NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2011-KA-0008**
VERSUS	*	
		COURT OF APPEAL
JIMMY JONES	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 479-609, SECTION "E"
Honorable Keva M. Landrum-Johnson, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., and Judge Roland L. Belsome)

Leon A. Cannizzaro, Jr.
District Attorney
Matthew C. Kirkham
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR THE STATE OF LOUISIANA

Katherine M. Franks
LOUISIANA APPELLATE PROJECT
P.O. Box 1677
Abita Springs, LA 70420-1677
COUNSEL FOR DEFENDANT/APPELLANT, JIMMY JONES

SEPTEMBER 21, 2011

SENTENCE VACATED AND REMANDED

Jimmy Jones appeals his sentence as a second felony offender to serve fifty years at hard labor for two counts of armed robbery with a firearm. We vacate his sentence and remand only to correct the errors patent discussed herein.

Statement of the Case

On July 22, 2008, the state filed a bill of information charging Jones with two counts of armed robbery with a firearm. He entered a not guilty plea on July 25, 2008, and on December 16, 2008, the district court found probable cause and denied the motion to suppress the identification. Following a jury trial on June 24, 2009, Jones was found guilty as charged. On July 14, 2009, the district court denied the motions for post-verdict judgment of acquittal and for a new trial. The defense announced that it was ready for sentencing; Jones was sentenced on each count to serve twenty years at hard labor, to run concurrently. His motion to reconsider sentence was denied. Jones' motion for appeal was granted. On May 13, 2010, he was adjudicated a second felony offender. After vacating the previous sentences imposed, the district court resentenced Jones to serve fifty years at hard labor on each count, to run concurrently.

Facts

Ivy Kroll was working at Z'otz Café on the morning of May 7, 2008, and two customers were at the café. It was a pretty day, and the door to the café was open. While she was making a drink at the espresso machine for one of her customers, she heard someone come inside the café. Ms. Kroll walked to the end of the counter near the register, where she encountered a man pointing a gun at one of her customers and yelling obscenities. After robbing her customer, the man pointed the gun at her, and demanded the money from the register. He told her to get down. Ms. Kroll gave the man the money from the register, and he then asked for the petty cash. She removed from a drawer two envelopes containing money from earlier shifts at the café and gave those to the man. The man then left the café; Ms. Kroll did not see where he went because she was behind the counter. Ms. Kroll stated that the man did not rob her second customer, who was a woman with her dog. Ms. Kroll called 911.[1]

Ms. Kroll described the man as African-American, approximately six feet tall, wearing a black shirt, black pants, and a sheer stocking that was covering half of his face. She described the gun as having a long barrel, and it was wrapped in camouflage. Because of the stocking pulled partially over the man's face, Ms. Kroll was unable to pick a single photograph from the six-person photographic line-up shown to her by Detective Baye. She was able to narrow the photographs down to two.

On May 7, 2008, Lee Downs went to the Z'otz Café at approximately 7:00 a.m. The door to the café was open. After ordering his coffee, he leaned against

[1] The 911 tape was played for the jury after being identified by the custodian of the 911 tape, Officer Roussel, from the Communications Department of the New Orleans Police Department.

the counter and looked out of the door. As he was looking out of the door, Mr. Downs saw a man, riding a red, female, cruiser-style bicycle across the street. He was riding the bicycle slowly, and he stared at Mr. Downs. Mr. Downs made eye contact with him for approximately fifteen seconds. Within two to five seconds later, the man was at the front door of the café, where he dropped his bicycle.[2] He was wearing a sheer stocking pulled partially over his face, and he started yelling obscenities while fumbling with something covered in camouflage material. After the material was removed, the man pointed a long-barreled gun at Mr. Davis and demanded money. Mr. Downs gave him two dollars.

Mr. Downs identified Jones in a six-person photographic line-up on May 20, 2009 and in court at trial as the man who robbed him.

Errors Patent

A review of the record reveals two patent errors. First, the district court failed to sentence Jones to a mandatory additional five years imprisonment pursuant to La. R.S. 64.3(A). Thus, the sentences are illegally lenient.[3]

La. R.S. 14:64.3(A) states:

> When the dangerous weapon used in the commission of the crime of armed robbery is a firearm, the offender shall be imprisoned at hard labor for an additional period of five years without benefit of parole, probation, or suspension of sentence. The additional penalty imposed pursuant to this Subsection shall be served consecutively to the sentence imposed under the provisions of R.S. 14:64.

In an unpublished opinion, this court remanded the matter to the district court for imposition of the additional five-year sentence. State v. Hayes, unpub., 2007-1280 (La. App. 4 Cir. 5/28/08), writ denied, 2008-1744 (La. 4/3/09), 6 So. 3d

[2] Detective Baye testified that the kickstand on the bicycle was not functioning.

