NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2008 KA 0703

STATE OF LOUISIANA

VERSUS

JIMMY CHERAMIE

Judgment rendered: SEP 12 2008

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On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Criminal Number 433435; Division: E
The Honorable F. Hugh Larose, Judge Presiding

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Defendant/Appellant
In Proper Person

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

DOWNING, J.

The defendant, Jimmy Cheramie, was charged by bill of information with two counts of theft when the taking amounts to a value of over $500.00 (counts 1 and 6), violations of La. R.S. 14:67; attempted armed robbery (count 2), a violation of La. R.S. 14:64 and La. R.S. 14:27; aggravated battery (count 3), a violation of La. R.S. 14:34; armed robbery (count 4), a violation of La. R.S. 14:64; and aggravated burglary (count 5), a violation of La. R.S. 14:60. The defendant pled not guilty on each count and was tried by a jury.

As to count 1, the jury was deadlocked and the trial court declared a mistrial.

As to counts 2, 3, and 6, the defendant was found guilty as charged.

As to counts 4 and 5, the defendant was found not guilty.

As to count 2 (attempted armed robbery), the defendant was sentenced to thirty-five years imprisonment at hard labor without the benefit of probation, parole or suspension of sentence.

As to count 3 (aggravated battery), the defendant was sentenced to five years imprisonment at hard labor.

The trial court found counts two and three to be crimes of violence and, therefore, denied diminution of sentence for good behavior for these convictions. La. Code Crim. P. art. 890.1.

As to count 6 (theft of property valued at five hundred dollars or more), the defendant was sentenced to five years imprisonment at hard labor. The trial court ordered that the sentences be served consecutively.

In a counseled brief, the defendant assigns error to the trial court's denial of a challenge for cause of prospective juror Elgin Thibodaux. In a *pro se* brief, the defendant assigns error to the trial court's denial of his motion for post-verdict judgment of acquittal and motion for new trial. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On or about January 31, 2006, Tony Dardar, the owner of Tiffany's Bait Shop in Lafourche Parish, arrived at his store at approximately 5:30 a.m. After Dardar started watching television, someone lightly knocked on the door. Dardar looked through a window and observed two individuals wearing black suits. Dardar unlocked his door and sat back down. The first individual who entered the store poked a gun in Dardar's face and demanded money. Dardar pushed the gun away and the gunman demanded money again and struck Dardar in the mouth with the gun. Dardar stated that he had to get his money from his girlfriend's house and exited the store with the gunman. As they walked towards Dardar's truck, the gunman made further demands for money. Dardar opened the door of his truck, still insisting that he had to get the money from his girlfriend's residence. At that point a customer drove up and the perpetrators fled. Dardar could not see the faces of the perpetrators because they were covered. He stated that the gunman was bigger than the other perpetrator. According to the trial testimony presented by Storm Dantin, the defendant was the gunman and he was co-perpetrator.

Storm Dantin also testified that he and the defendant stole a van from Raceland, drove it to Thibodaux, and abandoned it in Lafayette. Susan Earley reported her 2000 Honda Odyssey van stolen on February 3, 2006, from her home at 123 Willow Court, Raceland. The van was recovered in Lafayette, Louisiana at 112 Meadow Lane. Rebecca Alexander, an expert in identification of latent prints, matched fingerprints lifted from the van to the defendant's fingerprints.

COUNSELED ASSIGNMENT OF ERROR

In the sole counseled assignment of error, the defendant contends that the trial court erred in denying his challenge for cause of prospective juror, Elgin Thibodaux. The defendant argues that Thibodaux failed to meet the requirement of

literacy and exhibited an inability to be fair and impartial. The defendant contends that Thibodaux's responses as a whole indicate he could not be impartial.

Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant has exhausted his peremptory challenges. **State v. Ross**, 623 So.2d 643, 644 (La. 1993). An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **State v. Ball**, 00-2277, p. 12 (La. 1/25/02), 824 So.2d 1089, 1102, cert. denied, 537 U.S. 864, 123 S.Ct. 260, 154 L.Ed.2d 107 (2002). A trial judge is vested with broad discretion in ruling on challenges for cause, and his ruling will be reversed only when a review of the entire voir dire reveals the judge abused his discretion. **Ball**, 00-2277 at p. 12, 824 So.2d at 1102. The trial judge should grant a challenge for cause, even when a prospective juror declares his ability to remain impartial, if facts revealed from the juror's responses as a whole reasonably imply bias, prejudice or the inability to render a judgment according to the law. However, a refusal to disqualify a venireman on grounds he is biased does not constitute reversible error or an abuse of discretion if, after further examination or rehabilitation, the juror demonstrates a willingness and ability to decide the case fairly according to the law and evidence. **State v. Howard**, 98-0064, pp. 7 (La. 4/23/99), 751 So.2d 783, 795, cert. denied, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999).

