

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2010-KA-1286
VERSUS	*	
		COURT OF APPEAL
KENDALL GORDON	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 492-470, SECTION “D”
Honorable Frank A. Marullo, Judge

PER CURIAM

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Michael E. Kirby, and Judge Terri F. Love)

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CONVICTION AND SENTENCE AFFIRMED.

STATEMENT OF CASE

On November 19, 2009, a grand jury for Orleans Parish, Louisiana indicted the defendant, Kendall Gordon, for the crime of second degree murder. The defendant pled not guilty at arraignment on November 25, 2009, and filed a motion to suppress the identification which the trial court denied.

On June 22, 2010, after the defendant waived his right to trial by jury, the trial commenced. At the conclusion of the trial, the judge found the defendant guilty as charged. On August 5, 2010, the defendant appeared for sentencing. The trial court denied the defendant's motion for post-verdict judgment of acquittal and without objection the trial court proceeded to sentence the defendant to life imprisonment without benefit of probation, parole or suspension of sentence. The trial court granted the defendant's motion for appeal and appointed the Louisiana Appellate Project to represent the defendant.

STATEMENT OF FACT

Darceleen Commadore testified that on the evening of August 8, 2009, she was at her home, 1810 Tricou Street in New Orleans, where she lived with sister,

Patrice Commadore¹. Her friend, Earlitta Taylor, was present in the house that night along with four children. Ms. Commadore recalled that at approximately 10:30 p.m. she was in the front room talking on the phone with her mother and that Patrice Commadore was in bed. Ms. Taylor was washing clothes. Suddenly, someone kicked the front door in. Two men with bandanas covering their faces entered the house. They told Ms. Commadore not to move, and once she saw that at least one of the men was armed, she raised her hands above her head as the men moved past her.

Ms. Commadore heard them in another room saying, "Get on the floor. [Expletive deleted], don't move." She heard them asking where the money was. She then heard commotion as the men continued to demand to know where the money was, followed by a gunshot. Seconds later, the two men came from the hallway and fell down on top of her, where she was sitting on the ground in the living room. The older man yelled at the younger to get up. The older man then grabbed her and demanded to know where the money was. They went into her room to get her purse.

Ms. Commadore's sister was lying on the floor covered in blood. Ms. Commadore stepped over her body. The older man was yelling at Ms. Commadore to hurry and stated, "[Expletive deleted], if I get caught in this house, I am going to kill you and everybody in here." Ms. Commadore could not find her own purse, but she did find Ms. Taylor's purse. While Ms. Commadore was looking for her own purse, the older subject hit her across the face several times. She told him to wait, as she was trying to remember where her purse was located. Eventually, she

¹ For clarity, Darceleen Commadore will be referred to as "Ms. Commadore" and her sister, Patrice Commadore, will be referred to as "Patrice Commadore".

gave him two hundred dollars that she obtained from Ms. Taylor's purse. The men then left. Ms. Commadore ran into the street screaming, but no one was outside. Initially, she telephoned her mother and then the police.

Ms. Commadore informed the police that one of the perpetrators was named Kendall or Kendrick Gordon and that she believed he had tattoos on his face. She identified him as the younger of the two men who entered. She stated that when the men fell onto her, Kendall Gordon's bandana came off his face, and that was when she was able to identify him.

Hours after the murder, Ms. Commadore met with Detective Barrett Morton of the Homicide Division who showed her two lineups. She positively identified Kendall Gordon from the first lineup. Ms. Commadore explained that she knew Kendall Gordon because he lived in her area. She first met him at central lockup that year after she was arrested. She also met him through her business selling clothes. She knew him well enough to inform Detective Morton that he had tattoos on his face and a gap in his teeth. Ms. Commadore stated that she did not actually observe these traits on the night in question. Ms. Commadore examined the photographic lineup she used to identify Kendall Gordon and identified her signature on the back.

Ms. Commadore testified that at the time she identified the defendant, Kendall Gordon, he was the person whom she believed was in her house. However, she claimed that she now knew he was not the perpetrator. She stated that she came to this belief learned through the news media later that Jessie Bibbins had been killed and "the story started adding up." Ms. Commadore went to the District Attorney's Office in January of 2010 and told one of the assistant district attorneys that she had identified the defendant in error.

Ms. Commadore testified that Jessie Bibbins, and not the defendant, was the younger of the two perpetrators who was in her house. While looking at Kendall Gordon, Ms. Bibbins stated that he was not in her house on the night in question.

