# NOT DESIGNATED FOR PUBLICATION

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| **STATE OF LOUISIANA** | * | **NO. 2012-KA-0835** |
| **VERSUS** | * | |
| | | **COURT OF APPEAL** |
| **STEVEN WILLIAMS** | * | |
| | | **FOURTH CIRCUIT** |
| | * | |
| | | **STATE OF LOUISIANA** |

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 501-377, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
**Judge Max N. Tobias, Jr.**
* * * * * *

(Court composed of Judge Max N. Tobias, Jr., Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

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**AFFIRMED.**

On 25 October 2010, the state filed a bill of information charging the defendant/appellant, Steven Williams ("Williams"), with three counts of armed robbery with a firearm, a violation of La. R.S. 14:64.3. On 3 November 2010, Williams entered pleas of not guilty to all three counts. On 16 November 2010, he filed motions to suppress and for a preliminary hearing. On 18 March 2011, a hearing on the motions was held, but then continued twice for the state. On 7 April 2011, the hearing was concluded; the trial court found probable cause and denied the motions to suppress the evidence, the statement, and the identification. On 27 September 2011, a twelve-person jury trial was held as to counts one and two; the state elected to sever the third count. The jury found the defendant guilty of armed robbery as to the first count and attempted armed robbery as to the second count. Trial on the third count was set and reset.[1] On 28 September 2011, the state filed a multiple bill. On 1 December 2011, Williams filed a motion for a new trial, which was denied. On 15 February 2012, a multiple bill and sentencing hearing was held, and the trial court found Williams to be a second multiple offender. Williams was sentenced on count one as a second felony offender to

[1] The third count was subsequently nolle prosequied on 1 March 2012.

fifty years at hard labor and on count two to twenty-five years at hard labor, both without benefit of probation, parole, or suspension of sentence; the sentences were to run concurrently with any other sentence. Williams' motion to reconsider the sentence was denied, and his motion for appeal was granted.

## STATEMENT OF FACTS

At the beginning of trial, the assistant district attorney ("ADA") and defense counsel entered into a stipulation as to a 911 tape; the tape was played for the jury.

New Orleans Police Department ("NOPD") Officer William Mullaly testified that on 21 August 2010 he was assigned to night watch, and he responded to a 64G call at the corner of Canal and North Robertson Streets. The officer explained that 64G signaled an armed robbery with a gun. He stated that the area is usually very busy because it is Canal Street, close to the French Quarter. The area is well-lit with people flowing back and forth; vehicular and pedestrian traffic is present. When the officer arrived at the intersection he saw Michael Hill, the "nervous, excited and very upset" victim, standing at the intersection. Mr. Hill described the perpetrator of the robbery as a black male approximately six feet tall and between the ages of eighteen and twenty-four, wearing a red Arizona Diamondback's hat, a black t-shirt, jeans, and brown boots. Mr. Hill also said the robber had two tear drop tattoos on his face, and he ran toward the Iberville Housing Project that was a block away. Officer Mullaly said that the second victim arrived during that conversation. When he was asked if the second victim (Che Jones) corroborated what the first victim had said, Officer Mullaly replied: "Yes."

On cross-examination, the officer stated that he did not recall where the tattoos were, but that his report should reflect the information. He agreed that one of the victims said that he saw a brown (wooden) and chrome gun handle. The officer agreed that the robber stole a Blackberry cell phone, a silver necklace, and two or three dollars. Officer Mullaly again testified that the area was "[f]airly well lit."

Officer Jonathan Sam, a member of the NOPD First District COPS (Community Outreach Policing Unit) assigned to the Iberville Housing Development, testified that he heard the 64G call and that the suspect was heading toward the housing development; he went to the area and searched for the robber, whom he found. Officer Sam said that from North Robertson, he turned south onto Iberville Street. He saw the subject matching the description walking southbound in the 1500 block of Iberville Street. He turned into a driveway, stopped Williams, and detained him. The officer informed Williams of his rights and told him he was under investigation relating to an armed robbery. Officer Sam stated that he patted Williams down for the sake of officer safety, but found no gun. The officer described Williams as wearing a "[s]ky blue shirt, khaki, khaki pants with a Yankees baseball cap," the same description as he had heard on his radio. He also testified that he was able to confirm the tear drop tattoo on Williams' face, as well as a tattooed cross. He notified the dispatcher and radioed Officer Michael Wynn. The officer placed Williams by the car and waited. He explained that Officer Wynn was needed to conduct a show-up identification. Officer Sam identified Williams in court.

