NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1308

STATE OF LOUISIANA

VERSUS

DAMON CAMEL

Judgment Rendered: FEB 14 2007

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 08-03-0714

Honorable Richard D. Anderson, Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

The defendant, Damon Camel, Sr., was charged by bill of information with two counts of armed robbery (counts I and III), violations of La. R.S. 14:64; and two counts of possession of a firearm/carrying a concealed weapon by a convicted felon (counts II and IV), violations of La. R.S. 14:95.1, and pled not guilty Following a jury trial, he was found guilty as charged on count I and guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1, on count III.[1] On count I, he was sentenced to fifteen years at hard labor without benefit of probation, parole, or suspension of sentence. On count III, he was sentenced to ten years at hard labor. The court ordered that the sentences imposed on counts I and III would run concurrently with each other, but consecutively with any other sentence the defendant was serving. Thereafter, in connection with count I, the State filed a habitual offender bill of information against the defendant.[2] Following a hearing, he was adjudged a second felony habitual offender, the previously imposed sentence on count I was vacated, and he was sentenced on count I to fifty years at hard labor without benefit of probation, parole, or suspension of sentence. He now appeals, designating one assignment of error. We affirm the conviction, habitual offender adjudication, and sentence on count I, and the conviction and sentence on count III.

ASSIGNMENT OF ERROR

The evidence was legally insufficient to support the convictions.

FACTS

Early on May 31, 2003, Raymond Billups drove his cousin, Odis Lee

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[1] The State dismissed counts II and IV prior to jury deliberations.

[2] The predicate offense was set forth as the defendant's November 15, 1995 guilty plea, under 19th Judicial District Court docket #6-95-83, to possession of cocaine.

Martin, Jr.[3] to the City Nights nightclub in Martin's vehicle. Martin exited the vehicle on the passenger's side. While Billups had the vehicle's driver's side door open to speak with a friend, a man approached him and asked if he and Martin were rappers. Billups noticed the man had a "scar" over his eye. Billups answered the question negatively, and the man went away. Approximately three or four minutes later, the man returned and implied that they were rappers, and wanted to hear Billups's and Martin's CD. Billups told the man that neither he nor Martin had a CD. In an effort to get rid of the man, Billups also told the man that the car was "running hot." The man asked Billups to start the car. The man went away, but returned approximately three or four minutes later with an accomplice who had his face covered with a blue bandanna and braided hair. The man placed a gun to Billups's head. Billups described the weapon as "a black semi-automatic." The man stated, "Get out car (sic), big boy[.] Don't do nothing stupid, you know." The accomplice pointed a revolver at Martin and then got into the car. Billups got out of the car, and the man and his accomplice drove away in the vehicle. Billups reported the robbery to the police and gave them a description of the robber. He described the robber as 5' 9'' to 6' tall, with a low bald fade haircut, and a "cut" over his eye. Billups indicated he knew the robber's eye was disfigured. The parking lot was lit by large overhead lights and lights from a Hancock Fabric store. Billups indicated he had no trouble seeing in the parking lot and saw the robber for at least a minute. He identified the defendant in court as the robber and had no doubt in his identification. Martin testified the robbery occurred at approximately 5:00 a.m., and the robber stole his 1985 Chevrolet Caprice. The vehicle had 20" Dayton rims and a Panasonic CD player. The rims cost between $1200 and $1300.

At approximately 8:10 a.m. that same day, the vehicle was discovered at 4866 Bank Street.

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[3] Martin was named as the victim of count I.

On June 6, 2003, a man grabbed Reginald Demond Tackno[4] from behind as Tackno exited the home of a female friend. The man put an object, which felt like a gun to Tackno's head, pulled him from the porch, and demanded his car keys. Tackno surrendered his car keys, and the robber told him to walk off and not to look back. As the robber drove off in Tackno's vehicle, Tackno noticed the robber was "kind of bright" and had a scar on his face. Tackno went to look for his car with his cousin. Tackno asked different people if they had seen the car. One of the people Tackno spoke to told him that the car had been pulled behind a house located on Bank Street, which he pointed out to Tackno. Tackno provided the police with the information. Tackno testified the robber stole his 1985 Pontiac Bonneville. The vehicle had 20" Dayton rims and a Pioneer stereo system.

Baton Rouge City Police Officer Patrick Caldwell responded to Tackno's report of an armed robbery at approximately midnight. At approximately 4:00 a.m., Tackno advised the police that he had found his vehicle and directed them to 4760 Bank Street. Tackno's vehicle was behind the residence. The vehicle was partially jacked up and was partially covered with a tarp. There were tools, lug wrenches, and other items lying around the vehicle. The police tried to make contact with someone inside the house. They banged on the door for approximately an hour before the door was opened.

Baton Rouge Police Department Sergeant Rudy Babin also responded to the Bank Street address on the morning of the Tackno robbery. The home was within three miles of the location where Tackno had been robbed. The defendant and a female eventually responded to the police banging on the door. The defendant was advised of his *Miranda* rights,[5] and the defendant indicated when asked, that he was the owner of the house. Sergeant Babin advised the defendant of the stolen,

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4 Tackno was named as the victim of count III.

5 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

partially stripped vehicle in his backyard and asked the defendant to accompany her to the rear of the house. The defendant acted very surprised to see the vehicle. He claimed he did not know how the vehicle got behind his house and claimed it had not been there when he went to sleep. The defendant consented to a search of his home. Tackno's car stereo was discovered in the west bedroom of the home.

