

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * NO. 2007-KA-1429
VERSUS * COURT OF APPEAL
LADOIA SMITH AND ALFRED * FOURTH CIRCUIT
GREEN * STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 466-984, SECTION "D"
Honorable Frank A. Marullo, Judge

* * * * *

Judge Terri F. Love

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(Court composed of Judge James F. McKay, III, Judge Michael E. Kirby, Judge Terri F. Love)

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**CONVICTIONS AFFIRMED
SENTENCES AFFIRMED**

The defendants, Ladoia Smith and Alfred Green were jointly charged with armed robbery with a dangerous weapon (a gun), in violation of La. R.S. 14:64. The defendants were arraigned and pled not guilty. After trial by jury, Mr. Green was found guilty of armed robbery and Mr. Smith was found guilty of simple robbery. Mr. Green was sentenced to serve forty years without benefit of probation, parole, or suspension of sentence. Mr. Smith was sentenced to seven years at hard labor. This appeal followed.

We hold that as to Alfred Green, any rational trier of fact could have found beyond a reasonable doubt all of the essential elements of the offense of armed robbery were present, including, necessarily, that defendant Alfred Green was the individual who robbed the victim. We further hold that any rational trier of fact could have found beyond a reasonable doubt that defendant Ladoia Smith was a principal to the crime of armed robbery. We therefore affirm the decision of the district court.

FACTUAL AND PROCEDURAL HISTORY

Defendants Ladoia Smith and Alfred Green were jointly charged by bill of information on October 3, 2006, with armed robbery while armed with a dangerous

weapon, a gun, a violation of La. R.S. 14:64. Green pleaded not guilty at his arraignment and Smith pleaded not guilty at his arraignment. On December 19, 2006, Smith waived motions, and the trial court denied Green's motions to suppress the evidence and identification. Defendants were tried by a twelve-person jury. Smith was found guilty of simple robbery, a violation of La. R.S. 14:65, and Green was found guilty as charged of armed robbery. Green was sentenced to serve forty years without benefit of probation, parole, or suspension of sentence and Smith was sentenced to seven years at hard labor.

Defendants were both convicted of robbing Mohammad Esmail, the owner of U.S.A. Supermarket, located at 3141 General Meyer Avenue in the Algiers section of New Orleans, on June 30, 2006.

New Orleans Police Officer Len Major testified at trial that he arrested Ladoia Smith on July 30, 2006, for the armed robbery of Mohammad Esmail at Esmail's store. Officer Major, who knew the victim as a friend, stated that the victim called him on his cell phone on that date. Office Major heard through the phone what sounded like fighting. He could not get the victim to answer him, so the officer radioed the police dispatcher to send some units to that location. When Officer Major arrived at the store, bystanders told him to drive down the street. Two intersections down the street, the officer observed the victim and another individual, who turned out to be Smith, a distance away. He approached and found the victim fighting with Smith, who was carrying an opaque bag containing six beers. Smith also had some money in his hand, which turned out to be

approximately eight hundred dollars in tens and twenties. The officer gained control of Smith, and the victim told him that Smith was one of the men who had just robbed him at his store. The victim gave a description of the other robber as a black male wearing a dirty white shirt, blue jeans and a dark colored cap. Officer Major notified his rank, district investigators and the crime lab.

Officer Major described the victim as a close friend whom he had known for approximately three years. It did not surprise him that the victim telephoned him instead of the 911 operator. The victim described the gun used by the robbers as a gray metal semi-automatic pistol.

TESTIMONY OF DEPUTY BRENDON BASS

St. Tammany Parish Sheriff's Office Deputy Brendon Bass testified that he was a New Orleans Police Department detective on July 30, 2006, and that he participated in the investigation of an armed robbery of the U.S.A. Supermarket, which was what he characterized as a convenience store, located at 3141 General Meyer Avenue. Det. Bass said the victim-store owner, Mohammed Esmail, related that on July 30, 2006, at approximately 2:15 p.m., an individual later identified as defendant Green attempted to purchase a pack of cigarettes with a counterfeit fifty-dollar bill, which the victim rejected and handed back to Green. Green left but returned approximately fifteen minutes later and purchased a grape soft drink. Ten minutes later, Green re-entered the store, yelling to someone outside, "Kool or Newports." Shortly thereafter, defendant Smith entered the store, went to the courtesy booth, an island in the store where the cash register was located, and

attempted to purchase a pack of cigarettes. Green went to the cooler, situated behind the courtesy booth, grabbed a six-pack of “Red Bull,” and put it on the counter. Green then walked back to the cooler and obtained two “Powerades,” set them on the counter, and entered the courtesy booth from the rear. He drew a gun, pointed it at the victim’s chest, and told him to give it up. Green grabbed approximately two hundred dollars out of a cigar box behind the cash register and ordered the victim to take the cash register till out. The victim said he took the till out and placed it on the counter. Det. Bass said Green removed money from it. The victim armed himself, and Green ran out of the courtesy booth and out of the store. Det. Bass said a crumpled up counterfeit fifty dollar bill was found on the cooler side of the courtesy booth.

