

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1988

STATE OF LOUISIANA

VERSUS

TIMOTHY JAMES SYLVESTER

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DATE OF JUDGMENT: MAY 06 2011

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 10-08-0397, SEC. 7, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE DONALD JOHNSON, JUDGE

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

Defendant, Timothy James Sylvester, was charged by bill of information with being a felon in possession of a firearm, a violation of La. R.S. 14:95.1. He pled not guilty and, following a jury trial, was found guilty as charged. Subsequently, defendant filed a motion for a post-verdict judgment of acquittal, which was denied by the trial court. Thereafter, the trial court sentenced defendant to serve twelve years at hard labor, without benefit of parole, probation or suspension of sentence. Defendant's motion to reconsider sentence was denied. Defendant now appeals, alleging in his sole assignment of error that the evidence was insufficient to prove his identity as the same person convicted in the predicate offense. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On August 10, 2008, Baton Rouge City Police Officer Derek Evans observed defendant drive a truck across private property in order to avoid a vehicle stalled in the roadway. After helping move the stalled vehicle, Officer Evans initiated a traffic stop of defendant's truck several blocks away. Defendant was the only occupant of the truck. When Officer Evans requested his driver's license, defendant, who was outside the vehicle at this point, indicated it was inside the truck. Officer Evans walked back to the truck with defendant and observed him remove his driver's license from a pair of jeans lying on the front seat. Due to defendant's extreme nervousness, Officer Evans requested consent to search the truck, which defendant granted.

Officer Evans began the search by moving the pair of jeans from which defendant had earlier removed his driver's license. When he did so, a .22 caliber pistol fell from a pocket in the jeans. After advising defendant of his *Miranda* rights, Officer Evans asked him about the gun and whether he was a convicted felon. Defendant indicated he was a convicted felon and was at that time on parole for an armed robbery conviction. Officer Evans confirmed that defendant had an armed robbery conviction and placed him under arrest for being a convicted felon in possession of a firearm. His continued search of the truck revealed a 9 millimeter Glock pistol under the driver's seat, together with an extra magazine. According to Officer Evans, defendant displayed knowledge of both pistols being present. Defendant told him he had picked up the .22 caliber pistol to return it to his brother, who owned the gun. He claimed the Glock pistol belonged to his father.

LAW AND ANALYSIS

In his sole assignment of error, defendant contends the evidence was insufficient to prove his identity as the same person convicted of the predicate offense relied upon by the State to establish that he was a convicted felon.¹

The standard of review for the sufficiency of evidence to uphold a conviction is whether, after viewing the evidence in the light most favorable to

¹ Under the circumstances present, we reject the State's assertion that defendant waived this assignment of error by failing to designate that the closing arguments and the hearing held on defendant's motion for post-verdict judgment of acquittal should be included in the appellate record. The State argues that, because defendant deliberately omitted these pertinent portions of the record, he waived the right to have his assignment of error considered. Although the State hints that defendant may be arguing a hypothesis of innocence on appeal that was presented to and rejected by the jury, it does not specifically allege this occurred. Moreover, the State was free to designate for transcription any portions of the record it believed were necessary to oppose this appeal. See La. C.Cr.P. art. 914.1A.

the prosecution, any rational trier-of-fact could conclude that the state proved the essential elements of the crime and the defendant's identity beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also La. C.Cr.P. art. 821; *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. The *Jackson* standard of review incorporated in La. C.Cr.P. art. 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 trier-of-fact must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Riley*, 91-2132, p. 8 (La. App. 1st Cir. 5/20/94), 637 So.2d 758, 762. 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).

In order to sustain a conviction for being a convicted felon in possession of a firearm, the State must prove: (1) possession of a firearm; (2) conviction of an enumerated felony;² (3) absence of the ten-year statutory period of limitation; and (4) general intent to commit the offense. La. R.S. 14:95.1A; *State v. Husband*, 437 So.2d 269, 271 (La. 1983); *State v. Sims*, 98-1304, p. 4 (La. App. 1st Cir. 4/1/99), 734 So.2d 813, 816. In the instant case, defendant contends the State

² The predicate convictions enumerated for a violation of La. R.S. 14:95.1A include any felony that is defined in La. R.S. 14:2B as a crime of violence. Armed robbery is a felony crime of violence listed in La. R.S. 14:2B(21). See La. R.S. 14:64B.

failed to meet its burden of proving defendant was convicted of a predicate offense.

To meet this burden, the State introduced into evidence a certified bill of information charging a person with the same name and date of birth as defendant with armed robbery and a certified minute entry, dated November 29, 1999, reflecting a conviction for armed robbery under the same docket number as the bill of information. However, defendant argues that without establishing that the offender convicted for the armed robbery had the same driver's license number or social security number as defendant, it remains a reasonable possibility that another person with the same name as defendant could also have been born on the same day and was the person convicted for armed robbery.

In Louisiana, proof that a person of the same name has been previously convicted does not constitute *prima facie* evidence that the two individuals are the same. Rather, the State must offer additional proof that the accused is the same person as the defendant previously convicted in the predicate offense. *City of Monroe v. French*, 345 So.2d 23, 24 (La. 1977); *State v. Pitre*, 532 So.2d 424, 426 (La. App. 1st Cir. 1988), writ denied, 538 So.2d 590 (La. 1989). Various methods may be used to prove that the defendant on trial is the same person whose name is shown as the defendant in the evidence of the prior conviction, such as by testimony of witnesses, by expert opinion as to the fingerprints of the accused when compared with those of the person previously convicted, by photographs contained in a duly authenticated record, or by evidence of an identical driver's license number, sex, race, and date of birth. See *State v. Curtis*, 338 So.2d 662, 664 (La. 1976); *Pitre*, 532 So.2d at 426. Moreover, while defendant focuses on

the lack of evidence proving defendant has the same driver's license number or social security number as the person previously convicted of armed robbery, the jurisprudence makes it clear that for purposes of establishing a predicate offense identity may be established by any competent evidence. See *State v. Payton*, 2000-2899, p. 8 (La. 3/15/02), 810 So.2d 1127, 1132; *State v. Lindsey*, 99-3302, p. 7 (La. 10/17/00), 770 So.2d 339, 344 n.3, cert. denied, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663 (2001).

After a thorough review of the record, we are convinced that the State sufficiently established defendant is the same person previously convicted for armed robbery. The bill of information filed in this case identified defendant as "Timothy James Sylvester [,] W/M [,] DOB: 4/13/1972," and listed his address as 1951 Stafford, Baton Rouge, Louisiana, 70810. The bill of information introduced in connection with the predicate conviction identified defendant charged with armed robbery in that case as "Timothy J. Sylvester [,] W/M [,] DOB: 4/13/72," and listed his address as 1951 Stafford Avenue, Baton Rouge, Louisiana, 70810.

Thus, defendant's name, date of birth, race, sex, and address match those of the person previously convicted of armed robbery. Additionally, there was testimony at trial that defendant admitted to Officer Evans that he was on parole for a prior armed robbery conviction. Officer Evans further testified that he confirmed defendant's prior conviction at the time of defendant's arrest for the instant offense. Viewing defendant's admission, together with the other identifying information presented by the State, in the light most favorable to the State, we are convinced that any rational trier of fact could have found beyond a

reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was the same person convicted in the predicate offense. This assignment of error lacks merit.

REVIEW FOR ERROR

Initially, we note that our review for errors is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and “error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.” La. C.Cr.P. art. 920(2).

In the present case, the trial court failed to impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars required by La. R.S. 14:95.1B. Although the failure to impose the fine is an error under Article 920(2), it certainly is not inherently prejudicial to defendant. Because the trial court’s failure to impose the fine was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See State v. Price, 2005-2514, pp. 18-22 (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, we affirm the conviction and sentence of defendant, Timothy James Sylvester.

CONVICTION AND SENTENCE AFFIRMED.