NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0300**
VERSUS	*	**COURT OF APPEAL**
KIM SINGELTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 430-699, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

On May 31, 2000, Kim Singleton was charged with one count of unauthorized use of a motor vehicle, and he pled not guilty. On July 2, 2002, a six-member jury found him guilty of attempted unauthorized use of a motor vehicle, a responsive verdict. On October 23, 2002, the trial court sentenced him to three years at hard labor, suspended the execution of the sentence, and placed him on two years active probation with special conditions. Although the trial court denied his motion to reconsider sentence, it granted his motion for appeal. This appeal followed. The sole assignment of error raised is sufficiency of the evidence.

FACTUAL BACKGROUND

On May 25, 2002, Officer Nicole McCaskill of the New Orleans Police Department responded to a disturbance call at 2634 Upperline Street. When she arrived, she discovered the call actually involved a dispute over the unauthorized use of a vehicle. The owner of the vehicle, Edna Fleming, had earlier reported the vehicle stolen by Mr. Singleton, but had recovered the vehicle.

Officer McCaskill first spoke with Mr. Singleton, who was sitting outside. He informed her that he had possession of the vehicle because he had made some type of deal with Ms. Fleming whereby he would repair her rental property in exchange for ownership of the vehicle. Ms. Fleming, however, told Officer McCaskill that she had reported the vehicle as stolen. After confirming that the theft report listed Mr. Singleton as the person who took Ms. Fleming's vehicle, Officer McCaskill arrested him.

At trial, Ms. Fleming testified that she has known Mr. Singleton for about ten years and that he wanted to purchase the vehicle in question, a Ford van. She acknowledged that she made two deals with Mr. Singleton whereby he would purchase her van for $600, but neither of the deals was completed. The first deal, made in March 2002, called for Mr. Singleton to give her a $200 check, written to her by a third party for whom he had done some construction work, and to pay the remaining $400 balance in cash at the end of the week when his employer paid him. However, when Ms. Fleming attempted to cash the check, she was unable to do so because the maker had stopped payment. The second deal, made in April 2002, called for Mr. Singleton to pay her $200 to make good for the returned check and to do plumbing work in her upstairs apartment for the balance owed. At the time of the incident in question, April 22, 2002, he was performing that

plumbing work.

At the time of the original deal, Ms. Fleming allowed Mr. Singleton to take the van for a few hours to purchase some supplies to finish a construction job, and he returned the van. Likewise, on other occasions, she let him use the van for the same purpose. The incident in question occurred on April 22, 2002. On that date, Mr. Singleton borrowed the van at approximately 1:00 p.m. to get materials for the renovation job. When he had not returned by 10:30 p.m., she left him a note on the mailbox directing him to put the keys to the van in her mail slot and not to go upstairs to do any work that night. At trial, that note was introduced into evidence.

Ms. Fleming testified that three days later she saw Mr. Singleton driving her van down Napoleon Avenue. Although she blew her horn, he hung his arm out the window and quickly turned down a side street. She claimed that she was in the wrong lane to follow him. Later that evening she saw her van parked by Soniat Park. She removed the license plate from the van, intending to return later to retrieve it. However, when she returned, the van was gone. A few days later she again spotted her van, and it had a hand-written sign in the back widow that read: "License applied for 4/29/02".

She next spotted Mr. Singleton driving her van on the evening of May 15, 2002. She then called a friend of Mr. Singleton and asked the friend to

inform Mr. Singleton that if he did not return the van by the next day, she would call the police. When Mr. Singleton failed to comply, she reported to the police that her van had been stolen. Thereafter, she saw Mr. Singleton in her van, accosted him, and ordered him to follow her home. He informed her that he had hurt his shoulder and needed the van to drive to the doctor's office. She insisted that he follow her home, but he refused to do so and drove away. The next day, she received a phone call specifying where the van was parked. She contacted the police and then went to that location and retrieved her van. However, the van was in deplorable condition; the interior was torn, the back and side doors were dented, the ladder was broken, and a cabinet was missing out of the back. It was filled with trash, some building materials, a tool bag, and Mr. Singleton's clothing and shoes. It had a different license plate on it.