She acknowledged that Bibbins does not have tattoos on his face. She explained that although she described Gordon as having three tattoos on his face, she never stated that she actually observed the tattoos on the night in question, only that she knew that Gordon had three tattoos on his face.

Ms. Commadore denied being directly threatened by any family members associated with the case but admitted that she had heard of some threats on the street. She heard that “if this person is going to get out of jail, this person going to do me this.” Continuing, she stated, “As a matter of fact, they killed the wrong person.”²

In order to refresh Ms. Commadore’s memory regarding the color of the bandanas the perpetrators were wearing, the state played a tape of the statement Ms. Commadore gave to Detective Morton on the night of the murder.

Ms. Commadore testified that she was able to identify Jessie Bibbins in the photographic lineup only after Detective Morton all but told her whom to identify. She explained Detective Morton went through the photographs and essentially eliminated all but one of them, which she then identified as being that of the second perpetrator. She stated that because he told her that the photograph she

² Ms. Commadore was not asked to explain this statement further.

selected was of the subject who was found dead, she was eighty to ninety percent sure of her identification.

Earlitta Taylor testified that she was in the kitchen when the men burst into the house. One of the men ran up to her face with a gun and told her to get on the ground. The man who came into the kitchen had a red bandana covering his face. She could hear the other man constantly telling Patrice Commadore to give him the money in the other room. Then she heard one gunshot.

Afterwards, she could hear them asking Ms. Commadore for money, and she could hear Ms. Commadore saying she did not have any money and telling them that her purse was on the bed. Then someone jumped over her, and she heard Ms. Commadore on the phone whispering.

Detective Barrett Morton, of the New Orleans Police Department, Homicide Division, testified that when he entered the house on Tricou Street, he observed that the door appeared to have been forced open. There was debris and furniture in the living room. There was a common hallway with two bedrooms on either side, and the kitchen was at the rear of the house. Detective Morton observed the deceased lying in the entryway to the bedroom on the left. The opposite bedroom appeared to be a child's bedroom.

Detective Morton identified several photographs taken of the scene. One depicted a blood trail leading from the common hallway and out of the front door. Another photograph depicted a forty caliber handgun that was found on the floor just inside the doorway of the child's bedroom. Two nine millimeter casings were also recovered at the scene. One was recovered from the blood pool next to the victim.

Detective Morton did not speak with Ms. Commadore until approximately one and a half to two hours later, at the Homicide Office. Based on the information provided by Ms. Commadore, Detective Morton prepared a photographic lineup that included Kendall Gordon's photograph. He also prepared a second lineup containing a photograph of Jessie Bibbins, the believed co-perpetrator, who was found in another part of the Ninth Ward, about three miles away, shot to death about the same time as the incident on Tricou Street was being reported. Detective Morton left the house on Tricou Street and proceeded to the scene of the Bibbins homicide. He identified a photograph of Bibbins' body taken at the scene of his homicide.

Detective Morton testified that when shown the photographic lineup, Ms. Commadore positively identified Kenneth Gordon as the perpetrator. When shown the lineup containing Jessie Bibbins, she identified him and stated that he looked like he was the older one of the two and that she was about ninety percent sure of her identification, even though he appeared younger in the photograph. Detective Morton denied suggesting which of the photographs she should identify. After examining the rap sheets of Messrs. Gordon and Bibbins, Detective Morton confirmed that the two men were approximately the same age.

It was stipulated that had Dr. Garner testified, she would have confirmed that she conducted the autopsy of Patrice Commadore, and that she would have testified that she found the cause of death to be a gunshot wound to her skull and brain.

A second stipulation was entered that had New Orleans Police Department firearms examiner, Kenneth Leary, testified, he would have confirmed that the nine millimeter bullet recovered during Patrice Commadore's autopsy and the nine

millimeter bullet recovered from Jessie Bibbins' autopsy were fired from the same weapon.

August Gaines testified for the defense. He admitted having two convictions for theft, involving an automobile and a license plate. He stated that on the night in question, he saw the defendant, Kendall Gordon, at a bus stop at Canal and Basin Street at approximately 10:30 p.m. Gaines was on his way home from work. He and the defendant are good friends, as his girlfriend's brother dates Mr. Gordon's sister. The two spoke briefly before going their separate ways.