On cross-examination, Officer Sam admitted that Williams did not attempt to flee when he was being stopped, and he was not aggressive towards him. The

officer said that he did not recover any footage from the surveillance cameras in the Iberville Housing Development. He admitted that he did not find a gun, a necklace, a Blackberry cell phone, or Arizona Diamondbacks baseball cap during the pat-down.

Michael Wynn[2] testified that he was currently enrolled in law school in New York, and had flown to New Orleans to testify. Mr. Wynn testified that he became involved in this case the day after Mr. Hill first called 911. The dispatcher informed him that the armed robbery victim, Mr. Hill, had just spotted the robber from the day before. He met the victim and broadcast the description over the radio ("sky blue polo shirt, khaki pants, and a black Yankees hat"). Mr. Wynn stated that Officers Jonathan Sam and Lashon Jackson had detained Williams. Mr. Wynn relocated the victims, Michael Hill and Che Jones, to Williams' location at North Derbigny and Canal Streets for a show-up identification. The former officer said that he told the victims that he was taking them within a visible distance of a subject who had been stopped in order to see whether he was the robber. Mr. Wynn stated that he did not coerce, threaten, or promise the victims anything in order for them to make an identification. Mr. Hill confirmed that Williams was the man who had robbed him the day before. Williams was arrested at that point. When Mr. Wynn searched Williams incident to his arrest, he found two Blackberry cell phones and an iPod in his right front pocket. Mr. Hill confirmed that one of the cell phones belonged to him. The other one did not belong to either Mr. Hill or Mr. Jones. The defense stipulated that Williams was wearing the clothes about to be introduced at trial when he was arrested.

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[2] At the time of trial, Mr. Wynn was no longer an officer with the NOPD.

On cross-examination, Mr. Wynn clarified that the victims were in the back of his police car, and he was about thirty feet from Williams' location when the two victims made their identification.

On redirect examination, Mr. Wynn testified that Mr. Hill spontaneously identified his cell phone. Mr. Wynn said that when he turned on the phone, "Hello Michael" appeared on the screen.

Officer Anthony Bakewell testified that, after Williams' arrest, the detective assigned to the case was not available. He said that he applied for a search warrant of Williams' home on the same day as the arrest and the warrant was executed at 1581 Iberville Street, apartment G. The officer testified that he presented the warrant to the female leaseholder and hoped that he would get some cooperation. He was shown Williams' bedroom, which they searched, finding no gun. Williams' father then produced a handgun (a forty-caliber Smith & Wesson handgun). On cross-examination, defense counsel asked where the handgun was kept, and he replied that he believed that it was on a duty belt for the father was a security guard at the Superdome. Officer Bakewell said that he recovered nothing from Williams' room.

Michael Hill, who stated that he was twenty-seven years old, testified that he grew up in Birmingham, but the family moved around because his father was a newscaster. He denied having a felony conviction. On 21 August 2010, he was living at 1801 Canal Street and working at Café Du Monde in the Riverwalk.[3] He mostly "bussed" tables, but he was trying to learn all the jobs so that he could move up. In 2010, he and Che Jones had been friends for a year or two. On the

[3] Riverwalk is a shopping center close to the Mississippi River near Canal Street.

night of 21 August 2010 at about 11:00 p.m., he was walking home from work with food from McDonald's. Mr. Jones and his girlfriend were walking with him. They were going to play "Resident Evil" on X-Box. He was at North Villere Street, close to the Iberville Housing Development, when the subject walked up. The subject started talking to Mr. Jones. Mr. Hill said that street lights were present, and it was well-lighted enough to see people standing on the sidewalk. When he saw the subject was talking to Mr. Jones, he turned around and moved back toward Mr. Jones and the subject. At that point Mr. Jones was emptying his pockets, but he had nothing in them. The robber, later identified as Williams, then turned to Mr. Hill and told him to empty his pockets; Mr. Hill said "no," and that he was not going to give the robber anything. The subject then said that he would kill him. Mr. Hill said that he decided to comply "[b]ecause he reached in like this, gun right, gun in his back pocket. [']Say you don't think I'll kill you out here?[']"

Mr. Hill testified: "I didn't see the actual gun but I saw the handle." He said the handle of the gun was black in color. He stated that the subject was wearing black jean shorts with a maroon shirt (with some white); he could not recall the color of the robber's boots. He gave in and emptied his pockets. He tried to keep his Blackberry cell phone, but he had to turn it over too. He said the robber also had a tear drop tattoo under his right eye and tattoos on his arm. The robber took his wallet (but gave it back when there was no money in it) and took the sterling silver necklace he was wearing. The robber then walked toward the housing development. Mr. Hill went to a car lot and called 911.

