NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 2327

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STATE OF LOUISIANA

VERSUS

GILBERT SCOTT STUCKEY

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 10-09-0875, Section 1
Honorable Anthony J. Marabella, Jr., Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered June 8, 2012

PARRO, J.

The defendant, Gilbert Scott Stuckey, was charged by bill of information with one count of cruelty to the infirmed (count 1), a violation of LSA-R.S. 14:93.3, and one count of second degree battery (count 2), a violation of LSA-R.S. 14:34.1. He pled not guilty on both counts. Following a jury trial, he was found guilty as charged on both counts.[1] Thereafter, the state filed a habitual offender bill of information against him, alleging he was a habitual offender in regard to count 1.[2] The defendant stipulated to his habitual offender status. On count 1, he was sentenced to twenty years of imprisonment at hard labor. On count 2, he was sentenced to ten years of imprisonment at hard labor, with that sentence to run concurrently with the sentence imposed on count 1. He now appeals, challenging the preliminary examination and the sufficiency of the evidence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence on count 1; affirm the conviction on count 2; amend the sentence on count 2; and affirm the sentence on count 2, as amended.

FACTS

The victim, Mary Frances Stuckey, is the mother of the defendant and a retired English teacher. On October 7, 2009, the defendant was living with her in her apartment on Bluebonnet Boulevard in Baton Rouge. The victim testified the defendant liked to do the cooking at the apartment, and "didn't like [the victim] to mess with it." She stated, "My job was to come and tell him when the timer went off."

On October 7, 2009, the defendant was cooking chicken and "the timer went off." The victim went to the defendant's bedroom door and told him the timer had gone off. Approximately ten or fifteen minutes later, the defendant exited his room and asked about the timer. When the victim responded that she had already told him it had gone off, the defendant became angry, took the chicken out of the oven, slammed the chicken down on the counter, and may have burned his hands doing so. The victim stated the defendant

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[1] The verdict form listed count 1 as count 2, and count 2 as count 1. The jury, however, referenced the offenses by name in rendering the verdicts.

[2] The predicate offense was set forth as the defendant's December 10, 2007 guilty plea, under Nineteenth Judicial District Court Docket #04-07-434, to possession of cocaine.

then "yanked" her out of her chair and threw her into the "sharp edge" of the pantry where she kept the canned goods. The defendant called the victim a "bitch" and cursed her. He also threw her into one of the kitchen cabinets, while she screamed, "stop, stop, stop." The victim testified that, "after he had thrown me into the cabinet[,] he had me on the floor and he was pounding my head . . . onto the kitchen floor." The victim stated the defendant then picked up a serrated kitchen knife and cut each of her hands. After the defendant went to his bedroom, the victim hid behind a chair and called 911. The defendant came out of his room and saw the victim. He stated, "What are you doing bitch?" She told him she had called 911, and he approached the patio door to exit. On his way out, he turned to the victim and stated, "I will be back to kill you."

The victim indicated that prior to the incident, she did not have any issues with falling or keeping her balance, and had never suffered head trauma. One week after the incident, however, she fell to the ground for no apparent reason while getting her mail from the post office box at her apartment complex. After that incident, she started having a headache. Two days later, she fell again while walking out of a bookstore. She stated she was taken to the hospital, diagnosed with a subdural hematoma, and was hospitalized for four or five days. At the time of her testimony at trial on February 8, 2011, she was wearing "pain patches" on her head. She indicated she started wearing the patches because she had "such terrible headaches" and the medicine she was taking was "not doing any good." She stated, "my headaches for a while there [--] I had the headaches 24/7 but now they are beginning to improve." She testified she did not use a walker prior to the incident, but now she needed one. Additionally, she stated, "I can be talking about something and totally forget my train of thought. I guess some people would joke and say, well, that age has something to do with that. But I had not been having that problem before."

The victim testified she had called the police before about the defendant being physically aggressive with, or striking, her. She stated that, approximately a month before the incident, the defendant had talked about taking insurance out on her, so that he could get money when she died. She indicated he had also told her that he wished she was dead.

The victim testified she drank wine, but not every day. She stated she "probably" had a glass of wine prior to the incident, but denied she was inebriated or intoxicated at the time of the incident. She indicated she was not taking any medication that would have affected her mental faculties at the time of the incident.

On cross-examination, the victim stated she was taking Cymbalta at the time of the incident as prescribed by her doctor to help with pain, as well as depression. She denied ever being diagnosed as being "bipolar," and denied she was taking Cymbalta for that condition. She also denied falling over tables at a local restaurant, falling in her apartment, and needing home assistance prior to the incident. She also denied losing teaching jobs due to drinking or alcoholism.