Mr. Gaines saw the defendant the next morning at Gordon's sister's apartment. He stated that Gordon was hysterical. Gordon related that he had learned that he was wanted in connection with a murder that had occurred the previous evening. Gaines then pointed out that he had seen him the previous evening at the same time as the murder was alleged to have occurred and could establish his innocence.

At the conclusion of the trial, the trial court charged itself. In rendering its verdict the court explained that it found Detective Morton to be more credible than Ms. Commadore and that he believed that Ms. Commadore had retracted her identification out of fear of reprisal.

ERRORS PATENT

A review of the record for errors patent reflects that the record does not contain a minute entry reflecting sentencing. However, the record does contain the sentencing transcript. Considering this, and the fact that Mr. Gordon has not assigned any error regarding the absence of a minute entry reflecting sentencing, any error with regard thereto is harmless. *State v. Francois*, 00-1039 (La. App. 4 Cir. 1/10/01), 778 So.2d 673.

ASSIGNMENT OF ERROR

As his sole assignment of error, the defendant contends that the evidence produced by the State at trial was insufficient to support his conviction. Specifically, the defendant argues that Ms. Commadore's recanted identification is insufficient to support his conviction for second degree murder.

The standard of review for the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 requires that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test works with the Jackson constitutional sufficiency test to evaluate whether all evidence, direct and circumstantial, is sufficient to prove guilt beyond a reasonable doubt to a rational trier of fact. *State v. Rosiere*, 488 So.2d 965, 968 (La. 1986).

When the key issue in the case is identification, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof. *State v. Bright*, 1998-0398 (La.4/11/00), 776 So.2d 1134, 1147. A five-factor test for testing the reliability of an identification was enunciated in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972): (1) the witness' opportunity 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 witness' demonstrated level of certainty, and (5) the time lapse between the crime and the confrontation.

Although the defendant does not suggest that Ms. Commadore's initial identification should have been suppressed as unreliable under the *Biggers* factors, review of the circumstances of the identification reflects that Ms. Commadore related that she obtained an unobstructed view of the defendant's face when his bandana came down from around his face during the struggle. There is no indication that the lighting was poor or that any other factors interfered with her ability to see the defendant who it appears was only a few feet away when she observed his facial features. Ms. Commadore recognized the defendant immediately, and she identified his photograph from a lineup within hours of the crime. Accordingly, Ms. Commadore's identification is reliable under the *Biggers* factors.

The *Jackson* standard also guides appellate review on issues of witness credibility, as this court discussed in *State v. Holmes*, 05-1248, pp. 8-9 (La. App. 4 Cir. 5/10/06), 931 So.2d 1157, 1162:

The fact-finder weighs the respective credibilities of the witnesses, and a reviewing court will generally not second-guess those determinations. *State ex rel. Graffagnino v. King*, 436 So.2d 559 (La. 1983). However, the touchstone of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) is rationality and that "irrational decisions to convict will be overturned, rational decisions to convict will be upheld, and the actual fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law." *State v. Mussall*, 523 So.2d 1305, 1310 (La. 1988). The trier of fact makes credibility determinations, and may, within the bounds of rationality, accept or reject the testimony of any witnesses. *State v. Hampton*, 98-0331 (La.4/23/99), 750 So.2d 867, 880.

The defendant contends that the evidence was insufficient to support his conviction for the murder of Patrice Commadore and that his conviction should be overturned because the only eyewitness testified that he did not commit the crime and because no physical evidence was introduced which linked him to the murder.

The defendant acknowledges that the trial court was free to disbelieve Ms. Commadore's trial testimony that she then believed Jessie Bibbins was the perpetrator; however, the defendant argues that finding Ms. Commadore's testimony less than credible does not constitute substantive evidence of guilt and left the court with no evidence on which to support its verdict.

Citing *State v. Cousins*, 96-2973 (La. 4/14/98), 710 So.2d 1065, the defendant argues that the conviction cannot be supported by either the impeachment value of Detective Morton's testimony or by Ms. Commadore's initial unsworn statement that Kendal Gordon was one of the men who killed her sister. Because the defendant invokes *Cousins*, some discussion of the facts of the case is necessary.