Mr. Hill stated that he was walking home the next day, and he heard his music playing on his Blackberry cell phone that had been taken. He spotted the robber walking toward the project, listening to Mr. Hill's music. The cover on the

Blackberry cell phone was very distinctive. The subject then quickened his pace toward the project; he was not wearing the same clothes as during the robbery the day before. Mr. Jones was waiting for him at his apartment, and he went to follow the robber while Mr. Hill called the police. Mr. Jones found the robber sitting on his porch. Mr. Hill and Mr. Jones were able to identify Williams as the robber when the officers took them to where he had been arrested. Mr. Hill identified his Blackberry cell phone. He said that the officers recovered only his cell phone but not his eight gigabyte card that was in it or his sterling silver necklace. The state asked Mr. Hill if the man who robbed him was in the courtroom, and he asked if he could stand. The state then tendered the witness.

Just as defense counsel was about to start cross-examination, defense counsel said: "One second, Your Honor." Then Mr. Hill said: "I'm sorry, is it too late?" The court told the victim that he could say something. Mr. Hill then said: "He's right there in the second chair in the front." The court then asked if the ADA wanted to re-open direct examination, and the state answered affirmatively. The court instructed defense counsel to take a seat because the court was re-opening direct examination. The ADA asked if the victim could see the robber in the courtroom; defense counsel objected that the question had been asked and answered. The trial court overruled the objection. Mr. Hill replied that the robber was seated next to the gentleman with the suit and a maroon bowtie. The ADA then tendered the witness.

On cross-examination, Mr. Hill acknowledged that he was part of the Volunteers of America Program, where he received treatment, resided, and had to pay rent from money earned at a job. He stated that Mr. Jones did not work. When asked why Mr. Jones wanted to go by Villere Street that night, the state's

objection as to hearsay was sustained. He said that he saw Williams trying to rob Mr. Jones, and then the robber turned to him, but he would not give everything up. Mr. Hill said that Williams "reached for" the gun, and he "saw the handle." When counsel asked if it was a wooden handle, Mr. Hill replied: "It was a black, I couldn't tell you if it was wooden or not, I don't play with guns." After a bench conference, counsel asked about his description he gave to an officer that night, which included an Arizona Diamondbacks hat and brown boots. Mr. Hill remembered seeing his Blackberry cell phone and identifying it. He acknowledged that the tear drop tattoos were common in that area. He stated Mr. Jones was not in court, and he did not know where Mr. Jones was. He said that he thought the Saints had won because it was wild that night, with many people on the streets. He stated that he made the 911 call and told the operator that the robber took his cell phone and his sliver chain. He also described the robber.

On redirect examination, Mr. Hill said that he was not sure if he had his headphones that night, but his cell phone was in its case. He testified that he saw the handle of a gun. When he was asked what the handles looked like, he replied: "It was black. I may have said it was wooden that night but to tell you the truth I know it was black." Mr. Hill further stated: "I have no doubt in my mind it was black." He said that tear drop tattoos have a special meaning to him. (The ADA instructed him not to explain the significance.)

The defense called Eddie Foley, III, Williams' father, as a witness. Mr. Foley testified that he lived at 1581 Iberville Street, and his son resided with him. He said that he was at the residence when the officers executed the search warrant and seized his service revolver, which is a silver (nickel-plated) and black forty caliber Smith & Wesson. He had the gun because he was a commissioned officer

at the Superdome and had the paperwork for the gun. Mr. Foley said that the gun had only been fired when he was qualifying. He stated that Williams had never touched the gun, asserting that he had no right to it. He said that he had a dead bolt on his bedroom door, and the gun was kept in the bedroom because Williams' young daughters and his mother's brother, a recovering drug addict, were living with him. Mr. Foley denied that Williams had an Arizona Diamondbacks baseball cap and that he had never seen Williams wearing a baseball cap; further, Williams had no boots and no bandannas. Mr. Foley said that the officers did not sweep his home for fingerprints. The officers came in and handed him the search warrant. One officer asked about guns, and he and the officer went upstairs. Mr. Foley unlocked the bedroom door, entered, lifted the mattress, and retrieved the gun. There was no box for it, but he had a lock on the weapon while stored under the mattress. The officer seized the gun. After he was shown photos of his son, Mr. Foley testified that Williams had tattoos on his arm, the side of his neck, a star on his forehead along with a cross, the names of his brother's kids, and tear drops.