768. Notably, Hayes received only the minimum sentence of ten years under La. R.S. 14:64.

In State v. Burton, 2009-0826 (La. App. 4 Cir. 7/14/10), 43 So. 3d 1073, writ denied, 2010-1906 (La. 2/11/11) 56 So. 3d 999, this court held that in cases where minimum sentences are not imposed, the sentences are indeterminate, requiring the sentences to be vacated and the matter remanded for resentencing according to law for clarification of whether the defendant's sentence includes any additional punishment under La. R.S. 14:64.3.

Though Jones received twenty-year sentences on his convictions for armed robbery with a firearm, those sentences were vacated when he was resentenced as a multiple offender on both counts to serve fifty years at hard labor. The fifty-year sentences are only six months greater than the minimum sentence he could have received under La. R.S. 15:529.1 as a second felony offender. Under these circumstances, as in Hayes, this case must be remanded for imposition of the additional five-year sentences.

Second, the district court failed to restrict parole eligibility on Jones' sentences as required by La. R.S. 14:64. Though the district court neglected to restrict parole eligibility on the sentences, La. R.S. 15:301.1(A) self-activates the correction and eliminates the need to remand for a ministerial correction of the sentences. State v. Williams, 2000-1725 (La. 11/28/01), 800 So. 2d 790.

Assignment of Error #1 by Counsel

By his first assignment of error, Jones asserts that the district court erred by denying the motion to suppress the identification.

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[3] The additional five-year sentence provided by La. R.S. 14:64.3 can be imposed when the defendant is sentenced pursuant to the habitual offender law. See State v. King, 2006-1903 (La. 10/16/07), 969 So. 2d 1228.

The law pertaining to the suppression of out-of-court identifications is well-settled:

> La. Code of Criminal Procedure art. 703(D) provides that the defendant has the burden of proof on a motion to suppress an out of court statement. To suppress an identification, a defendant must first prove that the identification procedure was suggestive. State v. Prudholm, 446 So.2d 729, 738 (La. 1984). An identification procedure is suggestive if, during the procedure, the witness' attention is unduly focused on the defendant. State v. Robinson, 386 So.2d 1374, 1377 (La. 1980). Moreover, a defendant who seeks to suppress an identification must prove both that the identification itself was suggestive and that a likelihood of misidentification existed as a result of the identification procedure. State v. Valentine, 570 So.2d 533 (La. App. 4 Cir.1990).
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> The Supreme Court has held that even if the identification could be considered suggestive, it is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. State v. Thibodeaux, 98-1673 (La. 9/8/99); 750 So.2d 916, 932. Fairness is the standard of review for identification procedures, and reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 2253 (1977). Even a suggestive, out-of-court identification will be admissible if it is found reliable under the totality of circumstances. State v. Guy, 95-0899 (La. App. 4 Cir. 1/31/96), 669 So.2d 517. If a suggestive identification procedure has been proved, a reviewing court must look to several factors to determine, from the totality of the circumstances, whether the suggestive identification presents a substantial likelihood of misidentification at trial. State v. Martin, 595 So.2d 592, 595 (La. 1992). The U.S. Supreme Court has set forth a five-factor test to determine whether a suggestive 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. Manson v. Brathwaite, Id. The corrupting effect of the suggestive identification itself must be weighed against these factors. Martin, 595 So.2d at 595.
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> In evaluating the defendant's argument, the reviewing court may consider all pertinent evidence adduced at the trial, as well as at the hearing on the motion to suppress the identification. State v. Lewis, 2004-0227 (La. App. 4 Cir. 9/29/04); 885 So.2d 641, 652. A trial court's determination on the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal

> in the absence of an abuse of discretion. State v. Offray, 2000-0959 (La. App. 4 Cir. 9/26/01); 797 So.2d 764.

State v. Holmes, 2005-1248, pp. 6-7 (La. App. 4 Cir. 5/10/06), 931 So. 2d 1157, 1161.

Though Jones urges that the six-person lineup shown to Mr. Downs was per se suggestive because of its "static" nature, he cites no case law in support of his argument. In fact, he admits that no state courts have found six-person photographic lineups per se suggestive. Indeed, this court has found that a six-person lineup is suggestive only when the witness' attention is unduly focused on the defendant. State v. Johnson, 2009-1393 (La. App. 4 Cir. 7/29/10), 44 So. 3d 876, writ denied, 2010-2023 (La. 2/11/11) 56 So. 3d 999; State v. Moore, 2010-0314 (La. App. 4 Cir. 10/13/10), 57 So. 3d 1033. Here, Jones has not made such a claim, nor was such a claim argued at the hearing on the motion to suppress the evidence.

