

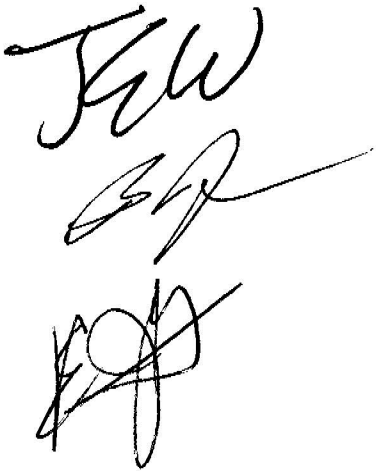
NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1515



STATE OF LOUISIANA

VERSUS

BELVIN JOSEPH McKINLEY

Judgment Rendered: March 25, 2011

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 504,510

Honorable Randall L. Bethancourt, Judge

Joseph Waitz, Jr., District Attorney
Jay Luke, Asst. District Attorney
Houma, LA

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State – Appellee

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Attorney for
Defendant – Appellant
Belvin Joseph McKinley

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Belvin Joseph McKinley, was charged by bill of information with simple burglary, in violation of La. R.S. 14:62. The defendant pled not guilty. After a jury trial, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. After waiving sentencing delays, the defendant was sentenced to ten years imprisonment at hard labor. The defendant was later adjudicated a fourth-felony habitual offender.¹ The trial court vacated the previously imposed sentence and sentenced the defendant to twenty years imprisonment at hard labor without the benefit of probation or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, raising error as to the sufficiency of the evidence. We affirm the defendant's conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On February 12, 2008, Randy Douglas, the victim, stopped at Murphy USA, a gas station located in front of a Wal-Mart, on Grand Caillou Road in Houma, Louisiana (Terrebonne Parish). At the time, his infant son was sleeping in the back of his vehicle, a 2003 Chevrolet Yukon. The victim parked at the gas pump closest to the cashier and left his son in the vehicle while he stood in line to pay for gasoline before pumping. The gas pump was located on the driver's side of the vehicle. As he stood in line, the victim observed two individuals, whom he identified in court as the defendant and another man who was with the defendant at the time (Dayshawn Clay), walking around a soda machine. The victim temporarily lost sight of the individuals before observing one of them walking between the gas pump and his vehicle. The victim became suspicious and

¹ The trial court specifically found that the State proved the following predicate convictions: possession of cocaine in violation of La. R.S. 40:967(A); possession of ecstasy in violation of La. R.S. 40:966(C); and theft over \$500 in violation of La. R. S. 14:67.

continued to watch the individuals. He again lost sight of them before seeing them walk around the pump towards the front of his vehicle. The victim then observed the defendant as he leaned over into the victim's vehicle from the passenger side door, which was closed (as were the other doors) when he left the vehicle, but opened as the defendant gained entry.

The victim ran around the soda cooler and screamed, "Hey, get out of my car. I got a kid in there." As the victim ran toward his vehicle, the defendant was "digging through everything, even the center console." The victim approached the defendant, grabbed his shirt, and pulled him out of his vehicle. The victim then stepped between the vehicle and the defendant so that the defendant could not get back into the vehicle. The defendant struck the victim in his face and a physical altercation ensued. A few seconds into the altercation, the defendant stepped back and removed his "gold to brown to a light brown kind of faded pullover" top before resuming the physical altercation. The victim further testified that the defendant was "running his mouth" before he and his "buddy" walked away.

The incident was immediately reported to police. When police officers arrived at the scene, the victim filled out a report on the incident and gave them a description of the pullover top that the perpetrator was wearing, and further informed them that he was wearing baggy jeans, and had tattoos on his face, neck, and arms. Approximately fifteen minutes after the victim submitted the report, the police arrested the defendant, who was still in the area, and brought him to the victim for identification. The victim positively identified the defendant as the individual who gained entry into his SUV and engaged in the physical altercation with him.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends that the evidence presented was insufficient to prove guilt beyond a reasonable doubt of every

element of the offense. The defendant specifically argues that the State failed to produce direct evidence showing the offender entered the vehicle without the owner's permission and/or with any intent to commit a felony, noting that the victim was not specifically asked if he had given the intruder permission to enter his vehicle. The defendant further contends that specific intent was not proven beyond a reasonable doubt.