Ms. Fleming then drove the van to her house. She parked it and placed a steering wheel lock on it to keep Mr. Singleton, who still had a key, from taking it again. She did not remove any of the items she found in the van because she did not want Mr. Singleton to accuse her later of taking things that belonged to him.

On May 25, 2002, Ms. Fleming looked out of her window and saw Mr. Singleton taking things out of the back of the van. She went outside and

asked him for the key to the van and then returned inside and phoned the police. Mr. Singleton knocked on her door, asking her to take him to a junk yard to sell the materials in the van, and offered her the money from the sale of these materials to pay for the van. She refused his offer.

At trial, Ms. Fleming identified the title, registration, and proof of insurance for the van, affirming that they had never been transferred to Mr. Singleton. She reiterated that the last time she gave him permission to use the van was on April 22, 2002, and that she only gave him permission to go get materials for the plumbing repairs he was making to the upstairs apartment, and that he never returned her van.

Testifying in his own defense, Mr. Singleton admitted having a 1993 conviction for simple possession of cocaine, yet insisted he pled guilty to take the rap for his nephew, who would have lost his football scholarship if he had been prosecuted. As to the alleged unauthorized use of a vehicle, Mr. Singleton testified that he performed construction work for Ms. Fleming in the past, for which she never paid him. He further testified he and Ms. Fleming agreed that she would sell him the van for the $200 check and his performing plumbing repairs to the apartment. He insisted that he thought he had paid for the van by giving her the check and making the plumbing repairs. He stated he had been using the van for about a month before he

gave her the check and that he had used the van for three weeks before she told him the check had bounced. He stated that he called the maker of the check and was informed that payment was stopped because it had not been cashed quickly and because Mr. Singleton refused to accept a new construction job. Mr. Singleton insisted Ms. Fleming let him keep the van even after discovering the check had bounced, agreeing that he could pay for the van by working on the apartment and buying the necessary materials.

Mr. Singleton testified he worked on Ms. Fleming's apartment at night, after completing other jobs elsewhere during the day, and that Ms. Fleming began complaining about the noise. On April 22, 2002, he stated that Ms. Fleming found him sleeping in the apartment; he claimed that he had worked until 4:00 a.m. and fallen asleep. He admitted that he took the van that day, but he insisted that he had her permission.

Mr. Singleton further testified that Ms. Fleming eventually took the van from his house when he was not there. He denied receiving any message that she was going to call the police if he did not return the van. He testified that he told Ms. Fleming that he would return the van after he had visited his doctor and that she would have to wait until his arm had healed before he could complete the plumbing work, which he estimated was 90% completed. He stated that she did not try to take the van at that time. He

admitted that his agreement with Ms. Fleming was only a verbal one. He maintained that she never paid him for the construction or plumbing work he had performed for her. He explained that he had not transferred the title, registration, and insurance on the van because he had not yet finished the work, and he admitted he did not yet own the van. He also denied trying to avoid Ms. Fleming. He claimed that she had told him to "never mind" about completing the work and that she never tried to get the van back from him.

On rebuttal, Ms. Fleming testified that she had to hire another plumber to finish the plumbing work and that she had to redo much of Mr. Singleton's work. Specifically, she indicated that the fixtures Mr. Singleton used had to be replaced because they had been soaked in chemicals and that the other plumber also had to replace pipes because of leaks. She testified it took three to four days to replace and fix Mr. Singleton's work.

PATENT ERRORS

A review of the record reveals there are no patent errors.

SUFFICIENCY OF THE EVIDENCE

On appeal, Mr. Singleton raises as his sole assignment of error the sufficiency of the evidence to support his conviction for attempted unauthorized use of a motor vehicle. He argues that the state failed to prove that his use of the vehicle was without Ms. Fleming's consent or by means

of fraudulent conduct.

