NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KA 1226

STATE OF LOUISIANA

VERSUS

BRAINARD STEWARD

Judgment Rendered: DEC 2 3 2009

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Case No. 21771

The Honorable Jane Triche-Milazzo, Judge Presiding

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

GAIDRY, J.

The defendant, Brainard Steward, was charged by bill of information with ten counts of simple burglary (Counts 1-10) in violation of La. R.S. 14:62, and two counts of attempted simple burglary (Counts 11 and 12) in violation of La. R.S. 14:27 and La. R.S. 14:62. A jury found him guilty as charged of simple burglary on Count 4 and attempted simple burglary on Count 12, not guilty on Count 11, and guilty of the responsive offense of attempted simple burglary on Counts 1, 2, 3, 5, 6, 7, 8, 9, and 10. The trial court sentenced the defendant to serve five years at hard labor for simple burglary and three years at hard labor for each attempted simple burglary conviction, all to run concurrently. The defendant appeals, designating four assignments of error for review.

For the following reasons, we reverse the convictions and sentences imposed for attempted simple burglary in Counts 2, 3, 5, 6, 7, 8, 9, and 10, and enter an order of acquittal. We affirm the convictions and sentences imposed in Counts 1, 4, and 12.

FACTS

On January 29, 2009, Lieutenant Joey Mayeaux with the Ascension Parish Sheriff's Office was patrolling an area neighborhood around 3:30 a.m. when he noticed a white Ford Explorer backed into the carport of a vacant house. This house was newly constructed, had not yet been occupied, and was within an area that had experienced numerous burglaries of similar properties over the preceding weeks. Mayeaux noted that the Explorer's engine was warm, although it was a very cold night.

Upon investigation, Mayeaux and a back-up officer found the house open and the dishwasher pulled away from the wall. They also noticed wet, muddy shoe prints on the carpet. The officers tracked the footprints out the

back door, across a pasture, and to a tree under which they found Kevin Brown and Amorita Walker, both of whom appeared to be hiding, along with the keys to the Explorer. Brown also had a pair of wire-cutters in his pocket.

Detective John Hebert investigated the burglary and determined that the Explorer belonged to the defendant. According to Brown, he and the defendant committed many burglaries like the one attempted on January 29. He characterized his relationship with the defendant as "buddies with Burglaries" and explained that they used crack cocaine together. According to Brown, the defendant chose the places to burglarize and provided the Explorer to haul the stolen merchandise. After they committed the burglaries, Brown and the defendant would sell the merchandise to buy drugs.

SUFFICIENCY OF THE EVIDENCE

In his first two assignments of error, the defendant challenges the sufficiency of the evidence to support his convictions. Specifically, in his first assignment of error, the defendant contends that the evidence presented at trial fails to meet the *Jackson* criteria for sufficiency. In his second assignment of error, the defendant argues that the evidence is insufficient because "the sole proof of the corpus delecti of the crime is hearsay evidence."

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting Code of Criminal Procedure article 821, 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. La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson* standard of review, incorporated in Article 821, 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 factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, 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. Richardson*, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. *State v. Taylor*, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. 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).

Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein. La. R.S. 14:62(A). An

attempt occurs when 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. It is immaterial whether he would have actually accomplished his purpose. La. R.S. 14:27(A).

Furthermore, all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals and, therefore, parties to the crime. La. R.S. 14:24; 14:23(1). There is no requirement that an indictment explicitly name the accused as "principal." That the accused is indicted for the offense itself, and not charged as an accessory after the fact, irrefutably evidences that he is charged as a principal. *State v. Peterson*, 290 So.2d 307, 308 (La. 1974); *State v. Haley*, 38,258, p. 4 (La. App. 2d Cir. 4/22/04), 873 So.2d 747, 750, writ denied, 2004-2606 (La. 6/24/05), 904 So.2d 728.

When a defendant does not object to a legislatively responsive verdict, the defendant's conviction will not be reversed, whether or not that verdict is supported by the evidence, as long as the evidence is sufficient to support the offense charged. *State ex rel. Elaire v. Blackburn*, 424 So.2d 246, 251-52 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983).

