

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1071

STATE OF LOUISIANA

VERSUS

DONALD RAY MAPES, JR.

Judgment Rendered: December 28, 2006

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 390,319

Honorable Reginald T. Badeaux, III, Judge

Walter P. Reed, District Attorney
Covington, LA
and
Kathryn Landry
Baton Rouge, LA

Attorneys for
State – Appellee

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Attorney for
Defendant – Appellant
Donald Ray Mapes, Jr.

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

JRW
EJC

WELCH, J.

Donald Ray Mapes, Jr., the defendant, was charged by bill of information with one count of first degree robbery, a violation of La. R.S. 14:64.1. The defendant pled not guilty and was tried before a jury. The jury determined the defendant was guilty as charged. The State instituted habitual offender proceedings. Following a hearing, the trial court adjudicated the defendant a second felony habitual offender and sentenced him to serve twenty years at hard labor without benefit of probation or suspension of sentence.¹

The defendant appeals. We affirm.

FACTS

Shortly before 2:00 a.m., on September 19, 2004, Detective Bobby Juge of the St. Tammany Parish Sheriff's Office was waiting for his partner, Detective Melissa Sperling, to return with a signed search warrant for a residence in the 4700 block of Pontchartrain Drive. Detective Juge had just returned from purchasing soft drinks at the Northshore Convenience Store for himself and the other policemen who were waiting with him. Soon thereafter, Detective Sperling returned with the signed warrant. As the two detectives and Deputy Lewis Sanders prepared to execute the warrant, their dispatcher informed them that an armed robbery was in progress at the Northshore Convenience Store. Deputy Sanders went to the scene of the armed robbery, while the two detectives began to ride around the area in their unmarked unit. While riding in the area, the detectives received a call that a white male suspect was headed northbound on Pontchartrain Drive.

The initial description Detective Juge received regarding the suspect was

¹ The underlying offense, La. R.S. 14:64.1 controls the defendant's eligibility for parole. However, the trial court's failure to indicate the defendant was not eligible for parole does not give him such eligibility. La. R.S. 15:301.1

that he was a white male, five feet tall, wearing a blue shirt, jean shorts, and a red ski mask over his head. After Deputy Sanders arrived at the store, the police received another call from the dispatcher relaying that an individual had just reported a subject in a red shirt and jeans running northbound away from the store. At that point, Deputy Sanders recovered a red ski mask lying on the ground in a weeded area near the grocery store.

As Detective Juge drove his unmarked unit along Pontchartrain Drive looking in a weeded area near the waterway, he heard someone yell at him, "He's behind the truck." Detective Juge encountered the defendant in a weeded area behind a vehicle parked along the roadway. Detective Juge placed the defendant in handcuffs and read the defendant his **Miranda** rights. Detective Juge noticed a bulge in the defendant's front pocket. Detective Juge asked the defendant if he had any weapons or things that could hurt the police, and the defendant replied that the bulge was his money, and that he had just left the store. The defendant later told the police that "I asked the cashier for money, he gave it to me."

Detective Juge reached into the defendant's pocket to recover the contents and removed a wad of cash. The cash was determined to be \$192.00, composed of ten ten-dollar bills; seven five-dollar bills; and fifty-eight one-dollar bills. According to Detective Juge, in his experience, convenience stores did not keep twenty-dollar bills in the cash drawers.

Detective Juge also recovered a rubber band around a small amount of money, the defendant's identification, and some business cards from the defendant's other pocket. Detective Juge then went to interview Thomas Porche, who was the clerk working at the convenience store that had just been robbed.

Thomas Porche, a seventy-year-old retiree, worked part-time at the Northshore Convenience Store. Porche usually worked the 11:00 p.m. to 7:00 a.m.

shift. According to Porche, he was folding money when the robber entered the store wearing a ski mask. Porche initially thought the robber was playing a joke on him because two weeks prior to this night, one of the store's regular customers had walked in with his shirt covering his face. Porche told the robber to get out, stop playing around, and then he continued folding money.

Porche realized that the robber had bad intentions when the robber told him, "Give me the money or I'll shoot you, don't make me shoot you old man." Porche handed the defendant the money from the register and the defendant ordered him to get on the floor and not to call the police. Porche testified that he thought the robber had a gun and he feared for his life. As Porche lay on the floor, he could see the robber's feet and knew that he had left the store. Porche then phoned the police and reported the robbery.

Porche's initial description of the robber described him as wearing a maroon ski mask, blue shirt, and cut-off shorts. Using the color codes on the door of the convenience store, Porche estimated the robber was approximately five feet four inches tall and had a stocky build.

Porche testified that the video surveillance tapes introduced by the State were an accurate reflection of what occurred during the robbery.

Within fifteen to twenty minutes of Porche's report of the robbery, Detective Juge put Porche in his unit and drove to where the defendant was detained in the back of a police car. Porche was able to view the defendant without getting out of the unmarked unit and immediately identified defendant as the robber. The defendant was wearing jean shorts and a red shirt.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NUMBER ONE

In defendant's first assignment of error, he argues that the trial court's denial

of his motion for continuance prevented him from being able to obtain private counsel and therefore violated his Sixth Amendment right to counsel.

