NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0791

STATE OF LOUISIANA

VERSUS

JAMES D. ROSS

DATE OF JUDGMENT: NOV - 9 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 450000, DIV. B, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE AUGUST J. HAND, JUDGE

* * * * * *

Walter Reed, D.A.
Covington, Louisiana

Counsel for Plaintiff-Appellee
State of Louisiana

Kathryn W. Landry
Baton Rouge, Louisiana

Prentice White
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
James D. Ross

* * * * * *

BEFORE: WHIPPPLE, KUHN, AND GUIDRY, JJ.

Disposition: CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND ENHANCED SENTENCE IMPOSED ON COUNT ONE AFFIRMED. ENHANCED SENTENCES IMPOSED ON COUNTS TWO AND THREE VACATED AND REMANDED FOR RESENTENCING ON COUNTS TWO AND THREE.

KUHN, J.

Defendant, James D. Ross, was charged by bill of information (as amended) on count one with simple robbery, on count two with illegal possession of stolen things having a value over $1000.00, and on count three with false personation of a peace officer, violations of La. R.S. 14:65, La. R.S. 14:69, and La. R.S. 14:112.1. Defendant entered a plea of not guilty as to each count. After a trial by jury, defendant was found guilty as charged on counts one and two, and guilty of the responsive offense of attempted false personation of a peace officer on count three. See La. R.S. 14:27. The trial court denied defendant's motion for post-verdict judgment of acquittal and motion for a new trial and sentenced him to seven years imprisonment at hard labor as to counts one and two, and to one year imprisonment at hard labor on court three. The trial court ordered that the sentences be served concurrently.

The State filed a habitual offender bill of information that defendant denied and after a habitual offender hearing, defendant was adjudicated a fourth-felony habitual offender. Enhancing each count, the trial court vacated the previously imposed sentences and sentenced defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one, and to life imprisonment at hard labor on counts two and three.[1] The trial court ordered that the sentences be served concurrently. Defendant now appeals, assigning error to the sufficiency of the evidence in support of the convictions. Defendant also filed a supplemental pro se brief wherein he challenges the legality

[1] We note that the sentencing minute entry indicates that all of the enhanced sentences were imposed without the benefit of parole; however, according to the sentencing transcript, parole was only restricted as to count one. When there is a discrepancy between the minutes and the transcript, the transcript prevails. ***State v. Lynch***, 441 So.2d 732, 734 (La. 1983).

of the sentences. For the following reasons, we affirm the convictions, habitual offender adjudications, and the sentence imposed on count one, vacate the sentences imposed on counts two and three, and remand for resentencing on counts two and three.

STATEMENT OF FACTS

On or about December 26, 2007, as a group of friends, Brian McManus (the driver), Richard Orser, and a third individual only identified as Michael, entered the parking lot of Texas Roadhouse Restaurant in Slidell, Louisiana to have dinner, a white Ford F-150 pulled in front of and blocked McManus's vehicle. The white strobe lights of the Ford were activated.[2] Orser noticed the approaching vehicle and removed his wallet from his back pocket and threw it under the seat of the vehicle in which he was riding. Two males exited the blocking vehicle. One of the males, later identified as defendant, exited from the passenger side and approached the group of friends as they exited McManus's blocked vehicle.

Defendant stated that he was an undercover police officer and accused Orser of concealing drugs under the seat. Defendant grabbed Orser and told him not to make any sudden moves, pushed him against McManus's vehicle, frisked him, and instructed him to retrieve his wallet and empty its contents and his pockets. Orser complied with defendant's orders. Defendant also instructed McManus to walk to the front of his vehicle and place the contents of his pockets on the hood and McManus complied. After defendant and the other individual left, McManus noticed that his wallet had been taken from the hood of his vehicle. McManus's

[2] Coincidentally, McManus's vehicle was also a white Ford F-150; however it did not have strobe lights.

wallet contained approximately one hundred fifty dollars, gifts cards, one or more credit cards, and a debit card.