Det. Bass said a surveillance video was obtained, and a CD of the video depicting the robbery was played for the jury. The detective said he broadcast a description of the getaway vehicle, a green Caravan mini-van. Approximately an hour after arriving on the scene the detective had a call from another officer who had located the suspect vehicle in the Fischer Housing Development. The victim identified it as the same mini-van. The van was very hot to the touch. It was locked. Det. Bass looked inside and observed a silver semi-automatic pistol lying on the floor board behind the driver’s side window. A license plate check revealed that the van was owned by Janelle Edwards. It had not been reported stolen, but had been reported to be in the possession of a missing person, defendant Alfred Green. The vehicle was towed to the Fourth Police District station and eventually

was searched pursuant to a warrant. The silver pistol turned out to be a plastic Crossman pellet gun that the detective said basically looked like a real semi-automatic pistol.

Det. Bass obtained a photograph of Alfred Green and had it incorporated into a photo lineup which he presented to the victim. The victim selected Green's photo.

Det. Bass confirmed on cross examination that he arrived after the robbery had occurred and that what his testimony regarding the robbery was based on what the victim told him. No one indicated at any point that Ladoia Smith had any weapon. Det. Bass confirmed that Smith was still in the store when Green ran out and when the victim armed himself and ran out after Green. The victim did not say that he saw Green in the van. Det. Bass confirmed that the victim wrote on the back of the photo lineup that he was ninety percent certain that Green was the person who had robbed him. He stated that the victim covered up and eliminated the ones he knew were not the robber. The pellet pistol was found between the two front seats on the floorboard of the green mini-van. No counterfeit or legitimate money was found in the van, nor was any physical evidence from U.S.A. Supermarket found in the van. There was no physical evidence found at the scene linking Alfred Green to the robbery. None of Green's fingerprints was found on the cigar box, counter, bottles or anywhere else in the store.

New Orleans Police Department Crime Scene Technician Aven Cooper testified that on July 30, 2006, she was called to 3141 General Meyer Avenue,

where she lifted five partial latent fingerprints from a cigar box that was located behind the front counter of the victim's store. She unsuccessfully attempted to lift fingerprints from two Powerade bottles collected as evidence at the scene, but they were too wet from condensation. She let the bottles air dry, but could not retrieve a print from either of them. Ms. Cooper said her report did not reflect that she dusted a cash register drawer, and indicated that it would have if she had done so.

TESTIMONY OF MOHAMMED ESMAIL

Mohammed Esmail, the victim and owner of the U.S.A. Supermarket, testified that on July 30, 2006, he was robbed by two individuals, one of whom, Alfred Green, was armed with a gun. He had seen Green twice before he actually drew the gun. Esmail said Green attempted to purchase cigarettes with a counterfeit fifty-dollar bill, which Esmail rejected, sending Green on his way. Green returned a second time, purchased a grape soft drink, and left again. The third time Green came in, he held the door open momentarily, yelling outside to another person, asking that person what kind of cigarettes he/she wanted. Green went to the cooler and got a six-pack of beer, which he placed on the counter. Green went back and got two bottles of Powerade.

It was then that Ladoia Smith entered the store, came to the counter, and asked for a pack of "Kool" cigarettes. While the victim was waiting on Smith, Green came into the courtesy area behind the victim and said: "Get down." When the victim turned around, Green had a silver gun, "like a forty," pointed at him. Green was about one foot away from the victim. Green grabbed a cigar box

containing five, ten and twenty-dollar bills. The victim said his wife and baby were behind the register with him at the time. Green ordered the victim to take the cash drawer out of the register and put it on the counter. Smith did not get down on the ground when Green said to get down, in contrast to the victim, his wife and a young male customer who was in the store, who all got down. Smith remained standing at the counter. Green told Smith to get the rest of the money, which Smith did. Both men then ran out the door. The victim replied in the negative when asked whether he armed himself or picked up a gun. Later, on cross examination, the victim was asked when it was that he “pulled” his gun, and he said it was after Green left. He said the gun was on a shelf.

The victim said he or “we,” apparently referring to his wife—who is seen on the surveillance video with a telephone in her hand after the robbery—dialed 911 and then called Officer Major. The victim ran outside and saw the gunman enter a “blue” van and burn rubber as he drove off toward the left. Only the gunman was in the van, although the victim said the passenger door was wide open when the van drove off. The victim began looking around for Smith. A minute or so later he observed Smith exit the store next door to the U.S.A. Supermarket, carrying a six-pack of Heineken beer in a yellow plastic bag. The victim said the money Smith had taken was in the bag. Smith ran off when he saw the victim. The victim chased Smith two blocks down one street, apparently General Meyer Avenue, and then into the second block of Murl Street before catching him. Officer Major then appeared on the scene and arrested Smith. The victim said Smith had

approximately eight hundred dollars in the same bag in which he had the six-pack of Heineken. The victim later went with Det. Bass to the Fisher Housing Project, where he saw the same van in which Green had fled. The victim recalled that his identification of Green in the photo lineup as the gunman took a minute or two. The victim said he wrote ninety percent on the back of the photo lineup because it was a photo. However, he stated that he was one hundred percent sure Green was the gunman who drove off in the minivan, and identified him in court.

The victim confirmed on cross examination that he had never seen Alfred Green prior to the day of the robbery. He was confronted with his prior testimony wherein he stated that he looked at the photo lineup for a couple of seconds. The victim said he told Officer Major the gunman was armed with a silver gun, like a “forty.” The victim stated that a camera trained on the cash register was turned off on the day of the robbery, and only the one trained on the cooler—which also catches the rear of the courtesy booth where the checkout counter and cash register are located—was working. He said Green told Smith to “[g]rab the rest of the money.” The victim said he saw Smith take the money out of the register. Green first left the store, then Smith. When the victim got outside Green was already getting in the van. The victim said that when Officer Major arrested Smith he took the eight hundred dollars in twenties from Smith and returned it to him.

New Orleans Police Officer George Jackson was qualified by stipulation as an expert in the analysis of fingerprints. He found none of the latent fingerprints taken in the case was suitable for identification.

TESTIMONY OF OFFICER LEN MAJOR

Officer Major was recalled as a witness by defendant Ladoia Smith. Officer Major testified that the victim related to him that defendant Green ordered the victim to put the cash register drawer on the counter. Then Green proceeded to walk behind the counter, at which time he dropped some of the money he had removed from the cigar box. As he picked it up, he yelled: "Get my money." Officer Major replied in the affirmative when asked whether it would comport with his recollection if the victim told him that when he came back inside the store after running outside to see Green leaving in the minivan he realized that Smith was gone. Officer Major also replied in the affirmative when asked whether it would comport with his recollection that the victim told him that after realizing that Smith was gone, he stepped outside to look around and then saw Smith exiting the store next door.

ERRORS PATENT

A review of the record reveals one error patent. The trial court failed to observe the twenty-four delay between the denial of defendant Green's motion for new trial and the imposition of sentence, as required by La. C.Cr.P. art. 873. However, this court has held that the failure to observe the twenty-four delay provided for by La. C.Cr.P. art. 873 is harmless error when there is a sufficient delay between the date of conviction and the date of sentencing; there is no indication that the sentence was hurriedly imposed; and there is no argument or showing of actual prejudice by the failure to observe the delay. *State v. Stovall*,

2007-0343, p. 12 (La. App. 4 Cir. 2/6/08), 977 So. 2d 1074, 1082; *State v. Foster*, 2002-0910, pp. 3-4 (La. App. 4 Cir. 12/11/02), 834 So. 2d 1188, 1192.

In *State v. Sam*, 99-0300 (La. App. 4 Cir. 4/19/00), 761 So. 2d 72, the defendant was convicted on August 9, 1995. Less than one month later, on September 8, 1995, the trial court denied the defendant's motion for new trial and immediately imposed sentence, failing to observe the twenty-four delay as required by La. C.Cr.P. art. 873. On error patent review, this court noted that there was no indication the defendant's sentence was hurriedly imposed and that the defendant did not argue or in any way show that he was actually prejudiced by the trial court's failure to observe the delay. Even though the defendant raised excessive sentence as an assignment of error, this court found that the failure to observe the delay constituted harmless error.

In the instant case, over ten weeks elapsed between the date of Alfred Green's conviction and the date of sentencing. There is no indication the sentence was hurriedly imposed. Green does not raise any assignment of error as to his sentence or argue that he was actually prejudiced by the failure to observe the delay. Nor has Green shown that he actually was prejudiced by the trial court's failure to observe the delay. Under these circumstances, the failure to observe the delay in the instant case constituted harmless error.

SUFFICIENCY OF EVIDENCE– ALFRED GREEN

Defendant Alfred Green's sole assignment of error is that the evidence is insufficient to support his conviction because the State failed to negate any 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, p. 13 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, 106-107, 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. 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.

When identity is disputed, the State must negate any reasonable probability of misidentification in order to satisfy its burden of proving every element of the crime charged beyond a reasonable doubt. *State v. Edwards*, 97-1797, pp. 12-13 (La. 7/2/99), 750 So. 2d 893, 902; *State v. Woodfork*, 99-0859, p. 4 (La. App. 4 Cir. 5/17/00), 764 So. 2d 132, 134.

Green was charged with and convicted of armed robbery, a violation of La. R.S. 14:64, which defines the offense as:

Armed 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, while armed with a dangerous weapon.

Defendant Green admits that a police missing person's report stated that he was last seen in possession of a green van found in the Fisher Housing Development within an hour or so after the robbery that was identified by the victim as the one in which the gunman fled. Inside of that van, on the floorboard between the two front seats, was a silver plastic Crossman pellet gun that investigating officer Det. Bass testified resembled a real semi-automatic pistol. The victim described the gun carried by the gunman as a gray metal semi-automatic pistol. The police report described the weapon as "gray silver metal." Defendant argues that the victim, who admitted owning a handgun, would have known the difference between a plastic pellet gun and what he refers to as "an actual automatic weapon." Thus, he submits that the plastic pellet gun could not

have been the one used by the robber because it was not metal. However, even Det. Bass testified that when he looked in the window of the green van he observed what he thought was a “silver semi-automatic pistol.” He said it “basically” looked like a real gun. If Det. Bass thought the gun was a real semi-automatic pistol, then the victim’s accuracy and ability to recall facts from the armed robbery cannot be attacked because he too believed it was a real metal handgun. Defendant points out that the victim never identified the plastic pellet gun as the one used by the gunman. However, the victim accurately described the physical appearance of the dangerous weapon used by the gunman, and the security camera video shows the gunman carrying what appears to be a silver semi-automatic handgun.

The victim selected defendant Green’s photo from the photo lineup and wrote on the back that he was ninety-percent certain that Green was the person who robbed him. The victim testified at trial that he was one hundred-percent certain Green was the robber. In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the United States Supreme Court set forth a five-factor test to determine whether an identification is reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s 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.

In the matter *sub judice*, the victim had an excellent opportunity to view the robber. Although he had never seen Green in his store before the day of the

robbery, the victim testified he saw Green when he attempted to pay for a pack of cigarettes with a counterfeit fifty-dollar bill. Green then left the store and reentered fifteen minutes later, purchased a grape soft drink, and left. Ten minutes later Green reentered, pausing at the front door before entering to ask someone outside if they wanted “Newport” or “Kool” cigarettes. Green obtained a six-pack of beer and placed it on the checkout counter, and returned to the cooler to get two Powerades, which he put on the counter behind the cash register, before producing what the victim recalled was a silver handgun.

The victim’s recollection of these events evidences the degree of attention he paid to Green. It can be noted that the only testimony at trial concerning the gunman’s description was by Officer Major, who said the victim described the gunman as a black male wearing a dirty white shirt, blue jeans and a dark colored cap. This description accurately describes what the gunman is seen wearing in the security camera video of the robbery. There was no testimony at trial concerning the victim giving a description of the gunman’s physical features, such as the gunman’s height, weight, skin tone, etc. As noted, the victim identified Green as the robber, being ninety-percent certain Green was the one. This identification was made only two days after the robbery.

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense of armed robbery present beyond a reasonable doubt, including, necessarily, that defendant Alfred Green was the individual who robbed the victim. Thus, the State

negated any reasonable probability of misidentification. There is no merit in this assignment of error.

SUFFICIENCY OF EVIDENCE – LADOIA SMITH

In his sole assignment of error, Ladoia Smith argues that the evidence was insufficient to support his conviction. Ladoia Smith was charged with armed robbery but the jury returned a responsive verdict of simple robbery.

If the evidence adduced at trial was sufficient to support a conviction of the charged offense, the jury's responsive verdict is authorized. *State v. Harris*, 97-2903, p. 8 (La. App. 4 Cir. 9/1/99), 742 So. 2d 997, 1001. See also *State v. Johnson*, 2001-0006, p. 4 (La. 5/31/02), 823 So. 2d 917, 920 (evidence sufficient to support conviction of the greater offense will necessarily support conviction of a lesser and included offense). A lesser and included offense is one in which all essential elements are also essential elements of the greater charge, such that evidence sufficient to support a conviction of the charged offense necessarily supports conviction on the lesser offense. *State v. Manning*, 2003-1982, p. 65 (La. 10/19/04), 885 So. 2d 1044, 1101.

La. R.S. 14:64 defines armed robbery as:

[T]he 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, while armed with a dangerous weapon.

La. R.S. 14:65 defines simple robbery as:

[T]he 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, while armed with a dangerous weapon, but not armed with a dangerous weapon.

All the essential elements of the offense of simple robbery are also essential elements of the greater charge of armed robbery. Thus, simple robbery is a lesser and included offense of armed robbery.

La. R.S. 14:24 sets forth the law on principals, and provides:

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

In the instant matter, it has been determined that the evidence was sufficient to support the armed robbery conviction of Ladoia Smith's co-defendant, Alfred Green. The evidence established that defendant Alfred Green entered the victim's store and attempted to purchase a pack of cigarettes with a counterfeit fifty-dollar bill. The victim store-owner detected the counterfeit bill, and Green left the store. He returned a second time to purchase a grape soft drink. Green returned a third time, pausing at the entrance while holding open the door, and purporting to ask someone outside if he/she wanted "Kools" or "Newports." Green then went to the cooler, removed a six-pack of beer, and walked over and placed it on the counter. Green then returned to the cooler, procured two Powerade drinks, walked up to the open rear of the courtesy booth/checkout counter, placed the bottles on the side of the booth, and proceeded to draw what appeared to be a silver semi-automatic pistol from underneath his T-shirt. He then perpetrated the armed robbery.

Prior to Green perpetrating the robbery, but after he entered for the third time, defendant Ladoia Smith entered the store, walked to the checkout counter, and asked for a pack of "Kool" cigarettes. Green is observed on the surveillance

video walking behind the courtesy booth back to the cooler to get the two Powerade bottles. He turned around and looked back in the direction of the courtesy booth immediately as he passed it by. Then he grabbed the Powerade bottles and committed the armed robbery. Green ordered everyone to get down. The victim got down after he removed the cash register drawer at Green's direction and placed it on the counter. The victim's wife got down. A young customer got down. But Ladoia Smith did not get down. He remained standing at the counter. Green said at some point: "Get the rest of the money." The victim testified he saw Smith remove money from the cash register drawer. Green then fled.

The victim testified that he observed Smith flee after Green did. There is some confusion as to when Smith left the store. When Officer Major was recalled as a witness by defendant Ladoia Smith, Major replied in the affirmative when asked whether it would comport with his recollection if the victim told him that when he came back inside the store after running outside to see Green leaving in the minivan he realized that Smith was gone. Officer Major also replied in the affirmative when asked whether it would comport with his recollection that the victim told him that after realizing that Smith was gone, he stepped outside to look around and then saw Smith exiting the store next door. In addition, Det. Bass confirmed on cross examination that Smith was still in the store when Green ran out and when the victim armed himself and ran out after Green.

In any case, the victim observed Smith take money out of the store's cash register drawer at the direction of Green. At some point after Green drove off in

the van the victim turned to look for Smith. He observed Smith leaving a store next door with a six pack of beer in a plastic bag that he apparently had purchased from that store next door. The bag also contained some eight hundred dollars from the victim's cash register drawer. Smith fled. The victim caught up with Smith blocks away and began scuffling with him before Officer Major arrived on the scene and Smith was arrested.

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant Ladoia Smith was a principal to the crime of armed robbery in that he aided and abetted Alfred Green in committing the armed robbery of the victim's store by distracting the victim during the armed robbery and then taking money out of cash register at Green's direction, rejecting the hypothesis of innocence that Smith was simply a bystander who merely saw an opportunity to steal money out of the cash register and run, as he suggests. Accordingly, the jury was justified in returning a verdict of guilty of the lesser included offense of simple robbery. There is no merit in this assignment of error.

DECREE

For the forgoing reasons, the convictions and sentences of both defendants are affirmed.

**CONVICTIONS AFFIRMED
SENTENCES AFFIRMED**