On cross-examination, Mr. Foley again said that he had never seen Williams in a baseball cap. The state noted that his son was wearing a baseball cap when he was arrested, to which Mr. Foley said that he was not present when his son was arrested.

The defense called Officer Mullaly, who testified that he interviewed both victims. The officer stated that Mr. Hill did not tell him that the robber threatened his life. He said that when he initially spoke to Mr. Hill he did not mention that he observed a handgun or that the robber had tattoos on his arms. When he was asked if Mr. Jones identified the handgun, he replied: "Correct." When counsel asked for Mr. Jones' description of the gun, the state objected because it called for hearsay.

Defense counsel stated that Mr. Jones was an unavailable witness and the trial court overruled the objection. After a bench discussion the court ruled that he could ask the question. Officer Mullaly then stated that Mr. Jones described it "as chrome with a brown or wooden handle." When asked if the victims ever said that the gun was black during that interview, the officer answered negatively. The officer stated that neither victim described the surroundings or the crowded streets.

On cross-examination, Officer Mullaly testified that both victims said that Williams reached with his right hand into his right front pocket. When the officer was asked if he recalled that Mr. Jones said that the gun had a wooden handle, but that he did not recall what, if anything Mr. Hill said about the handle, he replied: "Correct."

On redirect-examination, Officer Mullaly testified that Mr. Hill "didn't describe a gun." Mr. Hill indicated that he saw the robber's "right hand in his right front pocket as if he was holding a gun."

**ERRORS PATENT**

After a review of the record, we find no errors patent.

**DISCUSSION**

Because the defendant's second assignment of error argues the insufficiency of the evidence, that assignment of error will be considered first. *See State v. Hearold*, 603 So.2d 731 (La. 1992).

**ASSIGNMENT OF ERROR NUMBER TWO**

Williams argues that he was convicted of two crimes, one an armed robbery and one an attempted armed robbery, but only one victim testified, and that the testifying victim could not identify Williams as the robber in court without assistance. Williams contends that the evidence is insufficient to uphold both convictions for armed robbery and attempted armed robbery. Counsel argues that Mr. Hill could not say what transpired between Williams and Mr. Jones, for other reasonable explanations could have been that Mr. Jones owed Williams money or that Mr. Jones was working with Williams (since he did not show up for trial). Counsel points to Mr. Hill's change in the description of the color of the gun handle from wooden (brown), as noted in the police report, to black at trial. Officer Mullaly testified for the defense, but he said that Mr. Jones described the handle of the gun as brown or wooden; Mr. Hill never described the handle. The officer testified that both victims said that the robber put his hand into his pocket as if he were holding a gun. The state discounts Williams' attempts to provide reasonable alternative hypotheses. It argues that the jurors made a factual determination that Williams had attempted to rob Mr. Jones and had robbed Mr. Hill.

La. R.S. 14:64 A provides:

> 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.

La. R.S. 14:27 A provides:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense

> intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

To convict a defendant for armed robbery, La. R.S. 14:64 requires proof of (1) the taking (2) of anything of value (3) from the person of another or that is in the immediate control of another (4) by use of force or intimidation (5) while armed with a dangerous weapon. To commit attempted armed robbery a defendant must do or omit an act for the purpose of and tending directly toward the accomplishing of his object.

> In reviewing a claim of insufficiency of evidence, courts must apply the standard set forth in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which states that the court must determine whether the evidence, viewed in the light most favorable to the prosecution "was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Captville,* 448 So.2d 676, 678 (La.1984). *See also State v. Brown,* 03–0897, p. 22 (La.4/12/05), 907 So.2d 1, 18; *State v. Batiste,* 06–0875, p. 7 (La. App. 4 Cir. 12/20/06), 947 So.2d 810, 814; *State v. Sykes,* 04–1199, 04–0947, p. 6 (La. App. 4 Cir. 3/9/05), 900 So.2d 156, 161. In addition, when the State uses circumstantial evidence to prove the elements 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.' " *State v. Neal,* 00–0674, p. 9 (La.6/29/01), 796 So.2d 649, 657.

*State v. Pleasant*, 11-1675, pp. 17-18 (La. App. 4 Cir. 10/17/12), 102 So.3d 247, 256. *See also State v. Payne*, 00-2129, p. 5 (La. App. 4 Cir. 7/25/01), 794 So.2d 79, 82-83.

Here Mr. Hill testified that he and his friend, Che Jones, were walking home from work after stopping to pick up food at the McDonald's restaurant located at Bourbon and Canal Streets. They were at Villere and Canal Streets when a subject walked up. The subject, later identified as Williams, started talking to Mr. Jones,

at which point Mr. Hill turned around and started back toward Mr. Jones. At that point Mr. Jones was emptying his pockets, but he had nothing for the robber. The robber then told Mr. Hill to empty his pockets, but he said that he would not do that. Mr. Hill testified that the robber then said that he would kill him if he did not comply; the robber then reached into his pocket as if he were holding a gun. Mr. Hill said that he did not see the gun, but he saw the handle. He turned over his Blackberry cell phone and his silver chain. Mr. Hill called 911 and provided a description of the robber, the robber's clothing, and the robber's tattoos (tattoos on his arm and a tear drop tattoo on his face). The following day, Mr. Hill spotted the robber, who was listening to his (Mr. Hill's) music and was walking toward the Iberville Housing Development, and Mr. Hill called the police. Former NOPD Officer Wynn testified that Mr. Hill and Mr. Jones separately identified Williams as the armed robber after he had been apprehended. Mr. Hill's identification, if delayed in court, was certainly based upon a prior out-of-court identification of Williams. When Williams was apprehended, he was in possession of Mr. Hill's Blackberry cell phone.

Viewed in the light most favorable to the prosecution the testimony and evidence was sufficient to convince a rational trier of fact that all of the elements of the crime of armed robbery as to Mr. Hill, and attempted armed robbery as to Mr. Jones because nothing was taken from him, had been proved beyond a reasonable doubt.

This assignment lacks merit.

**ASSIGNMENT OF ERROR NUMBER 1**

Williams argues that the trial court erred by denying his motion for a new trial based on four trial court errors: (1) the witness/victim was unable initially to make an identification of him in court even though he was sitting at the defense table, and that identification should have been suppressed; (2) the alleged threat that Williams made to Mr. Hill (that the robber would kill the victim) was erroneously admitted when that statement was not provided during discovery; (3) the court erred by not allowing the arresting officer (former NOPD Officer Michael Wynn) to state what Williams said when he was being arrested (that he had found the cell phone on the ground); and (4) insufficiency of the evidence (raised in assignment number two, described above).

La. C.Cr.P. art. 851 provides:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
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> The court, on motion of the defendant, shall grant a new trial whenever:
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> * * *
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> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error….

The decision on a motion for a new trial rests within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a clear showing of abuse. *State v. Johnson*, 08-1488, p. 17 (La. App. 4 Cir. 2/10/10), 33 So.3d 328, 338. *See also State v. Quimby*, 419 So.2d 951 (La. 1982). We find no abuse of discretion.

**Identification**

In his motion for a new trial, Williams erroneously alleged that Mr. Jones could not identify him, but Mr. Jones did not testify at trial. Williams' counsel drops a footnote to explain the error and to state that it was Mr. Hill who could not identify Williams in the courtroom. Mr. Hill hesitated in making his identification of Williams in court. Counsel claimed that the witness/victim could not identify Williams in the courtroom when the ADA asked if he could identify the robber. Defense counsel stated that just prior to cross-examination, the defense attorneys had a brief conference, and the attorneys were standing momentarily; Williams was sitting at the defense table. Counsel alleged that the ADA improperly gestured to the victim on the stand, and then the victim identified Williams. In brief, defense counsel argues that the in-court identification was patently unreliable. Contrariwise, the state argues that the delay in Mr. Hill's in-court identification response does make it unreliable, noting he had spotted the robber the day after the robbery.

At the motion to suppress hearing, former Officer Wynn testified that he met the two victims on the day after they were robbed. Mr. Hill and Mr. Jones had spotted the robber walking toward the Iberville Housing Development and called the police. Mr. Wynn said that he broadcasted the description provided by Mr. Hill and Mr. Jones; a COPS unit apprehended Williams. He then conducted a show-up identification, where the two victims were taken separately to view Williams where he was located, and they both stated that he was the person who had robbed them the day before. The trial court did not suppress the out-of-court show-up identification where Williams had been apprehended because the two robbery victims had spotted him walking toward the housing development.

> 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. Sparks,* 88–0017, p. 52 (La.5/11/11), 68 So.3d 435, 477; *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 accused. *State v. Thibodeaux,* 98–1673, p. 20 (La.9/8/99), 750 So.2d 916, 932.
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> 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. Payne,* 04–828, pp. 4–5 (La. App. 5 Cir. 12/14/04), 892 So.2d 51, 53. 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, 113–14, 97 S.Ct. 2243, 53 L.Ed.2d 140 (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, pp. 9–10 (La. App. 4 Cir. 1/31/96), 669 So.2d 517, 523.

