

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1397

STATE OF LOUISIANA

VERSUS

DEAN PRESTON BERGERON, JR.

Judgment Rendered: December 23, 2009

On Appeal from the 32nd Judicial District Court
In and For the Parish of Terrebonne
Trial Court No. 452,277
Honorable Randall L. Bethancourt, Judge Presiding

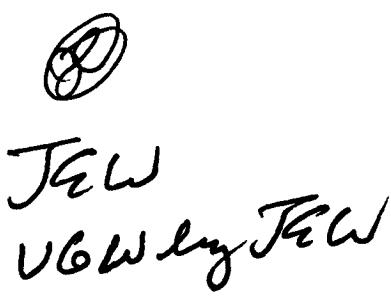
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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.


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HUGHES, J.

The defendant, Dean Preston Bergeron, Jr., was charged by amended bill of information with one count of attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to twelve years at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending that the State failed to present sufficient evidence of his specific intent to kill, and that the trial court erred in allowing the State to project images of the victim's injuries onto a five-foot screen. For the following reasons, we affirm the conviction and sentence.

FACTS

On February 7, 2005, the victim, Scott Lawrence Melancon, attended a Mardi Gras parade in Houma, Louisiana with his brother and father. While at the parade, the victim walked over to some of his friends. As he was walking, Destrie Hebert, who appeared to be intoxicated, grabbed the victim's shirt and asked him if he wanted to fight. The victim had never seen Hebert before. The victim did not fight with Hebert, and Hebert's friend, Jansen Simon, calmed Hebert. Approximately ten minutes later, as the victim was walking back through the crowd to return to his brother and father, Hebert grabbed him again and asked him if he wanted to fight. The victim pushed Hebert off, and stated, "I'm drinking. I'm trying to have fun at Mardi [G]ras. I don't need this shit." Simon "caught" Hebert and calmed him down. The victim then heard someone say, "[H]ey, you want to fight, mother f---er?" Thereafter, defendant Bergeron, a friend of Hebert's, suddenly cut the victim on the throat, face, and ear with a steak knife and ran away. The victim had never seen the defendant before. The victim denied that he told Hebert that he had "some iron for

[Hebert's] ass." He also denied that he was carrying a gun at the time of the attack or that he had ever owned a gun.

The victim was treated at Chabert Medical Center. The wound to his throat, which exposed his neck muscles, required 14 sutures. The wound to his face, which included a gash exposing his skull, required 16 sutures. Additionally, part of one of the victim's ears was cut in half and required 4 sutures.

Tonya Lynn Cunningham was only five feet from the incident at the parade. She saw Hebert argue with the victim. According to Cunningham, Hebert's friends pulled him away, but he came back and "started more stuff." The victim told Hebert that he (the victim) was only there to have a good time and did not want to fight. After Hebert's friends pulled him away again, the defendant approached the victim and "it looked like [the defendant] slapped [the victim]." Immediately thereafter, the victim's face was covered in blood. Cunningham never saw any weapons and did not hear anyone mention any weapons.

Destrie Hebert testified at trial. The defendant was his good friend and like a father figure to him. He claimed that he had an altercation with the victim after the victim bumped into him at the parade. Hebert claimed that he was extremely intoxicated, but remembered that approximately ten minutes after the altercation, it looked like somebody in front of him got slapped or that someone was waving to the parade. He conceded that, at the time of the incident, he told the police that he thought that the defendant was slapping a white male at the parade.

Jansen Michael Simon also testified at trial. Hebert was his good friend. At the parade, Simon helped Hebert stand up because he was too intoxicated to stand up by himself. According to Simon, the victim walked up to Hebert at

the parade and told him that he would “kick his ass.” Simon claimed that he grabbed Hebert to prevent him from fighting the victim because Hebert was on probation. Simon claimed that he told the victim not to touch Hebert and that he would not have to worry about Hebert because Simon was going to hold him. Simon claimed that the police arrived and broke up the first confrontation between Hebert and the victim. Simon claimed that the victim returned to Hebert after the police left and stated, “I’m going to go break your f---ing jaw.” Simon claimed that he told the victim to leave, and as the victim left, he stated, “[A]ll right, I got some iron for your ass.” Simon claimed that the defendant then intervened, and it “looked like [the defendant] was slapping [the victim].” Simon conceded that his statement to the police on February 9, 2005 made no mention of the victim’s alleged threat, but claimed that the police told him to write down only what he had seen.

Heidi May Carr also testified at trial. She was Simon’s girlfriend and was standing with him at the parade. She heard Hebert ask the victim if he wanted to fight, but thought he did so “in a playing way.” She did not hear the victim state that he had “some iron for your ass.”

The police spoke to the defendant at the parade following the incident. When asked about the incident, the defendant claimed that he did not know what the police were talking about. However, he had a steak knife in his rear pocket. Neither the defendant nor any of his friends made any claim that the victim made a threat involving a gun prior to the incident, and no guns were recovered from the scene.