In *Cousins*, the state attempted to elicit testimony from a friend of the defendant that the defendant had admitted his involvement in the robbery and murder of the victim. The witness denied that the defendant had made the statement; however, he did not expressly deny having told the police that the defendant had made the statement. The witness asserted that he had told police only "what his lawyer and the police told him to say in order to receive favorable treatment on pending charges." *Id.* The prosecution then called the defendant's lawyer, his sister and a policeman ostensibly to impeach the witness. The contents of the witnesses' statement that the defendant had admitted his involvement in the crime were presented to the jury, and during closing argument the state argued the substance of the defendant's confession. The Louisiana Supreme Court found the prosecutor improperly used the friend's hearsay statement to prove the defendant's guilt, that this error was not harmless, and reversed the conviction.

In *State v. Collins*, 01-1459 (La. App. 4 Cir. 8/21/02), 826 So.2d 598, as here, the defendant cited *Cousins* for the proposition that an eye witnesses' prior inconsistent statement was not admissible as substantive evidence of guilt. In *Collins*, an eyewitness to a murder denied informing either of two officers that the defendant was the gunman. In response, the State recalled the two officers who related the witness's prior statement identifying the defendant as the gunmen. This court's lengthy and reasoned discussion of the complex issues involving whether the witness's statement constituted inadmissible hearsay and whether the statement could be introduced as substantive evidence of guilt, rather than solely as impeachment evidence, is pertinent to the present discussion. This Court stated:

In *Cousin*, the prior statements were inadmissible hearsay because the statements purportedly made by the defendant to his friend did not fall within the narrow exception provided in La. C.E. art. 801(D)(1)(a) for prior inconsistent statements "given under oath." In contrast, Ms. Gould's prior statements are not hearsay because her statements fall within the exception provided by La. C.E. art. 801(D)(1)(c) for prior identifications. This distinction renders *Cousin* inapposite.

This distinction between the prior statements at issue in this case as opposed to those in *Cousin* arises as a result of the "quite different criteria controlling when these statements [by a witness (prior inconsistent statements and prior identifications)] fall outside the hearsay rule." Graham C. Lilly, *An Introduction to the Law of Evidence* § 53 (1978). As noted, in *Cousin*, the prior inconsistent statement was hearsay because it was not made under oath. In contrast, "[a] prior identification is considered outside the hearsay rule if no more is shown than that the testifying witness, now subject to cross-examination, made an earlier identification of the person in question 'after perceiving him.'" Lilly, *supra*.

As noted, La. C.E. art. 801(D)(1)(c), which conforms with its federal counterpart, is the pertinent evidentiary rule that governs prior identification statements; this rule provides that a witness' prior statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the statement is "[o]ne of identification of a person made after perceiving the person." La. C.E. art. 801(D)(1)(c). Although another circuit has narrowly construed this rule as applying solely to statements made in the context of an identification procedure, the rule

has been applied to prior statements of identification “made in a wide range of circumstances.” 29 Am. Jur. 2d *Evidence* §678; George W. Pugh, *et al.*, *Handbook on Louisiana Evidence Law* 519 (2002 ed.)(noting authors’ tendency to agree with broader construction adopted by federal courts and citing as illustrative *U.S. v. Brink*, 39 F.3d 419 (3d Cir. 1994)). In *State v. Johnson*, 99-3462 (La. 11/3/00), 774 So. 2d 79, the Supreme Court quotes the *Brink* case with approval, stating: “If at trial the eyewitness fails to remember or denies that he made the identification, the previous statements of the eyewitness can be proved by testimony of a person to whom the statement was made, and the statement can be given substantive effect.” *Johnson*, 99-3462 at pp. 2-3, 774 So. 2d at 80 (quoting *Brink*, *supra*). We adopt that broader construction of the rule.

In *Johnson*, *supra*, the Supreme Court further notes that La. C.E. art. 801(D)(1)(c)’s rule regarding prior identifications is an exception to the general rule discussed in *Cousin* that a witness’ prior inconsistent statements is not admissible as substantive evidence; specifically, the Court states:

When a non-party witness’s credibility is attacked through prior inconsistent statements incriminating the accused, the evidence is generally not admissible for its assertive value as substantive evidence of guilt. . . . *Cousin*, 96-2673 at pp. 8-9, 710 So. 2d at 1069. An exception to this general rule exists for cases in which the witness’s prior inconsistent statement also constitutes a prior statement of identification for purposes of La. C.E. art. 801(D)(1)(c), Louisiana’s counterpart of Fed. R.Evid. 801(d)(1)(C).

Johnson, 99-3462 at p. 2, 774 So. 2d at 80. Such statements of identification are, by statute, defined as non-hearsay.