Thereafter, the defendant indicated he wanted to put on a shirt, and Officer Caldwell escorted him to his bedroom. After the defendant threw around some clothes, Officer Caldwell saw something in the defendant's hand. The object was a set of car keys and a remote control to a car alarm. The remote control activated the car alarm of Tackno's vehicle. Thereafter, the police recovered the remote control to Tackno's car stereo from the front right pocket of the defendant's pants. Subsequently, fingerprints matching those of the defendant were recovered from Tackno's vehicle.

On June 10, 2003, due to similarities between the Billups/Martin and Tackno robberies, and due to similarities in the descriptions of the robber, Baton Rouge City Police Officer Tillmon Cox presented to Billups a six-photograph line-up, which included a photograph of the defendant. Billups selected the defendant's picture as that of the robber in approximately two seconds. He was one hundred percent certain of the identification.

The State also introduced the defendant's booking photograph and sheet into evidence. The sheet depicts a light-skinned black male, 6' tall, with a missing right eye.

SUFFICIENCY OF THE EVIDENCE

In connection with count I, the defendant argues the only evidence which connected him to the robbery was the identification made by Billups, and that identification was induced by a highly suggestive police tactic: which indicated to Billups that the man who had robbed him was in the line of photographs he was

being shown by being told to "look at it carefully and to point to which number [he thought] he was;" and which included only one photograph of a person with a disfigured right eye, where the description of the perpetrator given to the police was that he had a disfigurement in his right eye.

In connection with count III, the defendant argues the most that the evidence established was that he was in possession of stolen property.

COUNT I

We do not reach the merits of the defendant's challenge to his conviction on count I. The defendant failed to move to suppress the identification prior to trial and made no objection to the identification at trial. A defendant who fails to file a motion to suppress identification, and who fails to object at trial to the admission of the identification testimony, waives the right to assert the error on appeal. See La. C.Cr.P. arts. 703(F) & 841; State v. Moody, 2000-0886, p. 4 (La. App. 1st Cir. 12/22/00), 779 So.2d 4, 8, writ denied, 2001-0213 (La. 12/7/01), 803 So.2d 40.

COUNT III

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. Where the key issue 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. Wright, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486-87, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, State ex

rel. Wright v. State, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. Wright, 98-0601 at p. 3, 730 So.2d at 487.

First-degree 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, when the offender reasonably leads the victim to believe he is armed with a dangerous weapon. La. R.S. 14:64.1(A).

The first-degree robbery statute has objective and subjective components. The State must prove that the offender induced a subjective belief in the victim that he was armed with a dangerous weapon and that the victim's belief was objectively reasonable under the circumstances. The statute thus excludes unreasonable panic reactions by the victim, but otherwise allows the victim's subjective beliefs to determine whether the offender has committed first-degree robbery or the lesser offense of simple robbery in violation of La. R.S. 14:65. Direct testimony by the victim that he believed the defendant was armed, or circumstantial inferences arising from the victim's immediate surrender of his personal possessions in response to the defendant's threats, may support a conviction for first-degree robbery. State v. Gaines, 633 So.2d 293, 300 (La. App. 1st Cir. 1993), writ denied, 93-3164 (La. 3/11/94), 634 So.2d 839 (citing State v. Fortune, 608 So.2d 148, 149 (La. 1992) (per curiam)).

After a thorough review of the record, we are convinced the evidence, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of first-degree robbery and the defendant's identity as the perpetrator of that offense. The evidence, thus viewed, established that the defendant induced a subjective belief in Tackno that the defendant was armed with a dangerous weapon and that Tackno's belief was objectively reasonable under the circumstances.

The verdict rendered by the jury indicates it accepted the testimony of the State's witnesses. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. State v. Lofton, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

Moreover, in a case involving circumstantial evidence in which the jury has reasonably rejected the defense offered at trial, the reviewing court does not determine if another possible hypothesis has been suggested by the defendant that could explain the events in an exculpatory fashion. Instead, the court must evaluate the evidence in a light most favorable to the State and determine if the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. State v. Schleve, 99-3019, pp. 5-6 (La. App. 1st Cir. 12/20/00), 775 So.2d 1187, 1193, writs denied, 2001-0210 (La. 12/14/01), 803 So.2d 983, 2001-0115 (La. 12/14/01), 804 So.2d 647, cert. denied, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002). Purposeful misrepresentation

reasonably raises the inference of a guilty mind. State v. Mitchell, 99-3342, p. 11 (La. 10/17/00), 772 So.2d 78, 85.

In the instant case, Tackno's vehicle was discovered partially stripped behind the defendant's house a few hours after it had been taken from Tackno; the defendant's fingerprints were on the vehicle; the defendant was holding the remote control to the vehicle's alarm; the vehicle's stereo was in the defendant's house; and the stereo's remote control was in the defendant's pocket. Given these facts, the jury obviously concluded that the defendant lied when he claimed to have no knowledge of how Tackno's vehicle got behind the defendant's house. The instant guilty verdict indicates the jury reasonably rejected the defendant's hypothesis of innocence and concluded the defendant was the perpetrator. In reviewing the evidence, we cannot say that the jury's determination is irrational under the facts and circumstances presented to them. See State v. Ordodi, 2006-207, p. 14 (La. 11/29/06), ___ So.2d ___, ___, 2006 WL 3423234.

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION AND SENTENCE ON COUNT I AFFIRMED; CONVICTION AND SENTENCE ON COUNT III AFFIRMED.