With regard to Counts 2, 3, 5, 6, 7, 8, 9, and 10, the jury convicted the defendant of the responsive verdict of attempted simple burglary. The record is void of any evidence regarding these specific offenses. The State contends that Hebert's testimony adequately supports these charges.[1] The

[1] The State contends, without citation to the record, that Hebert testified "on each of the counts with which defendant was charged, the Sheriff's Office had received complaints that the structure had been entered without authorization and burglarized." After a

record, however, indicates only that Hebert investigated a rash of burglaries to unfinished homes in Ascension Parish and that, "as to the other reported Burglaries at sites under construction," Hebert considered those sites to be structures from which miscellaneous unidentified items were stolen.[2] Brown testified generally that he participated in numerous burglaries in Ascension Parish, but he could not say specifically where the burglaries occurred because he did not know what city or parish he was in. Brown explained that the defendant "was the one that took [him] to the places to Burglarize them. . . . Actually, the Burglaries were actually made up with him, the places that we went, the places that we Burglaried [sic]." Brown also explained that he and the defendant, along with others, would sell the stolen items and buy drugs with the proceeds.

The State acknowledges that the record is devoid of evidence as to what the defendant allegedly stole during any of the charged offenses, but contends that such evidence is unnecessary to support the convictions. However, this is not the only evidence lacking. Having failed to introduce evidence that the identified structures in Counts 2, 3, 5, 6, 7, 8, 9, and 10 were entered without authorization, were entered with the intent to commit a felony or a theft, and were entered by the defendant either as a perpetrator or in his capacity as a principal to the charged offenses, the State failed to prove beyond a reasonable doubt that the defendant committed either the offenses charged or the offenses for which he was convicted by the jury's return of responsive verdicts. Accordingly, any rational trier of fact, after viewing all the evidence in the light most favorable to the prosecution, necessarily must have a reasonable doubt as to the sufficiency of the

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thorough review of the record, we find no such statement.

[2] Hebert testified specifically as to the offense alleged in Count 4 only.

evidence to support these charges. We, therefore, must reverse the convictions and sentences, and enter an order of acquittal in Counts 2, 3, 5, 6, 7, 8, 9, and 10.

The jury found the defendant guilty as charged in Count 4, which alleged that the defendant committed simple burglary of a specific address, owned by Tony Rhodes, on Bluff Pass Drive on January 10, 2007, and Count 12, which alleged that the defendant committed attempted simple burglary at a residence on Crestway Avenue. The jury also found the defendant guilty of the responsive verdict of attempted simple burglary of a residence in Darrow, Louisiana alleged in Count 1.

With regard to Count 4, Hebert testified that a burglary occurred at that location and that unidentified items were stolen from inside the home. Pictures from a surveillance camera at that address showed the defendant, around 1:00 a.m., carrying an unidentified object to the defendant's white Ford Explorer. Hebert stated that the flash drive containing the photographs was provided to the police by Rhodes, the owner of the house.

The defendant was positively identified in the photographs by Hebert and Brown outside of the home, in the middle of the night, carrying a large unidentified object to his vehicle. Positive identification by only one witness is sufficient to support a conviction with regard to identity. *State v. Weary*, 2003-3067, p. 18 (La. 4/24/06), 931 So.2d 297, 311, cert. denied, 549 U.S. 1062, 127 S.Ct. 682, 166 L.Ed.2d 531 (11/27/06); *State v. Neal*, 2000-0674, p. 11 (La. 6/29/01), 796 So.2d 649, 658, cert. denied, 535 U.S. 1075, 122 S.Ct. 1323, 152 L.Ed.2d 231 (3/18/2002). Furthermore, although it is the generally accepted practice to elicit testimony from the victim of a burglary to establish that the accused had no permission to enter, circumstantial evidence can be used to show that an unauthorized entry

occurred. *State v. Jacobs*, 572 So.2d 1140, 1143 (La. App. 1st Cir. 1990). Here, evidence that Rhodes made a report of a burglary to the Sheriff's Department and provided them with surveillance photos to aid in the investigation of the burglary combined with the photos themselves, which show the defendant outside of Rhodes's house in the middle of the night loading a large item into his Explorer, is sufficient evidence to show that an unauthorized entry occurred. That combined with Hebert's testimony that items were stolen from the house and Brown's testimony regarding his commission of numerous burglaries with the defendant and at the defendant's direction is sufficient evidence to support the jury's guilty-as-charged verdict as to Count 4 (simple burglary).

As for Count 12, Lieutenant Jody Mayeaux testified that, on January 29, 2007 around 3:30 a.m., he saw a white Ford Explorer at a newly constructed home that he knew to be uninhabited. The house was unlocked and there were muddy footprints inside. Mayeaux followed the muddy footprints out the back of the house until he discovered Brown and Walker under a tree. Brown and Walker had wire cutters and the keys to the Explorer with them. Mayeaux noted that a dishwasher had been pulled away from the wall, and he remembered that it had not looked that way the last time he was in the house.