Illustrating what constitutes a statement of identification, a commentator states:

When A testifies that on a prior occasion B pointed to the accused and said, “That’s the man who robbed me,” the testimony is clearly hearsay. If, however, B is present in court, testifies on the subject of identity, and is available for cross-examination, a case within the present section is presented.

2 John William Strong, *McCormick on Evidence* §251 (4th ed. 1992). Obeying the traditional hearsay formula such prior identifications would be hearsay; “[a] pre-trial assertion . . . that identifies the accused as the person who committed the act

charged normally is offered for its truth and thus is hearsay.”
Lilly, supra at § 52.

In excluding statements of identification from the hearsay rule, Congress cited two perceived problems it was attempting to remedy; to wit:

- (1) the typical situation where the witness’s memory no longer permits a current identification and he therefore can only testify as to his previous identification; and
- (2) the instance where before trial the witness identifies the defendant and then because of fear refuses to acknowledge his previous identification.

3 Michael H. Graham, *Handbook of Federal Evidence* § 801.13 (5th ed. 2001)(quoting *U.S. v. Milton*, 8 F.3d 39, 47 (D.C. Cir. 1993)(quoting 121 Cong. Rec. 31, 866-67 (Congressman Hungate and Wiggins)).

In the second situation, “the witness’s prior identification can only be introduced into evidence by a third party who was present at the original identification.” *Graham, supra*. The rule thus contemplates that the declarant will not remember or deny making a prior statement, and “testimony of any person who was present, for example a police officer, is also admissible.” *Graham, supra*. As the court noted in *Brink*, “If at trial the eyewitness fails to remember or denies that he made the identification, the previous statements of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect.” 39 F.3d at 426 (quoting Jack B. Weinstein and Margaret Berger, *Weinstein’s Evidence* ¶ 801(d)(1)(C)[01], at 801-222 (1993)).

The second situation was presented in this case, as evidenced by Ms. Gould’s own testimony that in the interim between the shooting and trial she became aware of neighborhood gossip that she supposedly had told the police that Mr. Collins was the gunman and that as a result she “was put in a very uncomfortable position.” The testimony of Detective Bowen, Officer Eddington, and Ms. Lewis fall within the exception for statements of identification set forth in La. C.E. art. 801(D)(1)(c). Hence, Ms. Gould’s prior statements of identification were not hearsay and were properly admitted through those three witnesses as substantive evidence.

State v. Collins, pp. 22-25, 826 So.2d at 613-15.

As the foregoing discussion on the admissibility and evidentiary value of out of court statements of identification demonstrates, Ms. Commadore's identification of Kendall Gordon as the perpetrator was not hearsay and was admissible as substantive evidence of guilt.

The defendant also relies on *State v. Jones*, 610 So.2d (La. 1992) (*per curiam*), where the Louisiana Supreme Court reversed the defendant's conviction that was based entirely on an eyewitness's pre-trial identification. The defendant cites the Court's language acknowledging that, "[w]hen the state's case rests entirely on evidence of out-of-court assertions of fact ... this Court is not precluded from inquiring into the reliability of the result for due process purposes under *Jackson v. Virginia*." *Jones*, 610 So.2d at 784.

Briefly, *Jones* involved the armed robbery of a convenience store. The two perpetrators were observed fleeing the store, entering a vehicle, and driving away. A cab driver who was positioned across the street saw the men flee the store and followed the getaway car until it darted into the Calliope project. The cab driver radioed a description of the vehicle to his dispatcher, as well as a complete license plate number, and a direction of flight. Subsequently, police gave chase to a vehicle which matched the general description of the getaway car, but whose license plate number did not match the information provided by the eyewitness. After the vehicle was pulled over, three men bolted from the car and two subjects were eventually apprehended after an ensuing foot chase. One was the man wearing a brown leather jacket and the other was wearing a blue windbreaker. For reasons not discussed in the opinion, only the man wearing the brown leather jacket, Jackson, was returned to the store for possible identification. The store

clerk was unable to identify the subject; however, the cab driver did positively identify Jackson.

Two weeks later, police showed the store clerk a photo lineup of the second subject, Jones, who was wearing the blue windbreaker when he was apprehended. The store clerk thought Jones looked similar to one of the robbers but could not make a positive identification. The cab driver made a positive identification of Jones from the lineup.