In *State v. Francois,* 2002-2056, p.4-5 (La. App. 4 Cir. 4/9/03), 844 So. 2d 1042, 1046, we articulated the standard for reviewing a sufficiency of the evidence claim as follows:

> The standard for reviewing a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under that standard, the reviewing court must determine whether the evidence viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all the elements of the crime were proved beyond a reasonable doubt. 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). This standard thus "preserves the role of the jury as the factfinder the case but it does not allow jurors 'to speculate if the evidence is such that reasonable jurors must have a reasonable doubt.'" *State v. Pierre,* 93-0893, p. 5 (La. 2/3/94), 631 So.2d 427, 429.
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> Under *Jackson,* the totality of the evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *See State v. Jacobs,* 504 So. 2d 817, 820 (La. 1987). When circumstantial evidence forms the basis for the conviction, the totality of the evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. However, "[h]ypotheses of innocence are merely methods for the trier of fact to determine the existence of a reasonable doubt arising from the evidence or lack of evidence." *State v. Shapiro*, 431 So. 2d 372, 389 (La. 1982)(*on reh'g*)(Lemmon, J., concurring). The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of events; rather, when evaluating the evidence in the light most favorable

> to the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under *Jackson*. *State v. Davis*, 92-1623 (La. 5/23/94), 637 So. 2d 1012.
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> This circumstantial evidence rule is not a separate test from *Jackson*; rather, La. R.S. 15:438 merely "provides an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found defendant guilty beyond a reasonable doubt." *State v. Wright*, 445 So. 2d 1198, 1201 (La. 1984); s*ee also State v. Addison*, 94-2431 (La. App. 4 Cir. 11/30/95), 665 So. 2d 1224. Although the circumstantial evidence rule is not a more stringent standard than the general reasonable juror's reasonable doubt formula, "it emphasizes the need for careful observance of the usual standard, and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence." *State v. Chism*, 436 So. 2d 464, 470 (La. 1983).
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> 2002-2056 at pp. 4-5, ___ So. 2d at ___.

As noted, Mr. Singleton was charged with unauthorized use of a motor vehicle, but convicted of an attempt of that crime. As a result, the pertinent statutory provisions defining the crime are two-fold. First, La. R.S. 14:68.4 defines unauthorized use of a motor vehicle as follows: "the intentional taking or using of a motor vehicle which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices, or representations, but without any intention to deprive the other of the motor vehicle permanently." Second, an attempt, which is a responsive verdict, is defined by La. R.S. 14:27 as follows:

> A. Any 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 is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
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> B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.
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> C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.

In this case, Mr. Singleton cites in support of his inufficiency of the evidence argument the Louisiana Supreme Court's decision in *State v. Bass*, 400 So. 2d 650 (La. 1981). In *Bass,* the defendant had entered into a "rent-to-own" contract for a television set. Shortly after receiving the television, the defendant stopped making payments, failed to return the television, and moved away, taking the television with him. The rental company contacted the defendant at his work, and he agreed to continue making the contractual payments, but he failed to do so and failed to return the television. As a result, the rental company filed criminal charges against him. He was then

convicted of unauthorized use of a movable.

Reversing that conviction, the Louisiana Supreme Court reasoned: "We decline to accept a theory that the mere failure to make rental payments as agreed constitutes a 'use without consent' or a 'use by fraudulent practices' for purposes of the statute." *Bass*, 400 So. 2d at 652. The Court refused to equate a breach of a rental contract with use without consent or by fraudulent practices. The Court concluded that the State failed to show any *mens rea*, which distinguishes criminal acts from civil wrongs. The Court further concluded that the state failed to introduce evidence reasonably supporting the inference of fraudulent intent beyond a reasonable doubt.

In *State v. Cojoe*, 2000-1856 (La. App. 4 Cir. 3/21/01), 785 So. 2d 898, *writ denied*, 2001-1143 (La. 3/22/02), 811 So. 2d 921, we reversed an unauthorized use conviction. In *Cojoe*, the defendant was accused of using his father's car, which was kept behind a locked fence. The lock was broken when the defendant was found using the car; however, the defendant had the keys to all of his father's vehicles and used them on occasion. We found there was no evidence to show the father had revoked permission to use the car. The father was in the hospital at the time with a tube down his throat. We thus reversed the defendant's conviction.