The evidence established that the Explorer belonged to the defendant, was within his control, and that Brown never used the Explorer without the defendant's permission. That combined with Brown's testimony that the defendant chose the houses to burglarize renders the evidence sufficient to support the jury's guilty-as-charged verdict as to Count 12 (attempted simple burglary).

Lastly, with regard to Count 1, Hebert testified that he investigated a burglary at the address alleged, which occurred on December 19, 2006. Brown acknowledged that he committed a burglary in Darrow on that date, although he did not specify the address of the house in Darrow where that burglary occurred. Nevertheless, this testimony combined with Brown's previously-mentioned testimony is sufficient to support the jury's responsive verdict of attempted simple burglary in Count 1.

As to Counts 1, 4, and 12, we cannot say that the trier of fact's determination is irrational under the facts and circumstances presented See *Ordodi*, 2006-0207 at p. 14, 946 So.2d at 662. Viewing all of the evidence in the light most favorable to the prosecution, we conclude there was sufficient evidence for the trier of fact to find that the State proved these offenses beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence. However, as noted above, as to Counts 2, 3, 5, 6, 7, 8, 9, and 10, the facts established by the direct evidence and those reasonably inferred from the circumstantial evidence, even when viewed in the light most favorable to the prosecution, could not persuade a rational factfinder that the State proved all of the elements of the offense of simple burglary or the responsive offense of attempted simple burglary beyond a reasonable doubt. Accordingly, those convictions and sentences are reversed and we render an order of acquittal.

This assignment of error has merit.

The defendant contends in his second assignment of error that Hebert's testimony regarding the fact that various burglaries and attempted burglaries occurred is hearsay and cannot be considered in evaluating the sufficiency of the evidence because hearsay is insufficient to establish proof of the corpus delicti. See *State v. Robinson*, 34,383, pp. 9-11 (La. App. 2d

Cir. 2/28/01), 780 So.2d 1213, 1219-20, writ denied, 2001-1313 (La. 3/28/02), 812 So.2d 642.[3]

It is true that mere hearsay, alone, cannot establish the fact that a crime occurred. *State v. Brown*, 236 La. 562, 571, 108 So.2d 233, 236 (1959). Traditionally, the purpose behind this rule is to test the reliability of a defendant's confession. *State v. Connolly,* 96-1680, p. 14 (La. 7/1/97), 700 So.2d 810, 820. When determining the existence of the corpus delicti, the issue is not whether there is sufficient evidence to convict the defendant; the issue is whether there is any evidence at all, independent of the confession, which establishes the fact that a crime was committed. *Brown*, 236 La. at 573, 108 So.2d at 236-37. No rule requires the State to establish corpus delicti through the testimony of the victim of the crime. See *State v. Lee*, 2001-2082, pp. 6-7 (La. App. 4th Cir. 8/21/02), 826 So.2d 616, 623, writ denied, 2002-2549 (La. 9/5/03), 852 So.2d 1019. Furthermore, proof that the accused committed the offense is, obviously, necessary for conviction, but it is *not* an element of the corpus delicti. *State v. Freetime*, 334 So.2d 207, 210 (La. 1976).

As a general rule, hearsay evidence to which no objection is lodged constitutes substantive evidence. *State v. Hernandez*, 488 So.2d 972, 976 (La. 1986). Although this rule is inapplicable if the hearsay evidence is the exclusive evidence of the offense or an essential element thereof *and* is contradicted at the trial by the sworn recantation of the out-of-court declarant, that is not the case here. See *State v. Polkey*, 529 So.2d 474, 476 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989). On the evidence presented, a rational juror making credibility choices favorable

[3] In *Robinson*, the Second Circuit reversed the conviction where the only non-hearsay evidence presented at trial was the testimony of a co-defendant who denied that the crime occurred.

to the State *could* have found the defendant guilty of Counts 1, 4, and 12, notwithstanding that it was less than overwhelming and partially based upon hearsay testimony. See *Hernandez*, 488 So.2d at 976-77. This assignment of error lacks merit.

PROSECUTORIAL MISCONDUCT

In his third assignment of error, the defendant contends that prosecutorial misconduct "so permeated the trial and prejudiced the jury" that he was denied a fair trial. His allegation of misconduct is based upon the contention that the prosecutor brought a lengthy bill of information to trial without probable cause to support all the charges alleged. However, the defendant cannot avoid the procedural bar of Article 841(A) by styling his claim as one of prosecutorial misconduct.