Jones argues further that Detective Baye caused the lineup to be suggestive when the detective told Mr. Downs that he had a suspect in custody and "to pick out who did it." However, this argument is without merit. In State v. Gibson, 511 So. 2d 799 (La. App. 4 Cir. 1987), this court held that a victim being informed that a suspect is included in the lineup, in itself, is not impermissibly suggestive for it is generally assumed that if one is asked to view a photographic lineup, there is a suspect among the photographs displayed.

In sum, Jones has not made the requisite showing that the lineup was suggestive, and a review of the Manson factors is unnecessary. The description of

Jones given by Mr. Downs and Ms. Kroll was consistent and uncontroverted at trial.[4] Thus, this assignment of error is without merit.

Assignment of Error #2 by Counsel

Jones asserts that the evidence was insufficient to support the conviction because the state failed to negate a reasonable probability that he was misidentified.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, 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.
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> 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

[4] The narrative to the police report reflects that Ms. Kroll described Jones as a black male, approximately 6'1" in height, weighing about 180 pounds, clean shaven with a low haircut and dark complexion. Mr. Downs described him as a black male approximately 6 feet tall, weighing 170 pounds, and clean shaven with a dark complexion. The clothing description given by both victims was the same.

> 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.

In State v. Davis, 2002-1043, pp. 3-4 (La. 6/27/03), 848 So. 2d 557, 559, the Louisiana Supreme Court reiterated that:

> [T]he task of an appellate court reviewing the sufficiency of the evidence is not to second-guess the credibility choices of the trier of fact "beyond ... sufficiency evaluations under the Jackson [v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)] standard of review." A victim's or eyewitness's testimony alone is therefore usually sufficient to support a verdict. (Citations omitted).

In addressing Jones' prior assignment of error, it was determined that the identification of Jones by Mr. Downs less than two weeks after the robberies did not present a substantial likelihood of misidentification. Mr. Downs also identified Jones in open court. His identification was based on having locked eyes with Jones while he slowly rode his bicycle across the street from the cafe. Also, the stocking Jones wore partially over his face was sheer. Mr. Downs accurately described the bicycle ridden by Jones; Jones was in possession of the bicycle when he was arrested. Though Jones argues that Mr. Downs's identification of him is suspect because Mr. Downs did not notice whether he was carrying a camouflaged item or wearing a stocking on his head while he was riding the bicycle, this alone does not discredit Mr. Downs's identification of Jones as the robber. Thus, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the state's witnesses credible and found that

Jones was the person who robbed the victims at gunpoint. This assignment of error is without merit.

Pro Se Assignment of Errors #1, #3, and #4

As a preliminary matter, each of these assignments of error is premised on Jones' allegation that the bill of information is defective. He first urges that La. R.S. 14:64.3 does not charge a separate crime but is merely an enhancement statute that comes into effect only when a firearm is used during the commission of an armed robbery. Second, he notes that the bill of information fails to cite the statutes, La. R.S. 14:64 and La. R.S. 14:64.3.

Notably, no pretrial motion to quash was filed or objection lodged raising these issues. Deloch v. Whitley, 96-1901 (La. 11/22/96), 684 So. 2d 349. Because his assignments of error numbers one, three, and part of number four are premised on his claim that the bill of information is defective, Jones has waived his right to assert those assignments of error on appeal.[5] Those assignments are: (1) the jury was improperly instructed on two non-responsive verdicts, the two non-responsive verdicts being guilty and guilty of attempted armed robbery using a firearm;[6] (3) the trial court erred in denying the motion in arrest of judgment because the bill of information charged him under an invalid statute;[7] and (4) the trial court erred in sentencing him as a multiple offender because the underlying conviction for armed robbery with a firearm was based upon a defective bill of information.[8]

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[5] Jones raises a second claim regarding his adjudication as a multiple offender in assignment of error number four that will be addressed separately.

[6] Jones bases his claim on the list of responsive verdicts provided to the jury. Though the jury instructions are not part of the record, the trial transcript reflects that no objections were lodged. La. C.Cr.P. art. 801(C).

[7] No motion for arrest of judgment was filed pursuant to La. C.Cr.P. art. 859.

[8] Though a motion to quash the multiple bill was filed by counsel, this specific claim was not raised in the motion to quash, and no objection on this ground was raised during the hearing on the multiple bill. See La. R.S. 15:529.1(D)(1)(b).

