

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2007-KA-1580**  
**VERSUS** \* **COURT OF APPEAL**  
**NATHAN HOLMES** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 467-136, SECTION "F"**  
**Honorable Dennis J. Waldron, Judge**

\* \* \* \* \*

**Judge Patricia Rivet Murray**

\* \* \* \* \*

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Max N. Tobias, Jr.)

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**AFFIRMED**

This is a criminal case. The defendant, Nathan Holmes, was convicted of one count of simple burglary, adjudicated a multiple offender, and sentenced to thirty years at hard labor. Mr. Holmes appeals asserting two assignments of error: (i) insufficiency of the evidence, and (ii) invalidity of the multiple offender adjudication. Finding no error, we affirm.

#### **STATEMENT OF CASE**

On October 12, 2006, the State charged Mr. Holmes with one count of simple burglary of a vending machine. On November 27, the State amended the bill to charge one count of simple burglary of a structure, and Mr. Holmes pled not guilty. On December 19, the district court held a preliminary hearing. On that date, the court also heard Mr. Holmes' motions to suppress the evidence and statement. The court denied Mr. Holmes' motions and found probable cause to hold for trial. On February 7, 2007, a six-person jury found Mr. Holmes guilty as charged. The State noted its intent to file a multiple bill, and the district court reset the matter to February 14 and then again to March 16. On March 16, the court ordered a pre-sentence investigation and reset sentencing to May 18 and then again to June 7. On June 7, the court reset the matter to June 11 to allow defense counsel

time to review the certified copies of the prior offenses alleged in the multiple bill. The court subsequently reset the matter several times, including on June 29. On June 29, the court granted the State a continuance “in order to file [the] multiple bill.” On July 5, the court held the multiple bill hearing. At the conclusion of the hearing, the court adjudicated Mr. Holmes as a fourth offender and sentenced him to serve thirty years at hard labor. The court granted Mr. Holmes’ motion for appeal and denied his motion for reconsideration of sentence. This appeal followed.

### **STATEMENT OF THE FACTS**

On the morning of Sunday, July 9, 2006, Officer Ernest Alex and his partner, Officer Floyd Jackson, received a call concerning a burglar alarm that was activated at McMinn High School. According to Officer Alex, they arrived at the school at approximately 6:10 a.m. and heard loud, banging noises emanating from within the school. The noise was coming from the Nashville Avenue side of the school. Peering through a window on the basement/first floor on that side of the school, the officers saw a man (later identified as Mr. Holmes) battering the vending machines located in the basement of the school. Although the sun was just coming out, Officer Alex testified that they were able to see Mr. Holmes because the lights were on in the basement. Officer Alex further testified that he could not make out the object that Mr. Holmes used to get into the vending machines; however, he said it appeared to be a “heavy metal object.”<sup>1</sup> Officer Alex further testified that when they first arrived and saw Mr. Holmes trying to break into the vending machines, his back was to them. However, Mr. Holmes was constantly

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<sup>1</sup> Although the police did not recover any object from the scene, the janitor ultimately recovered one. The surface of the object was such that it was unsuitable for retaining fingerprints.

moving between several vending machines, and the officers were able to see Mr. Holmes' face when he turned.

The officers called for backup units and a canine unit. While they waited for the backup units to arrive, the officers continued to watch Mr. Holmes. When the backup units arrived, the officers stationed themselves at each corner of the large high school so that they could see all the exit doors. As the canine unit was preparing to enter the building, Officer Alex and his partner walked toward the door on the Nashville side of the school. The door opened, and Mr. Holmes exited the door carrying a plastic bag. When he saw the police officers, Mr. Holmes dropped the bag and immediately surrendered. He was arrested without incident. At that time, Mr. Holmes told the officers not to let the dog bite him. He also told the officers that the reason he was breaking in was that he was trying to feed his family. The officers found paper currency on Mr. Holmes' person and coins in the bag he was carrying. The currency the officers seized from Mr. Holmes totaled about \$300.00. Officer Alex identified photographs taken at the scene that showed the seized currency and the damaged vending machines. After Mr. Holmes was arrested, the search dog entered the school; no one else was found inside. At this time, Officer Alex also entered the school and learned that the rear door to the auditorium was unchained.