On December 28, 2007, McManus and Orser identified defendant in a photographic lineup and again at trial.[3] The Slidell Police Department determined that the white Ford F-150 used in the commission of the instant offenses was stolen from the Walker County Commission. The police recovered the truck while it was in the possession of Brandi Taylor and Daniel Lawson in or near Jasper, Alabama. Defendant was located in the Jasper, Alabama area and transported back to Louisiana.

COUNSELED ASSIGNMENT OF ERROR

In the sole counseled assignment of error, defendant asserts that the evidence is insufficient to support the convictions. As to the simple robbery conviction on count one, defendant does not dispute the fact that McManus's wallet was taken but claims that he did not exhibit any sign of force or intimidation toward the three individuals. Defendant contends that two of the men testified that they were unsure whether he was a police officer because of his attire and lack of a badge or firearm, and that no one saw who actually took the wallet, although Lawson was found in possession of the wallet and the truck. Additionally, defendant maintains that he was evicted from the truck when he learned of and questioned Lawson about the wallet.

As to the conviction for illegal possession of stolen things valued at over $1,000.00 on count two, defendant avers that he was not in constructive possession of the vehicle and had no knowledge it had been stolen from a state

[3] The third occupant of McManus's vehicle did not testify at the trial.

agency. In support of this, defendant notes that the vehicle's steering wheel column had not been broken or otherwise compromised, there were no decals or logos that suggested it belonged to a government agency or state department, and Lawson had the keys for the vehicle.

As to the conviction on count three for attempted false personation of a peace officer, defendant points out that he neither displayed a badge nor wore a uniform. He suggests that he was heavily intoxicated and his hair was barely combed. While defendant acknowledges that there was trial testimony indicating he had claimed to be undercover in an effort to explain his appearance, he asserts that it would be odd for an undercover officer to disclose such information. Defendant claims that if the persons intended to be deceived by an impersonation did not believe the offender was an officer, the offender should not be convicted of the offense. Lastly, defendant states that he did not obtain any advantage and was not responsible for taking McManus's wallet.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. C.Cr.P. art. 821; ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); ***State v. Johnson***, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). 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 (La. App. 1st Cir. 2/14/03), 845 So.2d

416, 420. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. ***State v. Captville***, 448 So.2d 676, 680 (La. 1984).

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 (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).

Pursuant to La. R.S. 14:65(A), simple robbery is defined as "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, but not armed with a dangerous weapon." Thus, the elements necessary to sustain a conviction of simple robbery are: (1) the taking of anything of value; (2) belonging to another; (3) from the person of another; (4) by use of force or intimidation. Black's Law Dictionary (9th ed. 2009) defines force, in part, as power, violence, or pressure directed against a person or thing. Simple robbery is a general intent crime. In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts that have been declared criminal. ***State v. Payne***, 540 So.2d 520, 523-24 (La. App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989). General criminal intent is present when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the

prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2). Though intent is a question of fact, it may be inferred from the circumstances of the transaction. ***State v. Henderson***, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. Louisiana Revised Statutes 14:24 provides, in pertinent part, that all persons "concerned in the commission of a crime" are principals. Only those persons who knowingly participate in the planning or execution of a crime are principals. ***State v. Pierre***, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (per curiam).

Illegal possession of stolen things is the intentional possessing, procuring, receiving, or concealing of anything of value that has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses. La. R.S. 14:69(A). Accordingly, the crime has these elements: (1) intent, (2) possessing, procuring, receiving, or concealing stolen goods, and (3) knowledge that the goods are stolen. ***State v. Dyson***, 98-1387 (La. App. 1st Cir. 4/1/99), 734 So.2d 786, 789. Illegal possession of stolen things is a general intent crime. See ***State v. Davis***, 371 So.2d 788, 790 (La. 1979).