At trial, the cab driver completely surprised the State when he exculpated Jackson, the man he identified at the store, by pointing to Jones as the man he identified on the night of the offense. The jury acquitted Jackson but convicted Jones. In its opinion, the Court also discussed in detail other substantial discrepancies between the initial descriptions of the perpetrators provided by the cab driver and the men who were apprehended, which further cast doubt on the accuracy of the cab driver's identification of Jones.

In finding the evidence was insufficient to support Jones' conviction, the Court also looked to the fact that cab driver had but a fleeting glimpse of the perpetrators as they fled from the store as well as the fact that the license plate number of the vehicle that was stopped did not coincide with the information which the cabdriver gave to his dispatcher.

Accordingly, the court concluded that because "no rational trier of fact could have found the [cab driver's] in-court identification of relator credible" ("a point the prosecutor did not even argue in closing") the case necessarily rested on the cab-driver's out-of-court identification, "which gave the jury no rational basis for concluding had any more reliability than his in-court testimony." *Jones*, 610 So.2d at 784-85. Ultimately, these circumstances caused the Court reverse the conviction

after concluding that “a rational trier of fact would necessarily have a reasonable doubt as to relator’s guilt.”

On its facts *Jones* can be distinguished as the circumstances of the present case did not present the same level of grave concern that surrounded Jones’s conviction. Significantly, *Jones* involved the identification of a total stranger, while the current case involved the recognition of a previous acquaintance. Ms. Commadore testified that she was well acquainted with the defendant prior to the incident and knew him by name. Ms. Commadore recognized Gordon during the commission of the offense and immediately identified him to the police as the perpetrator. She subsequently confirmed her identification by selecting Gordon in a photographic lineup while noting that she was one hundred percent positive of her identification. Furthermore, there is no indication from the testimony that there is any resemblance between Bibbins and Gibson such that a rational trier of fact should have questioned whether Commadore may have been mistaken in her belief on the night of her sister's murder that she recognized the defendant as the murderer.

As noted by the State, courts have affirmed a number of convictions which were partially supported by identifications that later were retracted; however, we note that those cases involved other supporting evidence. In *Jones*, the Court cited *State v. Allen*, 366 So.2d 1308 (La. 1978), in support of the statement that “[w]hen the state’s case rests entirely on evidence regarding out-of-court assertions of fact ...this Court is not precluded from inquiring into the reliability of the result for due process purposes under *Jackson v. Virginia*.” The facts of *Allen* were presented succinctly by the Court in its decision as follows:

The testimony at trial revealed the following facts. Two minor teen-aged girls were arrested for shoplifting and possession of marijuana on December 29, 1976. In exchange for immunity from prosecution on both charges, they agreed to make statements revealing the source of the marijuana. One minor stated that she purchased a "bag" of marijuana from the defendant. In her statement the other minor asserted that the defendant had given her the two marijuana cigarettes found on her at the time of her arrest. When called by the state to testify at defendant's trial, each girl admitted that she had made an earlier statement implicating the defendant. However, each of them denied the truth of the respective statements. The first girl testified that she made the statement only because of pressure from the deputies and her family, while the second indicated that her statement was motivated by the offer of immunity from the charges of shoplifting and possession of marijuana. The trial judge found the girls to be hostile witnesses and allowed the state to impeach the in-court testimony with the prior inconsistent statements which implicated the defendant. There was no request from the defendant that a limiting instruction be given the jury. Each witness had admitted having made the earlier statement but testified that it was false, that defendant had not sold or given either of them the marijuana.

Id., 366 So.2d at 1310.

Ultimately, in reversing Allen's conviction, the Court ruled:

[U]nobjected to hearsay which is the exclusive evidence of a defendant's guilt of the crime or an essential element thereof, and where contradicted at trial by the sworn recantation of the out-of-court declarant, is no evidence at all.

366 So.2d at 1312.

However, in the instant case, as discussed above, Ms. Commadore's identification shortly after her sister's murder was not inadmissible hearsay.

Ms. Commadore's testimony concerning the possibility of reprisal against her, based on comments she heard on the street about what "people" might do to her, while not clear and indisputable testimony that her recantation was the result of fear of reprisal, we cannot say that the trial court was unreasonable in inferring from her testimony that this was the case.