Here, the defense had twelve peremptory challenges and exhausted them. La. Code Crim. P. art. 799. Consequently, prejudice must be presumed from any error by the court in ruling on the defense cause challenges. At the outset, we note that the defendant's challenge for cause of the prospective juror at issue, Elgin Thibodaux, was strictly based on an argument that he demonstrated an inability to be fair and impartial, not on whether Thibodaux's level of literacy was sufficient. Before jury examination by the State or defense, the trial court read the jury

qualifications. Thibodaux expressed misgivings that led to the individual questioning of Thibodaux by the trial court regarding literacy. Thibodaux was not further questioned by the State or defense in this regard and there were no objections on this basis. The defense attorney specifically stated that he was not convinced that Thibodaux could be impartial and used a peremptory challenge when the trial court denied the defense challenge for cause. There was no objection to the trial court's ruling. A defendant may not assign as error a ruling refusing to sustain a challenge for cause made by him, unless an objection thereto is made at the time of the ruling. The nature of the objection and grounds therefor shall be stated at the time of objection. La. Code Crim. P. arts. 800A & 841A. Further, a new basis for an objection cannot be raised for the first time on appeal. La. Code Crim. P. art. 841; **State v. Drew**, 360 So.2d 500, 516 (La. 1978), cert. denied, 439 U.S. 1059, 99 S.Ct. 820, 59 L.Ed.2d 25 (1979). Nonetheless, we will consider the propriety of the trial court's denial of the challenge for cause as to the ground asserted during voir dire.

During examination by the State, Thibodaux stated that one of his best friends had been murdered and he felt bad about it. The State noted that this is not a murder case, and Thibodaux reiterated his feelings. The defense later challenged the prospective juror for cause, stating that he could not be impartial. The trial court questioned Thibodaux as to his ability to be impartial. Thibodaux stated, "I think I can do it, I'll try anyway. But I don't know how far I can go." Thibodaux stated that he did not like murderers and liars. The trial court noted this was a common aversion but continued to question Thibodaux regarding his ability to listen without making any assumptions and to base a decision upon the facts as presented. Thibodaux stated that he guessed he could do so but added that he had never been on a jury before. He concluded that he would "work it out" and "do it that way."

We cannot say that the trial court abused its discretion in denying the challenge for cause of Thibodaux. We find that the trial court's rehabilitative efforts were sufficient. Thibodaux ultimately demonstrated a willingness to be fair and impartial. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR

In his sole *pro se* assignment of error, the defendant argues that the evidence is insufficient to support the verdicts. The defendant does not contest that the instant crimes were committed, but argues that the State failed to negate the possibility of misidentification. The defendant notes that the co-perpetrator admitted to falsely accusing the defendant of the offenses. The defendant further contends that State witness Rusty Lebeouf fits the description provided by Dardar.

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). The standard of appellate review adopted by the Legislature in enacting La. Code Crim. P. art. 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. **State v. Brown**, 03-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18. 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**, 02-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420.

Where the key issue raised by the defense is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Johnson**, 99-2114, p. 4 (La. App. 1 Cir. 12/18/00), 800 So.2d 886, 888. Positive

identification by only one witness is sufficient to support a conviction. **State v. Davis**, 01-3033, p. 3 (La. App. 1 Cir. 6/21/02), 822 So.2d 161, 163.

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. 14:64A. 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. La. R.S. 14:27A. A battery is, in part, the intentional use of force or violence upon the person of another. La. R.S. 14:33. Aggravated battery is a battery committed with a dangerous weapon. La. R.S. 14:34. Theft is, in part, the taking of anything of value which belongs to another, without consent of the other and with the intent to permanently deprive the other of the subject of the taking. La. R.S. 14:67A.