In ***State v. Chester***, 97-1001 (La. 12/19/97), 707 So.2d 973, 974 (per curiam), the Louisiana Supreme Court stated:

> [J]urors may infer the defendant's guilty knowledge from the circumstances of the offense. ***See Barnes v. United States***, 412 U.S. 837, 843, 93 S.Ct. 2357, 2362, 37 L.Ed.2d 380 (1973) ("For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods.").

The prosecution does not need to prove actual possession in order to obtain a conviction. Instead, a conviction may be supported by a showing of constructive possession. Such possession exists when the item is within the defendant's dominion or control. ***State v. Short***, 2000-866 (La. App. 5th Cir. 10/18/00), 769 So.2d 823, 827, writ denied, 2000-3271 (La. 8/24/01), 795 So.2d 336; ***State v. Skipper***, 527 So.2d 1171, 1173 (La. App. 3rd Cir. 1988), writ denied, 559 So.2d 132 (La. 1990); ***State v. Mercadel***, 503 So.2d 608, 610-11 (La. App. 4th Cir. 1987).

False personation of a peace officer is defined, in pertinent part, as the performance of any one or more of the following acts with the intent to injure or defraud or to obtain or secure any special privilege or advantage: (1) impersonating any peace officer or assuming, without authority, any uniform or badge by which a peace officer is lawfully distinguished; (2) performing any act purporting to be official in such assumed character. La. R.S. 14:112.1(A). "Peace officer" shall include commissioned police officers, sheriffs, deputy sheriffs, marshals, deputy marshals, correctional officers, constables, wildlife enforcement agents, park wardens, livestock brand inspectors, forestry officers, military police, fire marshal investigators, probation and parole officers, attorney general investigators, and district attorney investigators. La. R.S. 14:112.1(B)(2). False personation of a peace officer is a specific intent crime. ***State v. Mayberry***, 95-2013 (La. App. 4th Cir. 9/4/96), 680 So.2d 722, 724. Specific criminal intent is that 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). "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; it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." La. R.S. 14:27(A).

Specific intent is a legal conclusion to be resolved ultimately by the trier of fact. ***State v. Guidry***, 476 So.2d 500, 503 (La. App. 1st Cir. 1985), writ denied, 480 So.2d 739 (La. 1986). 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 the action of the defendant. ***Guidry***, 476 So.2d at 503. Voluntary intoxication is a defense to a prosecution for a specific intent crime only if the circumstances indicate that it has precluded the presence of specific criminal intent. La. R.S. 14:15(2); ***Guidry***, 476 So.2d at 503. The defendant has the burden of proving the existence of that condition at the time of the offense by a preponderance of evidence. ***State v. Carter***, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 436. When defenses that actually defeat an essential element of an offense, such as intoxication, are raised by the evidence, the State must overcome the defense by evidence that proves beyond a reasonable doubt that the mental element was present despite the alleged intoxication. ***Guidry***, 476 So.2d at 503.

McManus testified that he thought the vehicle that defendant exited was a police vehicle because he was aware that some Slidell police officers used the same model as a police vehicle, and because it had blinking, white strobe lights. After McManus entered a parking spot, defendant positioned the truck in a manner that blocked the exit of McManus's vehicle. McManus and Orser testified that defendant placed his hands behind his back after he exited the vehicle in the same

manner that police officers often do when their weapons are located in their belts. McManus also noted that defendant was yelling and moving quickly. Based on defendant's statements, his questioning of Orser, and the strobe lights on the vehicle he exited, McManus assumed defendant was indeed an undercover police officer. McManus and Orser raised their hands up.

When defendant removed a box of firecrackers from McManus's vehicle and threw them around, McManus and Orser became suspicious and McManus requested that defendant display a badge. Defendant told McManus to step back and not ask anymore questions or he would be "in trouble." According to Orser's testimony, defendant stated, "I'm an undercover cop, I don't need to show identification." At that point, McManus was afraid, fearing defendant may have a weapon, and stayed out of defendant's way. The other individual who exited the truck along with defendant walked around the perimeter of the truck and appeared to be talking on a cellular telephone or walkie-talkie.

