years without benefit of probation, parole or suspension of sentence.

Given the above reasons and the circumstances of this case, we cannot say that the trial court abused its discretion in sentencing Mr. Harris to seven

years. We find this assignment of error unpersuasive.

**PATENT ERROR**

Complying with La. C.Cr.P. art. 920, we have conducted a patent error review of the record and found none.

**DECREE**

For the above reasons, Mr. Harris' conviction and sentence are affirmed.

**AFFIRMED**