A motion for a continuance shall be in writing and shall allege specifically the grounds upon which it is based. La. C.Cr.P. art. 707. The granting or denial of a motion for continuance rests within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of a clear abuse of discretion. The denial of a motion for a continuance is not reversible absent a showing of prejudice. **State v. Simon**, 607 So.2d 793, 798 (La. App. 1st Cir. 1992), writ denied, 612 So.2d 77 (La. 1993), overruled on other grounds by State v. Celestine, 95-1393 (La. 1/26/96), 671 So.2d 896 (per curiam).

An oral motion for a continuance presents nothing for review on appeal. However, where the occurrences that allegedly make the continuance necessary arose unexpectedly, and the defense had no opportunity to prepare a written motion, an appellate court may review the denial of the motion. **Simon**, 607 So.2d at 798.

The right to counsel cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. While the right to counsel of choice in a criminal trial is guaranteed by the United States and Louisiana Constitutions, there is no constitutional right to make a new choice on the date a trial is scheduled to begin, with the attendant necessity of a continuance and its disrupting implications to the orderly trial of cases. The right to counsel of choice must be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system of which it is a part. Once the day of trial has arrived, the question of withdrawal of counsel rests largely within the discretion of the trial court. The Louisiana Supreme Court has frequently upheld the trial court's denial

of motions for a continuance made on the day of trial when the defendant is dissatisfied with his present attorney but had ample opportunity to retain private counsel. **Simon**, 607 So.2d at 798.

The defendant was arrested on September 19, 2004. The bill of information charging the defendant with first degree robbery was filed on December 6, 2004. Although the defendant was originally scheduled to be arraigned on January 4, 2005, he was not arraigned until May 13, 2005. On July 18, 2005, the defendant appeared in court represented by the public defender. The defendant informed the trial court that he did not feel the public defender was acting in his best interests, because the public defender had only met with the defendant once for fifteen minutes and had failed to provide him with the discovery he had requested. The defendant informed the trial court that, "I'm trying to hire me an attorney, my family."

The public defender explained that he does not provide an incarcerated defendant with a copy of discovery because other people in jail can access it, review defendant's file, and may become familiar enough to make up a story in an attempt to negotiate time off their record. Due to such previous bad experiences, the public defender said he goes over the discovery with his clients, but never leaves the documents at the jail.

The trial court explained to the defendant that he did not have a choice of attorney appointed to represent him. In response to the defendant's statement that he wanted to fire the public defender, the trial court stated that the defendant would either have to represent himself or hire a private attorney. The defendant responded that his sister was planning to hire a private attorney for him. The trial court informed the defendant that they would pick a jury and proceed with trial. The defendant then moved for a continuance and the trial court denied the motion.

After reviewing the record, we cannot say the trial court abused its discretion in denying the defendant's oral motion for a continuance. The defendant had been in jail for ten months prior to trial and had made no attempt to hire his own counsel or to inform the court that he was dissatisfied with his public defender until the morning of trial. Moreover, the defendant failed to specify a basis for prejudice by the public defender's representation of him at trial. Under these circumstances, the trial court did not err in denying the motion to continue.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

The defendant argues the evidence is insufficient to support his conviction, specifically, that the State presented insufficient evidence identifying him as the perpetrator of this crime.

The standard of review for the sufficiency of evidence to uphold 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 beyond a reasonable doubt and the defendant's identity as the perpetrator. 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). Our standard of review 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 fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Williams**, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135. Where the defendant disputes his identity as the perpetrator, the State must negate any reasonable probability of misidentification. **State v. Jones**, 94-1098 (La. App. 1st Cir. 6/23/95), 658 So.2d 307, 311, writ

denied, 95-2280 (La. 1/12/96), 666 So.2d 320.

As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency. **State v. Probst**, 623 So.2d 79, 83 (La. App. 1st Cir.), writ denied, 629 So.2d 1167 (La. 1993).

Louisiana Revised Statutes 14:64.1(A) defines first degree robbery 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, when the offender leads the victim to reasonably believe he is armed with a dangerous weapon.

The defendant argues that there were discrepancies in the evidence presented by the State that should have created reasonable doubt as to his identity as the perpetrator. Specifically, defendant argues that Porche never saw the robber's face and described him as wearing a blue shirt and being five feet tall. Moreover, the amount of money recovered from defendant was \$192.00, while the amount missing from the cash register was determined to be \$196.28.

The jury's verdict indicates that these discrepancies were excusable under the circumstances of the robbery. The defendant was found attempting to conceal himself in a weeded area not far from the location of the robbery within minutes of the crime being reported. Porche identified the defendant as the robber no more than twenty minutes after he had been robbed and testified that the shape of defendant's head and shoulders were consistent with the person who robbed him. Detective Juge explained that in his experience twenty-dollar denominations were not usually kept in the cash drawers of convenience stores. Porche also testified

that the drawer had no twenty-dollar bill denominations because he had already placed those in the safe. Moreover, the defendant admitted to being in the store and claimed the clerk gave him the money.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence sufficiently supports defendant's conviction for first degree robbery.

This assignment of error is without merit.

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

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.