*State v. Shannon*, 11-0955, pp. 8-9 (La. App. 4 Cir. 9/19/12), 101 So.3d 67, 73.

Although asserted by defense counsel, the transcript does not reflect any gesture by the ADA. After asking Mr. Hill if he saw the robber in the courtroom, the witness asked if he could stand. The ADA then asked Mr. Hill that if he could not see the robber in court, was he sure the day after the robbery when he spotted Williams on the street and called the police? Mr. Hill answered affirmatively. The trial court judge was present and arguably saw what transpired, and the court re-opened direct examination so that Mr. Hill could make his identification. Mr. Hill testified that he got a good look at the robber, and he gave a good description to the police. Mr. Hill said that he was 100% sure that Williams, whom he identified the day after the robbery, was the man who took his Blackberry cell phone and chain. He spotted Williams walking on the street, and he identified Williams after he had

been apprehended because of Mr. Hill's description; his identification was reliable. The trial court did not err by allowing Mr. Hill to take the time to look around the courtroom (and not be told to look at the defense table) and actually see the robber before identifying him.

**Williams' Threat to Mr. Hill**

In brief, Williams argues that the trial court erred by overruling the defense objection to Mr. Hill's testimony: that during the armed robbery, Williams threatened to kill him if he did not turn over his cell phone and his chain. Defense counsel claims that the statement was not in the police report and was not turned over during discovery. Conceding that such a statement to a witness would not be discoverable under La. C.Cr.P. art. 716, counsel argues that it is inculpatory and should have been turned over to the defense under La. C.Cr.P. art. 716 B (the state must inform the defense of the existence a statement, not the content). Because the statement was not turned over during discovery, Williams argues it should have been excluded.

The state counters that Williams was aware that he made that statement to the victim, who would testify to what was said during the robbery. The state argues that the statement was neither a confession (where he admitted committing the armed robbery) nor an inculpatory statement (where he admitted facts and circumstances that tend to establish guilt or from which guilt may be inferred). What a perpetrator says during a crime is not a confession. Thus, the state argues that Williams suffered no prejudice.

We do not find that La. C.Cr.P. art. 716, which relates to the statements and confessions the state intends to introduce into evidence, applies to Williams' verbal threat to Mr. Hill because he was not emptying his pockets as the other victim had.

Mr. Hill was testifying to what happened on the night he was robbed. The trial court did not err by overruling the defense objection.

**Williams' Statement to the Arresting Police Officer**

Although defense counsel asserted as error the trial court's failure to allow the arresting officer to testify as to what Williams said immediately after being stopped by the police (that he found the cell phone), no argument on the point is made. Defense counsel notes that the first two errors were briefed in the first assignment of error, and that the insufficiency of the evidence (the fourth error noted) would be briefed in the second assignment of error. Assignments of error that are not briefed are deemed abandoned. Rule 2-12.4, Uniform Rules-Courts of Appeal; *see State v. LeBlanc*, 10-1484, p. 30 (La. App. 4 Cir. 9/30/11), 76 So.3d 572, 591, *writ denied*, 11-2300 (La. 11/18/11), 75 So.3d 446.

We find no merits to the assignment of error.

**ASSIGNMENT OF ERROR NUMBER THREE**

Williams concedes that his sentences as a second offender are the minimum sentences under La. R.S. 15:529.1, but he argues that the sentences are nevertheless constitutionally excessive. Defense counsel notes that Williams, who has an eighth grade education, was twenty years old at the time of the crime with one prior conviction for breaking into a car. Counsel argues that the minimum sentences under La. R.S. 15:529.1 have been upheld as constitutional, but downward departures are allowed if the court finds that the sentence is excessive

under *State v. Dorthey*, 623 So.2d 1276 (La. 1993).[4] Counsel claims that the trial court failed to consider mitigating factors in this case (no actual violence during armed robbery, very little was taken and Blackberry cell phone was recovered), but the state notes that Williams presented no actual mitigating circumstances at sentencing. The state argues that the fact that the appellant was young with a prior conviction for breaking into a car (simple burglary, actually) does not show that he is exceptional.

Appellate counsel argues that a sentence within the statutory limits may be excessive. In *State v. Smith*, 11-0664, p. 23 (La. App. 4 Cir. 1/30/13), __ So.3d __, 2013 WL 371587, this court set out the general law relating to excessive sentences:

> Excessive sentences are prohibited under the Eighth Amendment of the Unites States Constitution and La. Const. art. I, § 20. A sentence may be constitutionally excessive even when the sentence falls within the range permitted by statute. *See State v. Sepulvado,* 367 So.2d 762, 769 (La.1979). For a sentence to be found excessive, it must be "so grossly disproportionate to the crime committed, in light of the harm caused to society, as to shock our sense of justice." *State v. Cann,* 471 So.2d 701, 703 (La.1985). The district court is granted broad sentencing discretion, and we will not overturn the district court's judgment absent an abuse of that discretion. *See State v. Walker,* 00-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462.