Detective Brian Brown of the Slidell Police Department assisted in the investigation and apprehension of defendant. Detective Brown testified that Brandi Taylor and Daniel Lawson were arrested in or near Jasper, Alabama while in possession of the Ford truck. The vehicle was stolen from the Walker County Commission and had a retail value of $23,775.00. On February 12, 2008, after defendant was located in the Jasper, Alabama area and transported back to Louisiana, defendant was advised of his ***Miranda*** rights, an advice and waiver of rights form was executed, and defendant gave a recorded statement.

During his recorded statement, defendant stated that he had been drinking all day when Taylor and Lawson came along in the truck and asked him if he

could help them get rid of the truck in Louisiana. Defendant stated that while they were en route to Louisiana, Taylor and Lawson informed him that the vehicle had been stolen. Defendant further stated that he had already suspected as much since they told him that they only wanted to get $1,500.00 to $2,500.00 for the truck. They rode around and ended up at a steak house. Defendant observed one of the occupants of the vehicle they approached hiding something under the seat and suspected they had drugs. Defendant stated that one of the individuals gave him his wallet. He confirmed that he and Lawson forced the individuals to put their hands on their vehicle and admitted to doing a pat-down frisk. According to defendant, he got upset when he found out that Lawson took the wallet and he was made to exit the truck. Defendant stated that he thought the encounter would only involve drugs. Defendant stated that the encounter was not planned but was a spur of the moment incident. Defendant denied pretending to be a police officer but confirmed that Lawson was on the phone pretending to be an officer.

During the trial, defendant testified that he had been drinking alcohol (Vodka) at the time of the offenses. Defendant further testified that he did not know for sure if the truck had been stolen, noting that Lawson had the keys for the vehicle. Defendant stated that he concluded that the truck was stolen by the time they arrived in Louisiana, stating that he "just kind of picked it up." According to his testimony, he never had control of the truck. Defendant testified that he had no intention of stealing any of the victims' belongings. Defendant further testified that he and Lawson argued when he realized that Lawson had stolen the wallet. Defendant again denied claiming to be a police officer. On cross-examination, defendant, as in his recorded statement, admitted to frisking Orser.

In this case, it was clear that based on the testimony of McManus and Orser, both individuals were intimidated, complied with orders, feared defendant had a weapon, and believed during at least part of the encounter that he was a police officer. The evidence clearly supports a finding that defendant was at the least a principal in the robbery of McManus and the taking of his wallet. The evidence further shows that defendant knew the truck in question was stolen and intentionally possessed it. The fact that defendant used the vehicle to carry out the intentional acts in question shows that defendant had control of the vehicle. It is further evident that defendant committed several acts tending toward the false personation of a peace officer, specifically stating that he was an undercover police officer and acting in such a manner. Defendant has failed to show that any intoxication prevented him from forming the necessary intent to commit the instant offenses. He was able to successfully play the role of an officer and remembered many details from the event. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See ***State v. Ordodi***, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. 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 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found proof beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, of the essential elements of simple robbery, possession of stolen property valued at over one

thousand dollars, and attempted false personation of a peace officer. Thus, the counseled assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR

In the sole pro se assignment of error, defendant contends that the trial court erred in imposing illegal sentences. Defendant specifically contends that the trial court erred in sentencing him to life imprisonment under La. R.S. 15:529.1(A)(1)(c)(ii), asserting that his offenses fail to meet the requirements of that subsection of the habitual offender law.[4] Defendant maintains that based on the underlying offenses on counts two and three, the sentences imposed on those counts were illegally enhanced. Further, he claims that the trial court failed to specify which offenses were used to adjudicate him a fourth-felony offender and asserts that it appears the trial court used only his current convictions as a basis for his fourth-felony habitual offender status.