Michelle Simms, the head custodian at McMinn at the time of the burglary, testified that between 5:55 and 6:00 a.m. on July 9, 2006, she received a call from the security company for the school. The security company informed her that a motion detector on the first floor/basement area of the school had sent a silent alarm. When she arrived at the school, police officers were stationed on the four corners around the school and a canine unit was present. She told the officers that

she had the keys to all of the doors and gave them her set of keys. At that point, she heard an interior door bang and saw Mr. Holmes walk out the door on the Nashville side of the school. She testified that he dropped the bag of coins and stated to the officers: "Don't let the dog bite me." He also stated to the officers that he was stealing to feed his family. Ms. Simms testified that later she went inside the school and found that the vending machines had been damaged and that the auditorium door, which is normally chained, had been pried open. The next day Ms. Simms found a crowbar sitting on top of the milk machine in the cafeteria; she gave the crowbar to the police officer assigned to the school. Ms. Simms identified photographs of the damaged vending machines, which she indicated had been moved. She also identified the plastic bag Mr. Holmes was carrying when he exited the school as "the bag that was on the garbage can located in the basement where the kids would put the trash in after they'd go to the snack machine."

At trial, Ms. Simms identified Mr. Holmes as the man that she saw walk out of the school. Ms. Simms testified that the first time she saw Mr. Holmes was on the day of the crime. She further testified that he did not have permission to be inside the school that morning. On cross-examination, Ms. Simms admitted that she did not actually see anyone damaging the machines.

Mr. Holmes was the only defense witness. Testifying in his own defense, he denied taking money from the vending machines or even being inside the school that morning. He insisted that he was arrested about two or three blocks away from the school and that the officers brought him to the school. According to Mr. Holmes, the officers went in the school and came out with some money.

Mr. Holmes further testified that on the morning of July 9, 2006, he had gone to the area of Palmetto Street and South Carrollton Avenue to find a man

named James who had offered him work gutting houses. Although he was unsure of James' last name or address, he knew that James lived on Palmetto Street and drove a black Ford truck. Mr. Holmes testified that he walked from Carrollton Avenue and Palmetto Street until he came to South Claiborne Avenue. Because he was unable to find James' house or his truck, he decided to walk home. While en route home, he was stopped by police officers in the area on South Claiborne Avenue where Tulane Stadium formerly was located, which is a few blocks from McMain. At that point, the officers arrested him and took him to the school. Mr. Holmes testified that the only statement he made to the officers was, as Ms. Simms testified, "please don't let this dog bite me." He explained that the dog was in a rage. Mr. Holmes also testified that the only thing the officers took out of his pocket were his keys and a box of hot tamales candies. Mr. Holmes admitted having four prior convictions: (i) a 1992 conviction for illegal use of a weapon, (ii) a 2003 conviction for possession of crack cocaine, (iii) a 1988 conviction for possession of stolen property, and (iv) a 1986 conviction for possession of phencyclidine ("PCP"). He pled guilty in all those prior cases except for the 1988 conviction.

## **DISCUSSION**

### *A. Errors Patent*

A review of the record for errors patent reveals there are none.

### *B. Assignments of Error*

#### *i. Sufficiency of the evidence*

By his first assignment of error, Mr. Holmes contends that the State failed to present sufficient evidence to support his conviction. He contends that the State failed to prove an unauthorized entry into the school, an essential element of

simple burglary. In evaluating the sufficiency of the evidence, Louisiana appellate courts are governed by the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under the *Jackson* standard, an appellate court “must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.” *State v. Neal*, 00-0674, p. 9 (La.6/29/01), 796 So.2d 649, 657 (quoting *State v. Captville*, 448 So.2d 676, 678 (La.1984)). “The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.” La. R.S. 15:438. Under the *Jackson* standard, all evidence, both direct and circumstantial, must be sufficient to prove guilt beyond a reasonable doubt to a rational jury. *State v. Brown*, 03-0897, p. 22 (La. 4/12/05), 907 So. 2d 1, 18 (citing *Neal, supra*, citing *State v. Rosiere*, 488 So.2d 965, 968 (La.1986)).

Mr. Holmes was convicted of simple burglary. The elements of simple burglary are as follows: (1) an unauthorized entry; (2) of any dwelling, vehicle, watercraft, or other structure (moveable or immovable) or any cemetery; (3) with the intent to commit a felony or any theft therein other than as set forth in La. R.S. 14:60. La. R.S. 14:62; *see State v. George*, 01-1061, p. 3 (La. App. 4 Cir. 3/13/02), 829 So.2d 440, 443; *State v. Williams*, 96-1276 (La. App. 4 Cir. 4/9/97), 693 So.2d 204, 209.

In this case, the evidence supports a finding that Mr. Holmes entered the school—a structure—and committed a theft therein. As noted, his argument is that the State failed to prove an unauthorized entry into the school. Ms. Simms, the head custodian, was the only witness to testify that he lacked authority to enter the

school. He emphasizes that she failed to testify as to the source of her knowledge that he lacked the authority to enter. Mr. Holmes thus argues that this testimony was insufficient to show he did not have permission to enter the school because someone else could have given him permission. We find this claim unpersuasive.