However, in this case Williams' sentences were the minimum sentences for a second offender under La. R.S. 15:529.1. Both defense counsel and the state cite *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672, the seminal case in this

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[4] The holding in *Dorthey* has been curtailed by the Supreme Court in a number of cases. In *State v. Lindsey*, 99-3302, 99-3256, pp. 4-5 (La. 10/17/00), 770 So.2d 339, 343, the Court noted that the effort culminated in *State v. Johnson,* 97-1906 (La. 3/4/98), 709 So.2d 672, where the Court set out guidelines for when and under what circumstances courts should exercise their discretion under *Dorthey* to declare excessive a minimum sentence mandated by La. R.S. 15:529.1.

area, which was discussed by the dissent in *State v. Jackson*, 96-2540, pp. 2-3 (La. App. 4 Cir. 8/12/98), 718 So.2d 1001, 1002 (Murray, J., dissenting).

In *Jackson*, this court originally affirmed the defendant's conviction for theft of property valued between $100 and $500 and vacated his mandatory life sentence without benefit of probation, parole, or suspension of sentence as a fourth offender because it was excessive. In *State v. Jackson*, 97-3200 (La. 5/15/98), 714 So.2d 679, 679-80, the Court granted the writ in part and remanded the case to this court for reconsideration of its opinion in light of *Johnson*.

On remand this court discussed *Johnson*:

> Our Supreme Court has ordered us to reconsider our opinion in light of its decision in *State v. Walter Johnson,* 97-1906 (La.3/4/98), 709 So.2d 672, which, in essence, precludes a court from ever deviating from the sentences pronounced under the habitual offender statute. "[I]t is not the role of the sentencing court to question the wisdom of the Legislature in requiring enhanced punishments for multiple offenders." Rather, the sentencing court can only "determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates our constitution." *Walter Johnson,* 97-1906 at p. 8, 709 So.2d at 677. A defendant must prove by clear and convincing evidence that he "is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." *Walter Johnson, supra,* citing J. Plotkin's concurrence in *State v. Young,* 94-1636, pp. 5-6 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 531, *writ denied* 95-3010 (La.3/22/96), 669 So.2d 1223.

*State v. Jackson*, 96-2540, pp. 2-3, 718 So.2d at 1002. This court stated that it was bound by the rulings of the Supreme Court, reversed its prior opinion, and reinstated the defendant's conviction and sentence. *Id.,* p. 3, 718 So.2d at 1003.

At the 15 February 2012 sentencing and multiple bill hearing, Williams did not plead to the multiple bill alleging that he was a second offender because of a prior conviction for simple burglary in 2010, and the state had to prove that he was a second offender by calling a fingerprint expert and by introducing the certified conviction packet from the prior case, number 495-490. The trial court adjudicated Williams to be a second felony offender.

The trial court noted that a unanimous jury found Williams guilty of armed robbery in count one, and as a double offender his sentence could be up to 198 years at hard labor. As to count two, the jury unanimously found him guilty of attempted armed robbery, and the maximum sentence could be up to 100 years at hard labor. The trial court then stated:

> The Court takes in to [sic] account your relative youth in this matter. However, the Court balances that against what the facts of this case were, that you rejected a plea bargain in this case of some fifteen years for the crime.[5]
>
> But, above all, the Court is mandated by law under Revised Statute 15:529.1 [sic] the law says that you must, as a mandatory minimum sentence, receive a sentence of fifty years on count 1 as a double offender and a mandatory minimum sentence of twenty-five years on count 2 as a multiple offender.

The court then sentenced Williams as a second offender for armed robbery to fifty years at hard labor. The court sentenced Williams to twenty-five years at hard labor for attempted armed robbery. Both sentences were to be served without benefit of probation, parole, or suspension of sentence, and the sentences were to run concurrently with each other and any other sentence.

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[5] Right before trial, the ADA noted that the state had offered Williams, who was a triple offender, a plea bargain: the state would not multiple bill him, and the sentence would be twenty

Williams presented no evidence to the trial court supporting mitigating circumstances. He did not prove by clear and convincing evidence that he is exceptional. Defense counsel did not show that unusual circumstances existed whereby Williams would be deemed a victim of the legislature's failure to assign sentences tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. No basis was shown for a downward departure from the sentence for a second felony offender.

