

Judgment rendered August 23, 2006
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 41,216-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA

Appellee

versus

JOHNNY RAY DUKES

Appellant

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 239,333

Honorable Scott J. Crichton, Judge

* * * * *

G. PAUL MARX
Louisiana Appellate Project

Counsel for
Appellant

PAUL J. CARMOUCHE
District Attorney

Counsel for
Appellee

BRIAN HARRIST BARBER
TOMMY J. JOHNSON
Assistant District Attorneys

* * * * *

Before CARAWAY, DREW and MOORE, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

Appellant was convicted by a jury of theft of goods valued over \$300.00 but less than \$500.00. He was sentenced to 18 months at hard labor and ordered to pay a \$100.00 fine and costs. The sentence was suspended and the appellant was placed on probation for two years. The conviction is affirmed and the sentence, as amended, is affirmed.

FACTS

On October 31, 2004, Johnny Ray Dukes went to his workplace at Sears in Shreveport. He told a co-worker, William Charles Brooks, that although he was not scheduled to work that day, his supervisor had told him to come in and help out. Brooks, who always worked in the package pick-up area alone on Sundays, noted that Dukes did not clock in. A little while later Brooks noticed that Dukes was talking to someone in a white Pontiac Bonneville in the parking lot near the package pick-up area.

About 20 minutes later Brooks noticed that Dukes was loading a TV into the trunk of the Bonneville. He watched him tie down the trunk lid, an act the employees normally did not do. Noting that Dukes' actions seemed "strange," Brooks checked the computer scanner which did not show that a TV was distributed. He checked a back-up printout and there was also no information regarding this delivery.

Dukes told Brooks that he was going upstairs to work. Later, Brooks decided to confront Dukes about the TV and could not find him at the store. At that point, Brooks reported the incident to his supervisor. Brooks and

the supervisor watched a store videotape which showed Dukes “casually pick up the product and take it out the door.”

The next day, the loss prevention manager, Angela Williams, reviewed the store tape which showed Dukes loading a Toshiba “Supertube.” She checked both the computer printouts and the handwritten records and there was no evidence of a TV being logged out by Dukes.

Williams interviewed Dukes on November 1, 2004, and he denied loading the TV into the vehicle. She immediately reported a theft to the Shreveport police. When Corporal James Germane spoke with the appellant later that same day, Dukes told him the customer had shown him a receipt.

Dukes was arrested for theft. After a jury trial in which Dukes testified, he was found guilty of theft of goods valued over \$300.00 but less than \$500.00. He was sentenced to 18 months at hard labor and ordered to pay a \$100.00 fine and costs. Dukes was given credit for the 125 days he had already served, and the remainder of the sentence was suspended. Defendant was placed on two years’ probation with special conditions which included making restitution of \$329.00 to Sears and staying off its premises.

Discussion

Brooks challenges on appeal the sufficiency of the evidence to convict him. He claims that the state failed to negate Brooks’ explanation that he was duped by a customer who presented a false receipt. He also claims that the evidence never established a clear identity for the stolen television set or its value.

The standard of appellate review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *State v. Cummings*, 95-1377 (La. 2/28/96), 668 So. 2d 1132; *State v. Murray*, 36,137 (La. App. 2d Cir. 8/29/02), 827 So. 2d 488, *writ denied*, 2002-2634 (La. 9/05/03), 852 So. 2d 1020. This standard, now legislatively embodied in La. C.Cr.P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Robertson*, 96-1048 (La. 10/4/96), 680 So. 2d 1165. The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So. 2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Gilliam*, 36,118 (La. App. 2d Cir. 8/30/02), 827 So. 2d 508, *writ denied*, 2002-3090 (La. 11/14/03), 858 So. 2d 422.

When circumstantial evidence forms the basis for conviction, such evidence must exclude every reasonable hypothesis of innocence under La. R.S. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of the events; rather, when viewing the evidence in the light most favorable to the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could

not have found proof of guilt beyond a reasonable doubt under *Jackson v. Virginia*. This is not a separate test from *Jackson v. Virginia, supra*.

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. Allen*, 36,180 (La. App. 2d Cir. 9/18/02), 828 So. 2d 622, *writs denied*, 2002-2595 (La. 3/28/03), 840 So. 2d 566, 2002-2997 (La. 6/27/03), 847 So. 2d 1255, *cert. denied*, 540 U.S. 1185, 124 S. Ct. 1404, 158 L. Ed. 2d 90 (2004).

Brooks' version of the event depends upon his credibility as a witness. The state presented ample evidence that challenged his credibility. The evidence showed that Brooks' supervisor had not authorized his work on the day in question. Brooks had not clocked in. He inexplicably left early after loading the TV. Williams testified that when confronted, Brooks denied taking any television out of the store. Yet, that same day, he told the officer that the customer showed a receipt for the TV. At trial, Brooks testified that he had scanned data regarding the television set and the receipt. Nevertheless, the company records disputed that claim. Accordingly, on credibility grounds, the jury could reject Brooks' version that he was presented with a receipt for the TV by a customer.

Regarding the proof of the missing TV and its value, Williams "counted in the storeroom" and determined that one television was missing from stock. The loss-prevention manager stated she had seen the brand and

model name on the videotape. She further testified that the store's records listed the price of this model at \$329.00.

This evidence regarding the stolen item goes to the weight, not sufficiency of the evidence as shown in *State v. Johnson*, 31,448 (La. App. 2d Cir. 3/31/99), 747 So. 2d 61, *writ denied*, 99-1689 (La. 11/12/99), 749 So. 2d 653, and *cert. denied*, *Johnson v. Louisiana*, 529 U.S. 1114, 120 S. Ct. 1973 (2000), where this court stated:

We also fail to find merit to Johnson's claim that the state failed to prove the stolen items were valued at \$500 or more. Unless it is shown that the owner lacks knowledge of the value of a movable, his or her testimony as to value is generally admissible, with its weight being left to the jury. *State v. Dilworth*, 358 So. 2d 1254 (La. 1978); *State v. Curtis*, 319 So. 2d 434 (La. 1975). Although Brown admitted to not being an expert in valuation, she was obviously familiar with the personal items which were removed from her home. There has been no showing that Brown lacked knowledge of the valuables or electronics. The jury obviously weighed her testimony, valuing the stolen items at \$500 or more in favor of the state.

Accordingly, Dukes' arguments concerning the sufficiency of the evidence lack merit. We find that the state proved Dukes' guilt beyond a reasonable doubt.

Finally, our error patent review reveals an illegal sentence. The record shows this defendant's indigent status. Therefore, the trial judge improperly imposed jail time contingent on the payment of the fine and court costs. An indigent person may not be incarcerated because he is unable to pay a fine which is part of his sentence. *State v. Kerrigan*, 27,486 (La. App. 2d Cir. 4/3/96), 671 So. 2d 1242. A defendant's claim of indigence in such a situation may be discerned from the record. *State v.*

Williams, 484 So. 2d 662 (La. 1986); *State v. Conway*, 604 So. 2d 205 (La. App. 2d Cir. 1992). The record shows that the defendant is an indigent. He was represented at trial and on appeal by the indigent defenders' office. Therefore, the portion of the sentence imposing jail time in default of payment of the fine and costs is vacated.

Decree

Defendant's conviction is affirmed. The sentence is amended to vacate the imposition of jail time in default of payment of the fine and costs.

AMENDED, AND AS AMENDED, AFFIRMED.