In contrast, in a case much closer to the facts of the instant case we

affirmed a defendant's conviction. *State v. Coleman*, 2002-1487, p. 4 (La. App. 4 Cir. 10/9/02), 830 So. 2d 341, 343. In that case, the defendant was employed as a driver for the Salvation Army during the Christmas season, and his only duties with respect to the Army's van was to pick up and drop off kettle workers and then return the van at the end of the day. In mid-November he completed his morning run, but failed to pick up the workers or to return the van. He did not call the Army on the cell phone that was supplied for emergencies. Sometime in early December, the defendant called his supervisor to tell him the van had been stolen. Soon thereafter, the van was recovered in a housing project.

On appeal, we discussed the elements of unauthorized use of a motor vehicle, stating: "[t]he defendant maintains that the State must prove that the defendant `harbored fraudulent intent.' However, the statute provides that the State can prove either an intentional taking `without the owner's consent *or* by means of fraudulent conduct.'" *Id.* (Emphasis supplied). The defendant further argued that the evidence was insufficient to support his conviction because the State failed to show that he used the van without authorization. Disagreeing, we noted that the defendant had authorization to use the van for the sole purpose of transporting workers. We found that the defendant diverted the van from its proper use, did not complete his duties

with respect to the van, did not return the van, and did not report any problems he may have encountered. We reasoned that "[o]bviously, the reasonable inference is that the defendant attempted to use the van belonging to the Salvation Army without its consent and for his own purposes after he received possession of it. The evidence supports the jury's guilty verdict." *Coleman,* 2002-1487at p. 4, 830 So. 2d at 343.

Similarly, in St*ate v. Varnado*, 2001-367 (La. App. 5 Cir. 9/13/01), 798 So. 2d 191, the defendant was employed as a driver for a company. On a Friday, he was ordered to drive workers to another city. Late that Friday afternoon when the defendant had not returned, his employer learned he had dropped off the workers at 1:00 p.m. The employer contacted him on a company cell phone, and the defendant stated that he would return the company's truck around 7:00 p.m. The defendant, however, failed to return the truck, failed to answer his cell phone, and failed to respond to his pager over the weekend. He finally returned the truck on Sunday afternoon, after his employer had reported the truck stolen. The defendant was convicted of unauthorized use of a motor vehicle. Rejecting his insufficiency of the evidence claim on appeal, the appellate court noted that the evidence showed the defendant knew he was not authorized to keep the truck over the weekend and ignored all his employer's attempts to contact him over the

weekend.

In the instant case, as in *Coleman* and *Varnado*, Ms. Fleming allowed Mr. Singleton to use her van and he failed to return it when he was instructed to do so. Ms. Fleming testified the Mr. Singleton was to bring back the van as soon as he picked up the plumbing materials, and she further testified he resisted all attempts to have him return the van. Although Mr. Singleton argued he thought he had substantially purchased the van, he admitted the title, registration, and insurance had not been transferred because he "wasn't finished the work."

The jury was presented with both parties' versions of the case and apparently chose to believe Ms. Fleming's version. As this court noted in *State v. Ragas,* 98-0011 p. 16 (La. App. 4 Cir. 7/28/99), 744 So. 2d 99, 108, "it is well-settled that credibility decisions by the jury should not be disturbed unless such finding is clearly contrary to the evidence. *Id* .(citing *State v. Harris*, 624 So.2d 443 (La.App. 4 Cir. 1993)). Continuing, we noted "[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." *Id.*(citing *State v. Smith*, 600 So.2d 1319, 1324 (La. 1992)).

Given the testimony adduced in this case, we find the jury did not abuse its discretion in its credibility finding. As in *Coleman* and *Varnado*,

we find the evidence would have been sufficient to support a conviction for unauthorized use of a motor vehicle.

DECREE

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

AFFIRMED