

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0328

STATE OF LOUISIANA

VERSUS

ALBERT JAMES KENNEDY



**DATE OF JUDGMENT:** SEP 10 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
NUMBER 452780-1, DIV. J, PARISH OF ST. TAMMANY  
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT , JUDGE

\* \* \* \* \*

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BEFORE: KUHN, PETTIGREW, AND KLINE, JJ.<sup>1</sup>

**Disposition: CONVICTION AND SENTENCE AFFIRMED.**

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<sup>1</sup> The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

KUHN, J.

Defendant, Albert James Kennedy, was charged by bill of information with one count of unauthorized entry of an inhabited dwelling, a violation of La. R.S. 14:62.3.<sup>2</sup> Defendant entered a plea of not guilty and was tried before a jury. The jury determined defendant was guilty as charged. The trial court sentenced defendant to three years at hard labor.

Defendant appeals, raising the following issues:

1. Is the evidence sufficient to support the verdict?
2. Did the trial court err by denying the motion for new trial?
3. Did the trial court err by denying the motion for “judgment notwithstanding the verdict”?

We affirm defendant’s conviction and sentence.

### FACTS

On July 14, 2008, Tabitha Janssen Polk (Janssen) was living in a trailer at 34558 Edgar Kennedy Road in Pearl River. At approximately 4:30 p.m., as Janssen sat on her living room sofa with her three-year old son, the front door was flung open with such force that it struck a wall. A visible dent was later observed by the police. Jeremy Polk entered the residence demanding return of a DVD player. Janssen refused and a heated verbal exchange ensued with Janssen insisting Polk leave. At one point, Polk grabbed Janssen by the arm and threw her to the floor.

Janssen looked up and saw defendant standing inside the residence, leaning against a wall. Despite Janssen’s repeated orders for defendant and Polk to leave,

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<sup>2</sup> Jeremy C. Polk was charged as a codefendant in the same bill of information; however, Polk pled guilty prior to trial.

they remained. Shortly thereafter, two neighbors, Chad Chapman and Roland Polk (related to both Janssen and Jeremy Polk) entered the trailer. Defendant, Jeremy Polk, Chapman, and Roland Polk wound up on the porch, as Jeremy Polk continued to be argumentative. Janssen contacted the police, and defendant got into his car with Jeremy Polk as his passenger. As they left, defendant stopped the vehicle while Jeremy Polk made threats toward Janssen.

Deputies Thomas Williams and Tony Holloway of the St. Tammany Parish Sheriff's Office were among the officers responding to the dispatch call. The deputies proceeded to the location Janssen believed defendant and Jeremy Polk were going, the residence of Snow Polk located approximately one-half mile from Janssen's residence. As the deputies approached the Snow Polk residence, they observed a vehicle in the driveway matching the description of the one the suspects were using.

Deputy Williams approached defendant as he sat in the vehicle and asked for his name and identification, then asked where his partner went. According to Deputy Williams, defendant immediately grew evasive and said his friend ran from the vehicle as soon as they arrived. Deputy Williams testified that defendant appeared as if he did not want to speak with the officers. Jeremy Polk was eventually found hiding in the rafters of an outbuilding to the residence. Bernard Polk, Jeremy Polk's father, also was arrested for resisting an officer.

At trial, defendant presented testimony from Jeremy Polk. Polk testified that before going to Janssen's residence, he contacted her about returning the DVD player and she agreed. However, when he arrived, there was a note on green paper on her door indicating she would only return the DVD player when she

received the DVDs Jeremy had borrowed. Jeremy Polk testified that at no time did he ever enter Janssen's trailer, but that he remained on the porch. Although he admits he argued with Janssen, he claims there was never a physical altercation. According to Jeremy Polk, defendant remained in the vehicle except to suggest they leave before trouble ensued.

Jeremy Polk admitted he resisted arrest when the police arrived at his father's residence, but claimed he only entered a guilty plea to unauthorized entry because it was in his best interest. Jeremy Polk further testified he told the police about the letter Janssen taped to the door.

Roland Polk, the uncle of Janssen and a cousin of defendant, testified on defendant's behalf at trial. Roland Polk said he went over to Janssen's residence when he heard screaming. According to Roland Polk, defendant was sitting in his car and Jeremy Polk was arguing with Janssen on the porch. On cross-examination, the prosecutor presented Roland Polk with his handwritten statement provided to the police immediately after this incident. Although his handwritten statement indicated he saw both Jeremy Polk and defendant inside the trailer and that he and Chad Chapman made the men leave, at trial, Roland Polk testified he meant to write he only saw Jeremy Polk inside the trailer.

On rebuttal, the State called Deputy Williams to the stand. Deputy Williams testified he completed the incident report in this case and that Jeremy Polk never indicated to him that Janssen left a note on the door of her trailer that ignited the argument that occurred on that date.

Defendant did not testify.

## SUFFICIENCY OF THE EVIDENCE

Defendant briefs his three assignments of error as one urging that “[b]ecause the evidence is insufficient to support the verdict, the trial court erred by denying [his] motions for new trial and [JNOV].” Defendant asserts the conviction is only supported by the uncorroborated testimony of Janssen, despite the fact that her testimony was contradicted by both Jeremy and Roland Polk.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. La. C.Cr.P. art. 821(B); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

The appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn the determination of guilt by the fact finder. *State v. Polkey*, 529 So.2d 474, 476 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989). As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of witnesses, the question is one of the weight of the evidence, not its sufficiency. *State v. Young*, 99-1264, p. 10 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1006. A determination of the weight to be given evidence is a question of fact for the trier of fact and is not subject to appellate review. *State v. Payne*, 540 So.2d 520, 524 (La. App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989).

Unauthorized entry of an inhabited dwelling is the intentional entry by a person without authorization into any inhabited dwelling or other structure belonging to another and used in whole or in part as a home or place of abode by a person. La. R.S. 14:62.3(A).

Janssen testified defendant was in her residence without her permission during her confrontation with Jeremy Polk. The 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* standard of review. A victim's or eyewitness's testimony alone is usually sufficient to support a verdict. *State v. Davis*, 2002-1043, p. 3 (La. 6/27/03), 848 So.2d 557, 559 (per curiam). In the present case, the jurors were fully aware that the defense presented testimony contradicting Janssen's version of events. Considering that the defense's version of the incident was presented through one of the participants, who was a friend of defendant (Jeremy Polk) and a witness (Roland Polk), whose own trial testimony contradicted his written statement to the police, we cannot say the jury's verdict based on the credibility of the victim's testimony appears so irrational such that this court would have to intervene to assure due process of law. See *State v. Davis*, 2002-1043 at p. 4, 848 So.2d at 559.

Accordingly, the evidence is sufficient to support defendant's conviction for unauthorized entry of an inhabited dwelling. These assignments of error are without merit.

**DECREE**

For these reasons, the conviction and sentence of defendant, Albert James Kennedy, are affirmed.

**CONVICTION AND SENTENCE AFFIRMED.**