NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0508

STATE OF LOUISIANA

VS.

RICKY JOHNSON

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JUDGMENT RENDERED: SEP 15 2006

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ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 05-05-0110, SECTION V
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE LOUIS R. DANIEL, JUDGE

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HONORABLE DOUG MOREAU
DISTRICT ATTORNEY
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JEANNE ROUGEAU,
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STATE OF LOUISIANA

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COUNSEL FOR
DEFENDANT/APPELLANT
RICKEY JOHNSON

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

MCDONALD, J.

The defendant, Ricky Lee Johnson a/k/a Ricky Parker a/k/a Rickie Parker, was charged by bill of information with one count of armed robbery, a violation of La. R.S. 14:64, and pled not guilty.[1] Following a jury trial, he was found guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1. See La. C.Cr.P. art. 814(A)(22). Thereafter, the State filed a habitual offender bill of information alleging the defendant was a second felony habitual offender. The predicate offense was set forth as the defendant's November 14, 2003, guilty plea to attempted unauthorized entry of an inhabited dwelling.[2] Following advice of his habitual offender rights, the defendant agreed with the allegations of the habitual offender bill of information and was adjudged a second felony habitual offender. He was sentenced to twenty years at hard labor without benefit of probation, parole, or suspension of sentence. He now appeals, designating two assignments of error.

We affirm the conviction, the habitual offender adjudication, and the sentence.

ASSIGNMENTS OF ERROR

1. The evidence is legally insufficient to support the conviction.

2. The trial court erred in imposing an excessive sentence.

FACTS

The victim, Timeka Johnson, testified at trial and gave the following account of the offense. On March 31, 2005, she was working at the Fina gas station (the store) on Scenic Highway in Baton Rouge. At approximately 3:30 or 4:00 p.m., the defendant entered the store and blocked the door open with a brick. He

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[1] The record indicates the defendant entered a plea at arraignment but does not indicate which plea. In any event, no objection to any defect in arraignment was entered prior to trial, and thus, the defendant entered upon the trial with a plea of not guilty. See La. C.Cr.P. art. 555.

[2] The State further set forth, in regard to the predicate offense, the defendant was charged under 19th Judicial District Court Docket # 8-03-208 and, on January 20, 2004, sentenced to the custody of the Secretary of the Department of Corrections, but the sentence was suspended, and the defendant was placed on supervised probation.

opened his jacket to reveal he had a knife and told Johnson, "I'm just going to take what I want." He then went behind the counter and took five pints and one fifth of Hennessy whiskey from the shelf and stuffed them into the pockets of the overalls he was wearing. Johnson was shocked and terrified by the defendant's actions. As soon as he left the store, she reported the incident to the police.

The police apprehended the defendant within thirty minutes of the incident. Following a foot chase, he was discovered hiding under a house approximately four or five blocks from the store. During the foot chase, at least one bottle of liquor fell out of one of his pockets. After he was apprehended, a pint of Hennessy whiskey was recovered from one of his pockets. The knife allegedly displayed by the defendant was never recovered.

Approximately twenty or twenty-five minutes after Johnson reported the offense, the police brought the defendant to the store for Johnson to view. Johnson identified the defendant as the robber.

The defendant also testified at trial. He conceded he took Hennessy whiskey from the store and ran away but denied threatening Johnson or having a knife while committing the offense.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number one, the defendant argues there was insufficient evidence that he committed the offense by use of force or intimidation or that he led the victim to reasonably believe he was armed with a dangerous weapon. He argues, at most, he was guilty of a misdemeanor theft (theft when the misappropriation or taking amounts to less than three hundred dollars).

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. **State v. Wright**, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 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 leads the victim to reasonably 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 a perpetrator of that offense. The evidence thus viewed, established that the defendant induced a subjective belief in the victim that the defendant was armed with a dangerous weapon and that the victim's belief was objectively reasonable under the circumstances. The victim testified the defendant displayed a knife to her, stated, "I'm just going to take what I want," and took six bottles of whiskey from the store. The defendant conceded he took the whiskey but denied threatening the victim or having a weapon. The jury found the testimony of the victim more credible than the testimony of the defendant. This Court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. 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.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number two, the defendant argues a sentence of twenty years was excessive, even as a habitual offender, considering the facts of

the incident and the fact that the predicate offense was a conviction for breaking into a vending machine.

Initially we note, contrary to the defendant's testimony at trial and contrary to the instant argument, the predicate offense was not a conviction for breaking into a soda machine. Rather, the predicate offense was set forth as the defendant's November 14, 2003, conviction for attempted unauthorized entry of an inhabited dwelling.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

In order for a trial court to depart from a mandatory minimum sentence, the defendant must clearly and convincingly show that, "[he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." **State v. Johnson**, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676.

Whoever commits the crime of first degree robbery shall be imprisoned at hard labor for not less than three years and for not more than forty years, without benefit of parole, probation, or suspension of imposition or execution of sentence. La. R.S. 14:64.1(B).

La. R.S. 15:529.1, in pertinent part, provides:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> (a) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction;

The defendant was sentenced to the statutory minimum sentence of twenty years at hard labor without benefit of probation, parole, or suspension of sentence.

In sentencing the defendant, the court noted it had considered: the sentencing guidelines of La. C.Cr.P. art. 894.1; the facts of the case; and the social factors the defendant had testified to at trial, including his age. The court found: the defendant was in need of a custodial or correctional environment best served by commitment to an institution; if the defendant was eligible for probation, which he was not, there was an undue risk he would commit another crime if probated; the defendant played a major role in the commission of the instant offense; and the defendant had a prior felony conviction and had been adjudicated a second felony habitual offender.

The court asked the defendant where he had worked. The defendant replied he had served in the United States Army for five years and had thereafter worked at various restaurants. In sentencing the defendant, the court considered: that he had a substance abuse problem; that the crime occurred very quickly; that no one was injured; and that he did not actually approach the clerk and threaten her life.

The court stated, however, that the defendant's conduct did create a very dangerous situation. The court noted that leading someone to believe you have a dangerous weapon creates a terrifying situation, constitutes a threat and intimidation, and makes the person believe her life is in danger.

In the instant case, the defendant failed to clearly and convincingly show that because of unusual circumstances he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the provisions of La. R.S. 15:529.1(A)(1)(a) in sentencing the defendant.

Further, the sentence imposed was not grossly disproportionate to the severity of the offense and, thus, was not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.