Additionally, the defendant argues that the State failed to negate any reasonable probability of misidentification, urging that the victim's identification was not reliable. In that regard, the defendant contends the victim only had one or two minutes to view the intruder and was excited at the time as he thought his son might be in danger. The defendant argues that when he was taken back to Wal-Mart for the one-on-one identification, the victim could have been mistaken in his identification of the defendant as the intruder in light of the fact that he was not taken out of the police unit for a full viewing. Further, the defendant notes that while witnesses stated that he did not have any physical signs of being in a fight within twenty minutes of the identification, the victim estimated that he hit the perpetrator eight to ten times. The defendant further argues that the clothing description provided by the victim also suggests there was mistaken identification. Specifically, the defendant notes that officers testified that he was arrested because he was wearing a tan, hooded jacket as described by the victim. However, the victim indicated that the perpetrator removed the jacket during the fight, before he left the scene, and testified that the defendant was not wearing a tan hooded jacket at the time of the identification. The defendant notes that the described clothing was never produced in court and that his friend, Clay, admitted he owned a tan colored hooded jacket and that Clay had tattoos on his face, arms, and neck, and could have been the perpetrator. The defendant also claims that the victim was angry when he identified him as the perpetrator. The defendant insists that the

identification procedure was suggestive and thus affected the identification. Finally, the defendant points out that there was no effort to collect fingerprint evidence.

The constitutional standard for testing the sufficiency of evidence, enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), is whether the evidence, when 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. Wright**, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732. This standard is codified in La. C.Cr.P. art. 821. The **Jackson** standard of review is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). Where the defendant's identity as the perpetrator is a key issue, the State is required to negate any reasonable probability of misidentification. See State v. Lucas, 99-1524, p. 3 (La. App. 1st Cir. 5/12/00), 762 So.2d 717, 720.

Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Robins**, 2004-1953, p. 6 (La. App. 1st Cir. 5/6/05), 915 So.2d 896, 899. It is not the function of

an appellate court to assess credibility or reweigh the evidence. Appellate review for minimal constitutional sufficiency of evidence is a limited one restricted by the standard developed in **Jackson. State v. Rosiere**, 488 So.2d 965, 968 (La. 1986).

An identification procedure is suggestive if it unduly focuses a witness's attention on the suspect. **State v. Neslo**, 433 So.2d 73, 78 (La. 1983); **State v. Robinson**, 386 So.2d 1374, 1377 (La. 1980). Our jurisprudence permits testimony of a prior identification to support the present in-court identification. Even in tainted pretrial identifications, our courts have rejected a per se exclusionary rule and have adopted the same reliability test used for in-court identification. In **Manson v. Brathwaite**, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court allowed evidence of a suggestive pretrial identification from a single photograph by an undercover police agent after determining that it was reliable. In that decision, the court concluded that "reliability is the linchpin in determining the admissibility of identification testimony." Reliability is to be determined by the totality of the circumstances. **Manson v. Brathwaite**, 432 U.S. at 113-114, 97 S.Ct. at 2252-53.

Even if the identification could be considered to be suggestive, that alone does not indicate a violation of the defendant's right to due process. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **State v. Reed**, 97-0812, p. 5 (La. App. 1st Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572. An in-court identification may be permissible if there is not a "very substantial likelihood of irreparable misidentification." **State v. Martin**, 595 So.2d 592, 595 (La. 1992). See also State v. Jones, 94-1098, p. 6 (La. App. 1st Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320. As a general rule, one-on-one identifications are not favored. However, under certain circumstances, these identifications are permissible. **State v. Thomas**, 589 So.2d 555, 563 (La. App. 1st

Cir. 10/18/91). This is particularly true when the one-on-one identification is closely associated in time with the commission of the crime and where the suspect is returned to the location of the crime for immediate identification. Such identifications promote fairness by assuring reliability and the prompt release of innocent suspects. **State v. Robinson**, 404 So.2d 907, 909 (La. 1981).

If the identification procedure is determined to be suggestive, courts look to several factors to determine, from the totality of the circumstances, if the suggestive identification presents a substantial likelihood of misidentification. These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. **Martin**, 595 So.2d at 595 (citing **Neil v. Biggers**, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972)). Against these factors is to be weighed the corrupting effect of the suggestive identification itself. **Martin**, 595 So.2d at 595. The question for a reviewing court is to determine whether the procedure is so conducive to irreparable misidentification that due process was denied. **State v. Johnson**, 2000-0680, p. 7 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 677, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066. Positive identification by only one witness may be sufficient to support a defendant's conviction. **Lucas**, 99-1524 at pp. 2-3, 762 So.2d at 720.

Louisiana Revised Statutes 14:62(A) provides, in pertinent part: “[s]imple burglary is the unauthorized entering of any dwelling, vehicle ... with the intent to commit a felony or any theft therein.” Accordingly, to be guilty of simple burglary, a defendant must have the specific intent to commit a felony or theft therein at the time of his unauthorized entry. **State v. Thomas**, 540 So.2d 1150, 1153 (La. App. 1st Cir. 1989); **State v. Guidry**, 476 So.2d 500, 503 (La. App. 1st

Cir. 1985), writ denied, 480 So.2d 739 (La. 1986). Entry is accomplished whenever any part of defendant's person passes the line of the threshold. It is sufficient that any part of the person intrudes, even momentarily, into the structure. See State v. Petty, 99-1307, pp. 3-4 (La. App. 5th Cir. 4/12/00), 759 So.2d 946, 949, writ denied, 2000-1718 (La. 3/16/01), 787 So.2d 301. Specific intent is defined as the state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent is a legal conclusion to be resolved ultimately by the trier of fact. **Guidry**, 476 So.2d at 503. Since specific criminal intent is a state of mind, it need not be proven as a fact, but it may be inferred from the circumstances present and actions of the defendant. *Id.*

Clay testified as a State witness. He stated that he and the defendant were at the scene, "a little gas station ... [i]n front of Wal-Mart," on the day in question, "hanging around." Clay further testified that when he was at the window the defendant walked away and returned contending that some guy tried to harass him about a vehicle or "something like that." They walked home and the police arrested the defendant "behind what went down at the store." Clay stated that he did not see the defendant enter the vehicle and did not have a view of the entire area because he was talking to a clerk. At the time of the trial and the offense, Clay had a tattoo of a Louisiana boot on his face, and other tattoos on his neck, including his initials on the left side of his neck and the word "Day" on the right side of his neck. Clay further testified that his hair was cut short at the time of the offense and while he could not recall his attire for that date, he further responded, "I think I do got [sic] a tan colored hooded jacket. I'm not sure." Clay testified that he did not run from the police at the time of the defendant's arrest.

The victim testified that he was standing in the line located to the right of the spot where his vehicle was parked, nearest the passenger side, when he first

observed the individuals near his vehicle. He was standing in line for about four or five minutes before the confrontation with the perpetrator ensued. When he peered around the corner in attempt to keep an eye on the individuals and his vehicle, he saw the defendant leaning into his vehicle on the passenger side. The victim testified that his vehicle sat pretty high off of the ground, but confirmed that the defendant's feet were on the ground as he leaned into the vehicle. The victim's windows were tinted but he was close enough to see through them as he approached the defendant. The defendant had lifted the center console which had to be held up to remain open. Nothing was removed from the victim's vehicle or damaged to his knowledge.

The victim testified that he was a couple of inches away from the defendant during the altercation and was able to get a "very good" look at him. The defendant was instructed to come forward during the victim's testimony, and the victim indicated that he recognized the defendant's teardrop tattoos; specifically, the teardrop tattoos on the defendant's face next to his eye. But, he stated that he could not distinguish the tattoos on his neck at the time, "because it all happened so fast." The victim also recognized the tattoos on the defendant's arms as being the same ones he saw on the day of the offense, although he could not discern what they were at the time. The victim positively identified the defendant as the perpetrator, confirming that there was no doubt in his mind that the defendant was the individual who fumbled through his property and physically fought with him while Clay was standing to the side, approximately eight to ten feet away, but also within good view. The victim testified that the defendant struck the first blow and estimated that he hit the defendant eight to ten times in his face during the fight, but was not sure whether he injured the defendant. The victim stated that at the time of the offense, the defendant was wearing a baggy gold to brown pullover top with a hood on it, which the defendant removed as they fought, and stated that the

defendant had the pullover with him when he left the scene, although he could not recall whether the defendant put it back on in his presence. The victim acknowledged that the color of the pullover was difficult to pinpoint because it was faded and that he may have described it as yellow. Although he confirmed that he was able to get a good view of Clay, the victim did not know if Clay had any tattoos, nor did he recall his attire.

The on-scene identification of the defendant took place while the defendant was sitting in the back of the police unit. The victim testified that he thought the defendant was handcuffed at the time and did not see any injuries to his face. During cross-examination, the victim confirmed that he was angry that the offense took place, but reiterated that there was no doubt as to the accuracy of the identification of the defendant as the perpetrator.

Officer Dwan Bryant of the Houma City Police Department was in the area, on East Street, when the description of the perpetrator was dispatched. The suspect was described as a black male wearing a hooded tan sweatshirt and blue jeans who was on East Street heading toward Main Street. Officer Bryant advised the shift units that he had just passed a subject fitting that description on East Street, whom he knew to be the defendant, and that the defendant was accompanied by Clay. According to the officer, Clay's attire did not match the description of what the suspect was wearing. By the time Officer Bryant turned his unit around, the defendant was already in custody. During cross-examination, Officer Bryant confirmed that he did not write a report on the incident. He further confirmed that he read a police report on the incident, but did not rely on it for his testimony.

Officer Jerry Gaudet of the Houma City Police Department placed the defendant under custody. The defendant was located on a bridge between Daniel Turner and Payne Street when Officer Gaudet positioned his unit on the bridge, activated his emergency lights and sirens, exited his unit, and stated, "Belvin, stop.

You're under arrest." The defendant turned toward Officer Gaudet, stated "Fuck no" and fled. Officer Gaudet ultimately caught the defendant and handcuffed him. The officer read the defendant his **Miranda** rights, placed him in his unit, and brought the defendant back to the scene, where he was identified by the victim. Officer Gaudet testified that the defendant's shirt could have been described as yellow or tan. Officer Gaudet did not notice any injuries on the defendant's face. Officer Gaudet did not see Clay present at the time and location of the defendant's arrest.

In **State v. Winfrey**, 97-427 (La. App. 5th Cir. 10/28/97), 703 So.2d 63, writ denied, 98-0264 (La. 6/19/98), 719 So.2d 481, the court held that an identification procedure was not suggestive although the defendant was alone in the backseat of a police car and in handcuffs at the time he was identified. There, the victims were confronted with the defendant approximately thirty to forty-five minutes after the robbery offense. One victim identified the defendant therein as the man who robbed her as soon as she saw him in the back of the police car. The court noted that the victim had ample opportunity to view defendant at the crime scene. Her prior description of the defendant and his car were accurate. The time between the robbery and confrontation was short. Furthermore, she positively identified the defendant as the robber at the scene. The court reasoned that, even if the identification was suggestive, the identification did not present a substantial likelihood of misidentification.

Similarly, in the instant case, the victim had ample time to observe the defendant before and at the time of the confrontation. He identified the defendant at the scene and during the trial with a high degree of certainty and specificity. The defendant's cohort, Clay, placed himself and the defendant at the scene at the time of the offense. The victim stated with certainty that Clay was not the perpetrator. The identification took place shortly after the incident. Thus, even if

we were to find that the identification was suggestive, the identification did not present a substantial likelihood of misidentification. Also, based on the circumstances presented in the victim's testimony, it was certain that the defendant entered his vehicle without his permission, lifted his center console, and rummaged through the area of the victim's vehicle. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the State proved, beyond a reasonable doubt, to the exclusion of any reasonable hypothesis of innocence and negation of any reasonable probability of misidentification, the essential elements necessary to convict the defendant of simple burglary. The assignment of error lacks merit.

CONCLUSION

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

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND
SENTENCE AFFIRMED.**