The contemporaneous objection rule is specifically designed to promote judicial efficiency by preventing a defendant from gambling for a favorable verdict and then, upon conviction, resorting to appeal on errors which either could have been avoided or corrected at the time or should have put an immediate halt to the proceedings. *State v. Taylor,* 93-2201, p. 7 (La. 2/28/96), 669 So.2d 364, 368, cert. denied, 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996). An irregularity or error cannot be availed of after verdict unless it was objected to at the time of its occurrence. La. Code Evid. art. 103A(1); La. Code Crim. P. art. 841(A). This contemporaneous objection rule applies to claims of prosecutorial misconduct. See, *e.g.*, *State v. Jackson*, 43,139, p. 8 (La. App. 2d Cir. 3/26/08), 979 So.2d 678, 683, writ denied, 2008-0952 (La. 12/12/08), 997 So.2d 560 (claim that prosecutor improperly vouched for witness's credibility); *State v. Lowery,* 33,905, p. 25 (La. App. 2d Cir. 2/28/01), 781 So.2d 713, 732, writ denied, 2001-1041 (La. 2/22/02), 809 So.2d 978 (claim that prosecutor made false statements to

jury); *State v. Bishop,* 571 So.2d 749, 753 (La. App. 2d Cir. 1990) (claim that prosecutor used perjured testimony).

The record discloses no contemporaneous objection to claims of prosecutorial misconduct, nor any objection to the trial court's determination of probable cause. Accordingly, the defendant has waived any error based on this allegation by his failure to enter a contemporaneous objection. See La. Code Evid. art. 103(A)(1); La. Code Crim. P. art. 841(A); *State v. Sisk,* 444 So.2d 315, 316 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1215 (La. 1984).

Furthermore, the fact that the State failed to prove each charge beyond a reasonable doubt does not establish a lack of probable cause to support those charges. Had the State called the alleged victims to testify or directed more questions to Brown regarding the specific places he and the defendant burglarized, this Court's analysis of the sufficiency of the evidence may have had a different result. We cannot conclude, based on the record before us, that the lack of evidence brought forth at trial resulted from a lack of probable cause to support the charges.

This assignment of error lacks merit.

AUTHENTICATION OF PHOTOGRAPHS

In his fourth assignment of error, the defendant contends that surveillance photos relevant to the burglary alleged in Count 4 were erroneously admitted into evidence.

The defendant's objection to the admission of the photographs does not appear on the record. However, he filed and the court granted a motion to correct the record, which states that an objection was lodged because of "improper foundation" and "lack of discloser [sic] in discovery - never transmitted to the defendant." Because he makes no discovery complaint on

appeal, our review of this assignment of error is limited to the defendant's complaint regarding "improper foundation."

Generally, photographs are admissible if they illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted. *State v. Steward,* 95-1693, p. 5 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1011. It is well settled that a photograph need not be identified by the person who took it to be admissible.[4] Rather, the proper foundation for the admission of a photograph into evidence is laid when a witness having personal knowledge of the subject depicted by the photograph identifies it as such. *State v. Glynn*, 94-0332, p. 10 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1299, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464 (citing *State v. Robertson*, 454 So.2d 205, 210 (La. App. 1st Cir.), writ denied, 458 So.2d 487 (La. 1984); see also *State v. Leggett,* 363 So.2d 434, 439 (La. 1978). In the present case, the contested photographs depict the defendant, who was identified by both Hebert and Brown, and the white Ford Explorer, identified by Hebert.

A trial court has great discretion in admitting photographs and the decision to admit photographs will not be overturned absent an abuse of discretion. *State v. Gay*, 29,434, pp. 7-8 (La. App. 2d Cir. 6/18/97), 697 So.2d 642, 647. Although the record was corrected to show an objection of "improper foundation" was made, it is silent as to the arguments made and fails to show that the objection was overruled. On the contrary, the record reflects that the court stated, "Subject to the objection, let the exhibit be filed and marked." Without a record of the specific objection made, the

[4] Further, any defect in the chain of custody goes to the weight of the evidence rather than to its admissibility. *State v. Sam,* 412 So.2d 1082, 1086 (La. 1982).

conversation regarding such, or the court's in-chamber ruling, we cannot say that the admission of the photographs was an abuse of discretion.

This assignment of error lacks merit.

CONCLUSION

Having determined the evidence insufficient to support the defendant's convictions in Counts 2, 3, 5, 6, 7, 8, 9, and 10, we reverse those convictions and sentences, and enter an order of acquittal. We affirm the convictions and sentences imposed in Counts 1, 4, and 12.

CONVICTIONS AND SENTENCES IN COUNTS 2, 3, 5, 6, 7, 8, 9, AND 10 REVERSED AND ORDER OF ACQUITTAL ENTERED; CONVICTIONS AND SENTENCES IN COUNTS 1, 4, AND 12 AFFIRMED.