This assignment lacks merit.

**PRO SE ASSIGNMENT OF ERROR NUMBER 1**

Williams argues that his right to due process was violated because he was not able to confront his accuser, Che Jones, and cross-examine him at trial. He claims that Officer Mullaly testified that Mr. Jones was robbed and that Mr. Jones saw that the robber had a gun in his right pocket. He claims that the jurors' minds were poisoned against him.

In *State v. Grainer*, 02-0703 (La. App. 4 Cir. 12/4/02), 834 So.2d 555, the defendant argued that he had been denied his constitutional right to confront his accusers because the fourth victim of armed robbery did not testify at trial. This court discussed the pertinent law:

> The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This right provides two types of protections for a criminal defendant: the right physically to face those who testify against him and the right to conduct cross-examination. *State v. Welch,* 99–1283 (La.4/11/00), 760 So.2d 317.

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years if he pleaded to all three counts. Defense counsel stated that Williams was not interested in accepting the deal and wanted to go to trial.

> The State does not dispute that the only reason Fahim Akhtar did not testify at trial was because he had relocated to Canada.
>
> Confrontation errors are subject to a harmless error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination were fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. *Id.* at 684, 106 S.Ct. 1431. Factors to be considered by the reviewing court include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contracting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* at 684, 106 S.Ct. 1431; *State v. Wille,* 559 So.2d 1321, 1332 (La.1990). The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

*Grainer*, pp. 10-11, 834 So.2d at 562-563. This court noted that the other three victims, who were thoroughly cross-examined, testified to what happened when the robbers entered the jewelry store. The evidence was more than sufficient to prove the armed robberies of the four victims beyond a reasonable doubt. Considering the overwhelming evidence of the defendant's guilt and that the fourth victim's testimony would have been cumulative, the defendant's assignment of error lacked merit. *Id.*, pp. 11-12, 834 So.2d at 563. *See also State v. Rideau*, 05-0462 (La. App. 4 Cir. 12/6/06), 947 So.2d 127.

In this case, Mr. Jones did not testify, but Michael Hill, the other victim, did. It was Mr. Hill who had called 911, provided the robber's description to the police, and testified to what happened that on the night when Williams walked up to the two men and talked to Mr. Jones first. Mr. Hill testified that when he turned

around, Mr. Jones was emptying his pockets for the robber, but had nothing to take. Mr. Hill testified that he was not giving up his Blackberry cell phone until the robber threatened to kill him and put his hand in his pocket as if holding a gun; a gun handle was somewhat visible (although the color was not clear). Mr. Hill's testimony, along with the fact that the victim spotted Williams the next day listening to his music and had him arrested (with Mr. Hill's Blackberry cell phone on his person), was sufficient to prove the armed robbery and attempted armed robbery charges.

Officer Mullaly testified for the state that he met the first victim, Mr. Hill, who provided the information about the robbery (what was taken, and the robber's description). As to Mr. Jones, the officer testified that he arrived during the conversation with Mr. Hill and corroborated his story. Then defense counsel during cross-examination asked if the officer had spoken to both victims, and he agreed that "they" described the robber's tear drop tattoos and that one said that the gun handle was brown. He verified that a Blackberry cell phone, a silver necklace, and a couple of dollars had been taken from Mr. Hill. However, toward the end of trial, defense counsel called the officer to the stand and asked if Mr. Hill had said that the robber threatened his life, and the officer answered negatively. When Officer Mullaly was asked if Mr. Jones described or identified the handgun, he replied: "Correct." He said that Mr. Jones described the weapon as chrome with a brown handle; neither victim said that it was black that night. Both victims said that the robber had his right hand in his right pocket as if holding a gun. On redirect exam he stated that Mr. Hill did not describe the gun at all.

Not only did defense counsel not object to the officer's testimony as to what Mr. Jones said, the defense had called him as a witness. During Mr. Hill's

testimony relating to Mr. Jones, no contemporaneous objection was made, and thusly, the issue was not preserved for appeal. La. C.Cr.P. art. 841; *State v. Jones*, 09-1453, p. 9 (La. App. 3 Cir. 8/11/10), 45 So.3d 1136, 1142 (where one doctor as an expert testified to care rendered by other healthcare providers, who were not at trial to be cross-examined, but no objection was made during that testimony)

We find no merit to this assignment of error.

**CONCLUSION**

We affirm the convictions and sentences of Steven Williams.

**AFFIRMED.**