At the beginning of the habitual offender hearing, the prosecution stated its intent to prove allegations under subsection "(c)(ii)" of the habitual offender law as to each underlying conviction, and the trial court acknowledged such intention. After the State rested, the trial court noted that the State presented sufficient evidence to prove defendant's status as a fourth felony offender under the requirements of La. R.S. 15:529.1, and, enhancing each count, imposed three sentences of life imprisonment, to be served concurrently. However, in accordance with La. R.S. 15:529.1(A)(1)(c)(ii):

> If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B), a sex offense as defined in R.S. 15:540 *et seq.* when the victim is under the age of

[4] We note that the references made herein to the habitual offender law pertain to the law in effect at the time of the underlying offenses.

> eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

In the instant case, two of the fourth felonies -- the underlying convictions of possession of stolen things valued at over $100.00 and attempted false personation of a peace officer -- are not either (1) a crime of violence, (2) a violation of the Uniform Controlled Dangerous Substances Law or (3) punishable by twelve years. Therefore, La. R.S. 15:529.1(A)(1)(c)(ii) was not applicable on those counts; rather La. R.S. 15:529.1(A)(1)(c)(i) was applicable and it provided for a sentencing range of twenty years to life imprisonment. Thus, we find that the trial court erred in imposing mandatory life sentences as to the underlying convictions on counts two and three. These two enhanced sentences must be vacated and remanded for resentencing under La. R.S. 15:529.1(A)(1)(c)(i) (prior to 2010 amendments).

Regarding the other fourth felony enhanced herein -- i.e., the underlying conviction of simple robbery -- we first note that the offense is a crime of violence and, therefore, meets the above criteria for enhancement. La. R.S. 14:2(B)(23). Thus, we look to the predicate offenses.

At the habitual offender and sentencing proceeding, the State presented, and the trial court accepted, evidence to prove the following 22nd J.D.C., St. Tammany Parish predicate convictions: a January 22, 1999 possession of cocaine guilty plea (a violation of La. R.S. 40:967, under docket number 288417); a November 18, 1993 theft guilty plea (a violation of La. R.S. 14:67, under docket number

205466); a November 7, 1990 simple burglary of an inhabited dwelling guilty plea (a violation of La. R.S. 14:62.2, under docket number 186051); and a January 12, 1987 simple burglary guilty plea (a violation of La. R.S. 14:62, under docket number 156935). Two of defendant's prior felonies -- simple burglary of an inhabited dwelling and simple burglary -- are crimes punishable by imprisonment for twelve years. Thus, the sentence on count one was properly enhanced under La. R.S. 15:529.1(A)(1)(c)(ii) to the mandatory sentence of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence because the underlying fourth felony on count one is a crime of violence and two of the prior crimes are punishable by twelve years imprisonment. Though, on appeal defendant points out that the trial court did not specify which of the predicate convictions were used to establish his fourth-felony offender status, he did not raise this issue at the habitual offender hearing. To preserve the right to appellate review of an alleged trial court error, a party must state a contemporaneous objection with the occurrence of the alleged error as well as the grounds for the objection. La. C.Cr.P. art. 841(A); La. C.E. art. 103(1). Moreover, defendant has failed to show how he was prejudiced in this regard. See ***State v. Johnson***, 99-2371 (La. App. 1st Cir. 9/22/00), 768 So.2d 234, 237.

REVIEW FOR ERROR

In his supplemental brief, defendant requests an examination of the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, regardless of whether such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

After a careful review of the record in these proceedings, outside of the sentencing errors noted above, we have found no reversible errors. See ***State v. Price***, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

DECREE

For these reasons, the convictions, habitual offender adjudications, and the enhanced penalty imposed against defendant, James D. Ross, on count one is affirmed. The enhanced sentences imposed against him on counts two and three are vacated and remanded for resentencing.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND ENHANCED SENTENCE IMPOSED ON COUNT ONE AFFIRMED. ENHANCED SENTENCES IMPOSED ON COUNTS TWO AND THREE VACATED AND REMANDED FOR RESENTENCING ON COUNTS TWO AND THREE.