Storm Dantin was nineteen years old at the time of the trial and seventeen years old at the time of the offenses. Dantin previously worked at Tiffany's Bait Shop and was related to the owner, Tony Dardar. Dantin testified that on January 31, 2006, he and the defendant went to the bait shop around 4:00 a.m. or 5:00 a.m. to rob Dardar. Dantin testified that he did not speak during the robbery because he did not want Dardar to recognize his voice. He stated that the defendant had the gun and demanded money. He added that the defendant hit Dardar in the mouth after Dardar slapped the gun. He stated that Dardar was bleeding. After a car appeared, he and the defendant left. At that point they ran toward 223rd Street, in Dantin's neighborhood. Dantin saw several people whom he knew and who also lived in the neighborhood, including his cousin, Gordon Taylor, and Dwayne Lee. Dantin also saw police cars in the area as he and the defendant continued to run. As they ran, he and the defendant removed shirts that were previously wrapped around their heads. They arrived at the home of his cousin, Rosalie Griffin, around

7:30 a.m., and the defendant shaved off all of Dantin's hair. The defendant's brother, Randy Cheramie, and Rusty LeBouef came to pick them up. During cross-examination, Dantin confirmed that LeBouef was slightly shorter and heavier than he. He stated that LeBouef was not with him and the defendant during the robbery attempt. Dantin confirmed that he and the defendant stole a van within the same time period, specifically, about one or two days after the attempted armed robbery. They abandoned it in Lafayette. Dantin stated that he and the defendant were ultimately arrested in Texas. During cross-examination, Dantin stated that he did not want to testify in the trial because "it ain't right" and responded positively when asked whether he was falsely accusing the defendant. On re-direct examination, Dantin clarified that he testified as to what really happened and that his testimony was consistent with his statements to the police, but that he should not have divulged the facts of the incidents. He added, "That's the only reason why we got caught." He insisted that his testimony was truthful.

Rusty Lebouef and Randy Cheramie testified that they saw the defendant and Dantin on the morning in question. They both further testified that the defendant and Dantin bragged about committing the attempted robbery in question.

Tiffany Lee, Dwayne Lee, and Gordon Taylor, were students at the time of the offenses and were waiting for the school bus on the morning in question. Tiffany Lee saw Dantin and another individual running down the street. She stated that both were wearing a "hoodie." She also saw police cars passing. She did not recognize the other individual. Dwayne Lee knew the defendant and Dantin and stated that he saw both of them that morning. He stated that they had on jackets with a "hoodie." Gordon Taylor also saw Dantin and identified the defendant in court as the person who was with Dantin at the time. Rosalie Griffin testified that she was related to the defendant and Dantin. She stated that they came to her home on 223rd Street on the morning in question, between 7:30 a.m. and 8:30 a.m., and

she also confirmed that the defendant shaved off Dantin's hair. She stated that they both were acting nervous.

Susan Earley testified that her son's letter jacket from Central Lafourche High School was in her van at the time it was stolen. Her son's name (William Earley) was on the jacket. Earley testified that the vehicle was worth over two thousand dollars. Detective Michael Hollier of the Lafayette Police Department testified that he was on patrol when the 2000 Honda Odyssey van registered to Susan Earley was recovered at 112 Meadow Lane. He dusted the exterior of the two front doors for fingerprints. In accordance with Rebecca Alexander's testimony, two of the latent prints in State Exhibit 15 were identified as the left, little finger of the defendant and one of the latent prints in exhibit 17 was identified again as the left, little finger of the defendant.

Officer Christopher Deslatte of the Guadalupe Bay County Sheriff's Office in Luling, Texas was one of the officers who arrested the defendant and Dantin in Texas. After fleeing from the officers in a vehicle that collided into a house and giving chase by foot, the defendant and Dantin were captured and arrested. A high school letterman's jacket with William Earley's name on it was discovered during a search of this vehicle.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of credibility of the witnesses, the matter goes to the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38. When a case involves circumstantial evidence and the trier of fact reasonably rejects a 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. 1 Cir.

1987). A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Thomas**, 05-2210, p. 8 (La. App. 1 Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 06-2403 (La. 4/27/07), 955 So.2d 683.

We conclude that the jury did not err in finding the evidence supports the convictions herein. It is undisputed that the evidence established the elements of theft of property valued at over five hundred dollars, attempted armed robbery, and aggravated battery. The State clearly negated any possibility of misidentification. The jury was reasonable in accepting Dantin's testimony detailing the offenses committed by him and the defendant. While Dardar could not identify the perpetrators, several witnesses saw the defendant with Dantin in the area moments after the attempted armed robbery took place. Both were acting in a very suspicious manner. Further, the defendant's fingerprints were found on the stolen van. Viewing the evidence in the light most favorable to the prosecution, we find that the evidence in the record sufficiently supports the convictions. For the above reasons, the pro se assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED