

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0232

STATE OF LOUISIANA

VERSUS

CHAD R. HERQUET

Judgment Rendered: September 20, 2006

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On Appeal from the Twenty-Second Judicial District Court
In and For the Parish of St. Tammany
State of Louisiana
Docket No. 383230

Honorable Elaine W. Dimiceli, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

DMC
RHP
Grey

McCLENDON, J.

Defendant, Chad R. Herquet, was charged by bill of information with unauthorized use of an access card (value over \$500.00), a violation of LSA-R.S. 14:67.3. He pled not guilty. Defendant was tried by a jury and convicted as charged. He was sentenced to imprisonment at hard labor for ten years. The state filed a multiple offender bill of information seeking to have defendant adjudicated and sentenced as a habitual felony offender under LSA-R.S. 15:529.1. Following a hearing, the trial court adjudicated defendant a fourth felony habitual offender, vacated the previously imposed sentence, and resentenced defendant to fifty years imprisonment at hard labor.¹ Defendant now appeals, urging in a single assignment of error that the evidence was insufficient to support his conviction. Finding no merit in the assigned error, we affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

In the summer of 2004, Kristin and Dale Blackburn were having their home renovated. Kristin's father, Robert Schumberg, was the contractor on the job. Robert Mauer, defendant's brother-in-law, had been subcontracted to complete the flooring work. Defendant was employed by Mauer.

On June 15, 2004, Kristin and Dale decided, as they routinely did, to stop by the residence to see how the renovation project was progressing. The couple had been living in an apartment while the project was underway. When Kristin and Dale arrived at the residence, Schumberg, Mauer, and defendant were the only workers present. At some point during the visit,

¹ Although the minutes reflect that the defendant's sentence was to be served without benefit of parole, the sentencing transcript indicates the trial court did not impose such a restriction. It is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See State v. Lynch, 441 So.2d 732, 734 (La. 1983).

defendant left the residence and went outside. Although Kristin had left her purse inside her unlocked vehicle parked in the driveway, the couple thought nothing of defendant's temporary absence from inside the residence. Upon his return, however, Dale noticed that defendant was behaving strangely. Dale noticed the behavior, but did not make much of it. After a while, Kristin, Dale and their children left the residence.

Later that same day, Kristin went to a local video store to rent movies for her family. When she opened her wallet to pay the clerk, Kristin noticed that the credit cards inside her wallet were out of place. Upon closer inspection, Kristin realized that her Visa credit card was missing. Kristin contacted Dale and asked if he had removed the card from her wallet. He had not. Believing that the card may have been stolen, Dale immediately contacted the credit card company to determine if there had been any recent purchases made with Kristin's card. Dale learned that there had been two unauthorized transactions earlier that same day at Car Audio Connection in Mandeville, Louisiana. The total of the transactions was approximately \$1,600.00. Dale then contacted Car Audio Connection and advised that neither he nor Kristin had made the purchases in question and that said purchases were made without their permission. Dale went to Car Audio Connection to investigate further.

At the store, Dale learned that the individual who used Kristin's credit card purchased some high-end car stereo speakers and also custom ordered a box to house the speakers. Since the speaker box had to be custom made, the individual left a contact telephone number and agreed to return to collect the box once it was completed. The contact number was written on the store copy of the sales invoice.

In an effort to get the purchaser to come back to the store, Car Audio Connection employee, Robbie Hampton, dialed the contact number listed on the sales invoice and advised the purchaser that his speaker box was complete and ready for pickup. Shortly thereafter, defendant returned to the store. Hampton, who had assisted with the purchase, immediately identified defendant as the individual who made the purchase with Kristin's credit card.

At the store, defendant asked Dale if they could talk. Defendant admitted using the credit card, but denied taking it from Kristin's purse. He told Dale that he found the credit card in the parking lot at Wal-Mart. When Dale informed defendant that Kristin had not been to Wal-Mart since she last used the card, defendant claimed he must have found the card at Home Depot. Although the location changed, defendant maintained his claim that he found the card. Dale became angry and an argument ensued between him and defendant. Meanwhile, Deputy Lee Harding of the St. Tammany Parish Sheriff's Office arrived on the scene. In response to questioning by Deputy Harding, defendant again admitted that he had used the card to make the purchase at Car Audio Connection and claimed that he had found the card. Defendant adamantly denied taking the card from Kristin's wallet.

As Deputy Harding reached for defendant's arm to place him under arrest, defendant fled the area on foot. A chase ensued. Shortly thereafter, defendant was captured and arrested.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, defendant contends the evidence presented at his trial was insufficient to support the jury's verdict. Specifically, defendant asserts the state failed to produce any documentation to verify the credit card number of the Visa used to make the purchases in

question. Thus, defendant argues that while he may have used a credit card to purchase items at Car Audio Connection on the day in question, there was no evidence to suggest that the card he used was the same credit card that was missing from Kristin's purse. Defendant further notes that the evidence was insufficient because he was never observed in possession of any of the unauthorized items.

The standard of review for the 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 that the state proved the essential elements of the crime 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 LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When analyzing circumstantial evidence, LSA-R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885, pp. 3-4 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 159.

The **Jackson** standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. **State v. Mussall**, 523 So.2d at 1308-11. Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Marcantel**, 00-1629, pp. 8-9 (La. 4/3/02),

815 So.2d 50, 56. It is not the function of an appellate court to assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. See State v. Houston, 98-2658, p. 5 (La.App. 1 Cir. 9/24/99), 754 So.2d 256, 259. 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. Smith, 03-0917, p. 5 (La.App. 1 Cir. 12/31/03), 868 So.2d 794, 799.

In the instant case, defendant was charged with unauthorized use of an access card. Louisiana Revised Statute 14:67.3(B) provides, in pertinent part, as follows:

Whoever, directly or indirectly, by agent or otherwise, with intent to defraud, (1) uses a forged Access Card, (2) makes reference by number or other description to a nonexistent Access Card, (3) steals or wrongfully appropriates an Access Card, or (4) uses an Access Card belonging to another person without authority of said person; thereby obtaining, whether contemporaneously or not, credit, money, goods, services or anything of value shall be guilty of theft and shall be subject to the penalties provided for the crime of theft in R.S. 14:67.

In challenging the sufficiency of the evidence to support his conviction, defendant does not dispute that he used a credit card that did not belong to him to make purchases at the Car Audio Connection on the date in question. Instead, he argues the state failed to prove his identity as the individual who stole and used Kristin Blackburn's credit card. The hypothesis of innocence he offers is that while he may have admitted that he used a credit card at Car Audio Connection, he claims he could have used another credit card to make the purchases. He further argues that since the state did not clearly establish the card number of the card used in the Car Audio Connection purchases, the evidence was insufficient to support the verdict.

A thorough review of the record in this case convinces us that the evidence presented herein, viewed in the light most favorable to the state, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant committed the offense of unauthorized use of Kristin Blackburn's credit card. At trial, Robbie Hampton, the store employee who assisted defendant with the purchase, testified that defendant was, in fact, the same individual who purchased the stereo equipment in question and signed the invoice "Brian Blackburn."² Hampton further testified that defendant was also the same individual who returned to the store in response to the call indicating that the speaker box was completed.

Dale Blackburn testified that when he questioned defendant at the store regarding the unauthorized purchases made with Kristin's credit card, defendant admitted to using the card. According to Dale, defendant stated, "[w]ell, I just used the credit card. I found your credit card in the parking lot." His only defense at that time was that he did not steal the card from Kristin's purse. Instead, defendant claimed he "found" the card. Furthermore, Kristin and Dale Blackburn both testified that they learned from their credit card company that the missing card had been used at the Car Audio Connection. Dale Blackburn further testified that when he telephoned Car Audio Connection, Hampton confirmed that Kristin's card was used at the store that day. Thus, there was no question as to whether the card used by defendant was the same one that was missing from Kristin's purse. Both Kristin and Dale Blackburn testified that they did not authorize defendant's use of the credit card.

² The transcript of Hampton's testimony indicates that defendant signed the invoices "Ryan Blackburn." However, the actual invoices, which were introduced into evidence at defendant's trial, reflect that the invoices were signed "Brian Blackburn."

Considering the foregoing evidence, we find that the facts and circumstances of this case clearly show that defendant, without authority, used Kristin Blackburn's credit card to purchase approximately \$1,600.00 of stereo equipment. Whether the card or any of the stolen merchandise was in defendant's actual possession at the time of his arrest is of no moment. The evidence presented, which included specific admissions by defendant to both Dale Blackburn and Deputy Harding, sufficiently proved each of the essential elements of the crime beyond a reasonable doubt and to the exclusion of any reasonable hypothesis of innocence. We also note that flight or attempt to avoid apprehension indicates consciousness of guilt. **State v. Fuller**, 418 So.2d 591, 593 (La. 1982). This assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, defendant's conviction, habitual offender adjudication, and sentence are affirmed.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION,
AND SENTENCE AFFIRMED.**