After the defendant filed his appeal brief, the State supplemented the record with a copy Ms. Commadore's tape recorded statement. The defendant then filed a supplemental brief wherein he suggests that the tape recorded statement further confirms and supports Ms. Commadore's belief that she was mistaken in her identification of Kendall Gordon. However, at the conclusion of the trial, the trial court commented that the taped statement "had no substantive value at all." The court stated: "As a matter of fact, it is so inaudible I couldn't understand it. I didn't understand it." Because the taped statement was played only to refresh Ms. Commadore's recollection regarding the color of the two bandanas, and because the trier of fact could not understand the contents of the tape, it is irrelevant to our resolution of defendant's assignment of error.

Our review of the tape recording shows that Ms. Commadore's statement varies slightly and immaterially from her trial testimony in that she states that after she heard the gunshot the older of the two men threw the younger one out of the bedroom and onto the floor where she was sitting. As he did so, they both fell. She states that the older one then yelled at the younger one to "Get the [expletive deleted] up." He then threw him out of the room to leave. Apparently, the younger one left the house at this point as there is no further mention of him. As she testified at trial, the older one then picked her up, took her into the room to search for the money, and struck her several times. In the tape, it is reasonably clear that Kendall Gordon is the younger of the two subjects. At trial, Ms. Commadore testified that both men fell onto her.

As at trial and on the tape, Ms. Commadore stated that while the two men were struggling, Kendall Gordon's bandana came off which enabled her to identify him.

The defendant contends that it is unreasonable to conclude that it was Jessie Bibbins who was the subject who threw Kendall Gordon to the floor, and who subsequently picked Ms. Commadore up from the floor, because it was well established that Bibbins was shot during the incident and subsequently, it appears, perished from his wounds. Accordingly, the defendant contends that the only reasonable explanation is that Jessie Bibbins was the younger subject who was on the ground and was thrown out of the living room and the house.

However, as the interview continues, the focus turns to Jessie Bibbins, and it is reasonably clear from Ms. Commadore's account that she was quite sure that it was Bibbins who took her into the room to look for the money and who struck her several times. During the interview, Ms. Commadore also states that she was able to identify Bibbins because his bandana came off when the two men struggled with each other. Although Ms. Commadore never actually suggested that both men's bandanas fell off during their struggle, she testified that she was able to tell that one of the men was older and one was younger because she saw their faces.

It should also be noted that in the tape, it appears that Ms. Commadore states that she believed that Kendall Gordon had been shot. She appears to state that she believed that the older one shot the younger one because of the way he picked the younger one up and was yelling at him. The tape does not establish with certainty whether or not Ms. Commadore believed that Kendall Gordon was the one who had been shot, because the tape becomes inaudible at critical moments and both Detective Morton and Ms. Commadore used unattributed pronouns throughout the statement.

The defendant also points out that, at the suppression hearing, Ms. Commadore related that the subject that fell on her left blood on her. This would

lend further support to the theory that it was Bibbins who was thrown to the floor and not Gordon, which in turn suggests that Ms. Commadore was actually mistaken when she identified Kendall Gordon as the younger of the two men. However, at trial, Ms. Commadore testified that both men essentially fell on top of her when they tumbled out of the room. Accordingly, from her trial testimony, the presence of blood on Ms. Commadore is not significant as either of the two men could have been the source of the blood.

Finally, essentially no evidence was introduced regarding Jessie Bibbins' injuries. Accordingly, it is difficult to conclude that he was or was not the subject who pulled Ms. Commadore up from the floor and who took her into the bedroom. Ultimately, this is the crux of the defendant's supplemental argument, as it were, that a rational trier of fact should have believed that Ms. Commadore was actually mistaken in her identification, because it was unlikely that Bibbins, who was injured, would have had the strength to proceed as Ms. Commadore suggested he did. However, viewing the evidence in the light most favorable to the State, one cannot conclude that Bibbins must have been the younger of the two and that Ms. Commadore was mistaken when she told the police that she recognized Kendall Gordon as one of the two perpetrators.

From the outset, Ms. Commadore identified the defendant, a person to whom she was acquainted, as one of the perpetrators of her sister's murder. Later, she recanted her identification for reasons which she could never fully explain. Upon our review of the record in its entirety, in the light most favorable to the prosecution, we cannot say that the defendant's due process rights have been

adversely affected, nor that the trial court's verdict was not reasonable and in accord with the foregoing standards of review.

For the foregoing reasons, we affirm the defendant's conviction and the sentence imposed by the trial court.

CONVICTION AND SENTENCE AFFIRMED.