Approximately three days after the incident, the police questioned the defendant about the incident again. The defendant claimed that during a verbal altercation, the victim told Hebert that he had some iron for him and reached under his shirt. The defendant claimed that he thought the victim was

pulling out a gun and so he “sliced” the victim with a steak knife approximately five times to protect Hebert. When asked if he had cut the victim in an aggressive manner, the defendant stated that he wanted the victim to “know that he meant business.”

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues that the evidence failed to establish that he possessed the requisite specific intent to kill the victim and the offense was no more than aggravated battery.

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 that 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 LSA-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.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. LSA-R.S. 14:30.1(A)(1). Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. LSA-R.S. 14:27(A).

Although the statute for the completed crime of second degree murder allows for a conviction based on specific intent to kill or to inflict great bodily harm, attempted second degree murder requires specific intent to kill. Specific intent is the state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Specific intent need not be proven as a fact but may be inferred from the circumstances and actions of the accused. The trier of fact determines whether the requisite intent is present in a criminal case. **State v. Brown**, 2003-1076, pp. 9-10 (La. App. 1st Cir. 12/31/03), 868 So.2d 775, 781-82, writ denied, 2004-0269 (La. 6/4/04), 876 So.2d 76.

In reviewing the correctness of such a determination, the court should review the evidence in a light most favorable to the prosecution and must determine if the evidence is sufficient to convince a reasonable trier of fact of the defendant's guilt beyond a reasonable doubt as to every element of the offense. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **Brown**, 2003-1076 at p. 10, 868 So.2d at 782.

The defendant claims that the evidence is sufficient to support only a battery offense as opposed to the offense of aggravated battery. Battery is the

intentional use of force or violence upon the person of another. LSA-R.S. 14:33. Aggravated battery is a battery committed with a dangerous weapon. LSA-R.S. 14:34. A "dangerous weapon" includes any gas, liquid, or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. LSA-R.S. 14:2(3). The dangerousness of an instrumentality because of its use is a factual question for the fact finder to decide for purposes of a conviction of aggravated battery. Aggravated battery requires neither the infliction of serious bodily harm nor the intent to inflict serious injury. Instead, the requisite intent element is general criminal intent. See State v. Odom, 2003-1772, p. 8 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 589, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted second degree murder and the defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against the defendant indicates that the jury accepted the testimony offered against the defendant, while rejecting the defendant's attempts to discredit the witnesses giving that testimony. 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. 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. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances

presented to them. See State v. Ordodi, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. It was not irrational for the jury to conclude that the defendant acted with specific intent to kill the victim when he cut the victim's throat while repeatedly "slic[ing]" him with a steak knife. This assignment of error is without merit.

GRUESOME PHOTOGRAPHS

In assignment of error number 2, the defendant argues that the gruesome images projected on the screen at trial overwhelmed the jurors' reason, leading them to convict him of attempted second degree murder without any other evidence.

Photographs which illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted, are generally admissible, provided that their probative value outweighs any prejudicial effect. The trial court's admission of allegedly gruesome photographs will be overturned on appeal only if the prejudicial effect of the photographs clearly outweighs their probative value. No error will be found unless the photographic evidence is so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. **State v. Brunet**, 95-0340, p. 3 (La. App. 1st Cir. 4/30/96), 674 So.2d 344, 346, writ denied, 96-1406 (La. 11/1/96), 681 So.2d 1258.

Prior to the presentation of testimony at trial, the defense objected to the State using a projector to display photographs of the victim's injuries on an approximately 5' or 6' screen. The defense argued that large images of the victim's injuries made his wounds appear large and more aggravated and the prejudicial effect of the images outweighed their probative value. The State responded that the jury had a right to see the pictures and that projecting them on a screen and allowing the victim to identify himself and point out his

injuries avoided the alternative of making numerous copies of the photographs. The State disputed that the projector made the victim's injuries seem more severe, pointing out that the injuries were shown in proportion to the victim. The court found that the projection of the photographs did not alter the photographs, but was merely a matter of convenience to allow the jury, the witness, the attorneys, and all interested parties, to see the image at the same time. The court also noted that the jurors were viewing the projected images from approximately 40 feet away, and thus, the images would appear smaller to them than to the attorneys. The court overruled the defense objection and noted the objection of the defense to the ruling.

At trial, the victim identified the first projected image as a photograph of himself taken the day after the incident. He identified the second projected image as a photograph showing the injuries to his neck and the sutures to treat the larger injury. He identified the third projected image as a photograph showing the injuries to his head and ear and the sutures to treat the injuries. He identified the fourth image as a closer photograph of the injuries to his head and ear, showing swelling. He identified the fifth image as showing an injury to the lower part of his face and indicated that the injury was "apparently a miss for my neck."

There was no error in the admission of the challenged photographs or the use of a projector to display them to the jury. The prejudicial effect of the photographs did not clearly outweigh their very high probative value. The photographs established the *corpus delicti*, corroborated the victim's testimony concerning the wounds inflicted upon him by the defendant, and illustrated the location and severity of those wounds. They were highly probative on the issue of the defendant's intent in cutting the victim and were not so gruesome

as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.