The jurisprudence has upheld convictions for offenses having unauthorized entry as an element when someone other than the owner of the structure testified that the defendant did not have authority to enter that structure. *State v. Martin*, 28,489 (La. App. 2 Cir. 8/21/96), 679 So.2d 557. In *Martin*, the defendant was convicted of simple burglary of an inhabited dwelling, one element of which is unauthorized entry. The owner of the burglarized house was incarcerated and allowed another person to live in the house while he was in jail. The person who lived in the house testified that the defendant did not have permission to enter the house. On appeal, the defendant contended that the evidence was insufficient to support his conviction because the State did not prove that the incarcerated owner had not given him permission. Rejecting this argument, the appellate court reasoned that “[t]he trial court found the possibility that [the owner] had given defendant permission to enter the house was sheer speculation which did not rise to the level of reasonable doubt.” *Martin*, 28,489 at p. 3, 679 So.2d at 560.

In this case, the school’s head custodian, Ms. Simms, testified that Mr. Holmes did not have authority to enter the school. As in *Martin, supra*, Mr. Holmes’ argument that Ms. Simms’ testimony is insufficient does not create a reasonable doubt. The evidence that the State presented, though circumstantial, was sufficient to show that Mr. Holmes’ entry into the school was unauthorized. *See Williams*, 96-1276 at pp. 10-11, 693 So.2d at 209-10 (summarizing jurisprudence in which circumstantial evidence linking the defendant to the

burglarized site was found to be sufficient to support affirming burglary conviction). The silent alarm in the school building sounded at approximately 6:00 a.m. on a Sunday, and the responding officers saw Mr. Holmes looting vending machines inside the school. He was arrested as he walked out the school door carrying a garbage bag filled with coins. The doors were locked, and the only point of entry was a pried open auditorium door. No one else was found inside the school. Based on these factors, there was sufficient evidence for the jury to find that Mr. Holmes committed an unauthorized entry of the school. This assignment of error lacks merit.

*ii. Multiple offender adjudication*

By his second assignment of error, Mr. Holmes argues that his multiple offender adjudication must be vacated because the record contains more than one multiple bill. For this reason, he contends there was no showing that he was given proper notice of the prior offenses that the State intended to use to support his multiple offender adjudication.

The record contains three multiple bills that pertain to this case. One lists three prior convictions: (i) possession of PCP in 1986, (ii) case 352-411D for illegal possession of stolen property and illegal discharge of a weapon in 1991, and (iii) case 440-243J for possession of cocaine in 2003. The second one lists only two prior convictions: (i) case 440-243J, and (ii) case 352-411D. The third one, which included the predicate offenses actually used at the multiple bill hearing, lists three prior convictions: (i) case 325-641H, a conviction for illegal possession of stolen property in 1988, (ii) case 352-411D, and (iii) case 440-243J. The only motion to quash the multiple bill contained in the record does not allege any confusion as to the predicate offenses; rather, it merely alleges that the State failed

to prove the existence of prior convictions or that waivers of rights in connection with guilty pleas were knowingly and intelligently made. The minute entry of June 7, 2007, indicates that the multiple bill hearing was reset to allow Mr. Holmes to review the certified copies of the prior convictions. The minute entries reflect that the State filed a multiple bill on June 12, and then on June 29, the court granted the State a continuance to allow it to file a multiple bill. On July 5, 2007, the multiple bill hearing was held. At the hearing, the State presented, among other documents, certified copies of the prior convictions in the three cases listed in the third multiple bill (cases 325-641H, 352-411D, and 440-243J).

Defense counsel did not object at the multiple bill hearing to the use of the predicate offenses on the basis that he was unaware of which prior convictions the State intended to use to establish Mr. Holmes was a multiple offender. Thus, this claim was not preserved for appeal. *See State v. Wilson*, 06-1421, p. 18 (La. App. 4 Cir. 3/28/07), 956 So.2d 41; 52, *State v. Dozier*, 06-0621, pp. 9-10 (La. App. 4 Cir. 12/20/06), 949 So.2d 502, 507-08. Regardless, “there is no requirement that the State submit its documentation to the defense prior to the multiple bill hearing.” *Dozier*, 06-0621 at p. 6, 949 So.2d at 505 (citing *State v. Williams*, 02-2189 (La. App. 4 Cir. 6/4/03), 849 So. 2d 799). The transcript of the multiple bill hearing indicates that defense counsel had copies of the exhibits used by the State with respect to the prior convictions. Given that defense counsel had documentation as to the predicate offenses, there was no basis for a claim that the defense had no proper notice of the predicate offenses the State intended to use to show that Mr. Holmes was a multiple offender. This claim, even if it had been preserved, lacks merit.

**DECREE**

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

**AFFIRMED**