Also, even assuming a defect in the bill of information, a post-verdict attack on the sufficiency of an indictment does not provide grounds for setting aside a conviction unless the indictment failed to give fair notice of the offense charged, or failed to set forth any identifiable offense. State v. Cavazos, 610 So.2d 127 (La.1992). The Louisiana Code of Criminal Procedure article 464 provides:

> The indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

In the present case, Jones was charged with two counts of La. R.S. 14:64.3, armed robbery with a firearm. Count one of the bill of information alleged that Jones "while armed with a dangerous weapon, to wit: a rifle or shotgun, robbed Lee Downs of U.S. Currency." Count two alleged that Jones "while armed with a dangerous weapon, to wit: a rifle or shotgun, robbed Ivy Kroll of U.S. currency."

While the bill of information does not list the statutes, it gives fair notice of the crime of which Jones was charged and ultimately convicted, that is, armed robbery with a firearm. Thus, the bill of information did not mislead Jones to his prejudice.

Pro Se Assignment of Error #2

By this assignment of error, Jones argues that his multiple bill sentences of fifty years at hard labor are excessive. The transcript of the multiple bill hearing fails to show that an objection to the length of the sentence was lodged. Though a motion to reconsider sentence was filed and ruled upon when Jones was first sentenced to twenty-years at hard labor, the motion was not renewed after he was sentenced as a multiple offender.

Under La. C.Cr.P. art. 881.1, a defendant may file a motion for reconsideration of sentence within thirty days following the imposition of sentence. The motion shall be oral if made at the time of sentencing or written if made thereafter, and it shall set forth the specific grounds on which it is based. La. C.Cr. P. art. 881.1 A(2). Absent the filing of a timely written motion for reconsideration of sentence or making of an oral objection at the sentencing hearing, a defendant is precluded from urging on appeal any ground of objection to the sentence. La. C.Cr.P. art. 881.1(D). Stated otherwise, "the failure to object to the sentence as excessive at the time of sentencing or to file a written motion to reconsider sentence precludes appellate review of the claim of excessiveness." State v. Robinson, 98-1606, p. 9 (La. App. 4 Cir. 8/11/99), 744 So.2d 119, 125. Although Article 881.1 A(2) requires the motion to set forth specific grounds, "a simple objection to the sentence is sufficient to preserve appellate review on the grounds of excessiveness." State v. Miller, 2000-0218 (La. App. 4 Cir. 7/25/01), 792 So.2d 104, 111 (citing State v. Mims, 619 So.2d 1059 (La. 1993)).

The jurisprudence has construed Article 881.1 as requiring a defendant who is multiple billed to file separate motions to reconsider his initial sentence and his new sentence imposed after his multiple bill adjudication. State v. Chisolm, 99-1055, pp. 9-10 (La. App. 4 Cir. 9/27/00), 771 So.2d 205, 212 (citing State v. Lewis, 98-2575 (La. App. 4 Cir. 3/1/00), 755 So.2d 1025); State v. Kirkling, 2004-1906 (La. App. 4 Cir. 5/18/05), 904 So. 2d 786. Therefore, review of Jones' claim of excessive sentence is precluded by his failure to file a new motion for reconsideration or to object to the sentence after the trial court resentenced him as a second felony offender on each count to serve fifty years at hard labor.

Assignment of Error #4

By his remaining claim Jones argues that because La. R.S. 14:64.3 is an enhancement statute, his sentences could not be further enhanced by the application of La. R.S. 15:529.1.

We note that Jones did not raise this claim in the motion to quash the multiple bill that was filed, nor did he argue this claim at the hearing on the multiple bill. Also, no motion to reconsider sentence was filed. Thus, this issue was not preserved for appellate review. Nevertheless, the claim lacks merit.

In the case herein, Jones was adjudicated a second felony offender based upon the instant convictions and a prior conviction for possession of a stolen automobile valued at over $500.00.[9] As in State v. White, 39,634 (La. App. 2 Cir. 6/16/05), 907 So. 2d 180, writ denied, 2005-2097 (La. 3/10/06), 925 So. 2d, no double enhancement of Jones' sentences occurred in the state's application of both La. R.S. 14:64.3 and La. R.S. 15:529.1. This assignment of error is without merit.

Decree

We vacate Jones' sentence and remand for resentencing as discussed under our errors patent review and in accordance with State v. Hayes, unpub., 2007-1280 (La. App. 4 Cir. 5/28/08), writ denied, 2008-1744 (La. 4/3/09), 6 So. 3d 768, as discussed herein.

SENTENCE VACATED AND REMANDED

[9] The multiple bill of information charged Jones as a third felony offender. Jones was found to be only a second felony offender because the state did not have sufficient proof of the second predicate conviction.