Dr. Michael Loewe was accepted by the trial court as an expert in emergency room medicine. He saw the victim at the emergency room of Our Lady of the Lake Hospital on October 7, 2009. Her date of birth was September 19, 1934. Dr. Loewe ordered a major trauma evaluation for her, including CAT scans of her head, cervical spine, chest, abdomen, and pelvis, as well as X-rays of her ribs, chest, and lumbar spine. His diagnosis of the victim was domestic altercation, scalp contusion, scalp laceration, facial contusion, and back contusion. His physician notes indicated the patient was not to be discharged to her home due to her son abusing her and threatening to kill her.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 2, the defendant argues the evidence was insufficient to support the verdicts because the victim's accusations against him were done to disguise her battle with substance abuse.

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. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732. 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 must be excluded. See **Wright**, 730 So.2d at 486; 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**, 730 So.2d at 487.

Cruelty to the infirmed is "the intentional . . . mistreatment . . . by any person, . . . whereby unjustifiable pain, . . . or suffering is caused to . . . an aged person[.]" LSA-R.S. 14:93.3(A). An "aged person" is any individual sixty years of age or older. LSA-R.S. 14:93.3(C). The term "intentional" as used in LSA-R.S. 14:93.3 refers to a "general criminal intent" to mistreat and does not require a specific criminal intent to cause unjustifiable pain and suffering. See LSA-R.S. 14:11; **State v. Echeverria**, 02-2592 (La. App. 1st Cir. 6/27/03), 858 So.2d 632, 635, writ denied, 03-2332 (La. 8/20/04), 882 So.2d 580. General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. LSA-R.S. 14:10(2). "Unjustifiable," within the meaning of LSA-R.S. 14:93.3, is a term of limitation intended to distinguish that pain and suffering which is an inevitable consequence of care and treatment from that which is not justified by medical needs. **Echeverria**, 858 So.2d at 635.

As is pertinent here, battery is the intentional use of force or violence upon the person of another. LSA-R.S. 14:33. Second degree battery is a battery when the offender intentionally inflicts serious bodily injury. LSA-R.S. 14:34.1(A). Serious bodily injury

means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death. LSA-R.S. 14:34.1(B). Second degree battery is a specific-intent offense. Specific criminal intent is that state of mind which 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 may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. **State v. Druilhet**, 97-1717 (La. App. 1st Cir. 6/29/98), 716 So.2d 422, 423.

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the state, could find the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of cruelty to the infirmed and second degree battery, and the defendant's identity as the perpetrator of those offenses against the victim. The verdicts rendered in this case indicate that the jury rejected the defendant's theory that the victim lied about the defendant attacking her in order to hide the cause of her injuries, which was falling down due to drinking and/or use of medication. When a case involves circumstantial evidence and the jury 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. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. Further, the verdicts indicate the jury accepted the victim's testimony and rejected the defendant's attempts to discredit her. This court cannot 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 (La. App. 1st Cir. 3/27/97), 691 So.2d

1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, 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**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

PRELIMINARY EXAMINATION

In assignment of error number 1, the defendant argues a new trial should be granted because the trial court inserted its comments at the probable cause hearing and failed to make a ruling on probable cause.

In felony cases where an indictment has not been issued, a defendant has both a constitutional and a statutory right to a preliminary examination. LSA-Const. art. I, § 14; LSA-C.Cr.P. art. 292. The primary function of the examination is to ensure that probable cause exists to hold the accused in custody or under bond obligation. **State v. Spears**, 92-1701 (La. App. 1st Cir. 3/11/94), 634 So.2d 9, 10. No preliminary examination shall be held invalid for any purpose because of an informality or error that does not substantially prejudice the defendant. LSA-C.Cr.P. art. 298. Errors alleged to have occurred at the preliminary hearing are moot after the defendant has been tried and convicted. **State v. Herrin**, 562 So.2d 1, 10 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990).

Prior to trial, the defendant moved for a preliminary hearing and bond reduction so that he could be discharged from his bond obligation. The trial court held a preliminary examination.

At the hearing, East Baton Rouge Parish Sheriff's Office Deputy Mark Bienvenu testified concerning his investigation of the incident that resulted in the arrest of the defendant. On cross-examination, defense counsel asked Deputy Bienvenu if he knew of

any prior history of incidents between the victim and the defendant. Deputy Bienvenu answered negatively, but the trial court stated, "I do. I do, if you want to ask me." Thereafter, at the end of the hearing, the court stated, "To answer . . . your question, [defense counsel], I have [the defendant's] bond file. He has been arrested on at least four previous times for battery on his mother." The defense did not object to any comment by the trial court or to any failure by the court to make a formal ruling. Neither did the defense move to recuse the trial court. The defense also did not seek supervisory relief from this court for any violation of his right to preliminary examination.

This assignment of error is moot. See **Herrin**, 562 So.2d at 10.

REVIEW FOR ERROR

Initially, we note our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony, the district attorney of the parish in which the subsequent conviction was had may file an information accusing the person of a previous conviction. LSA-R.S. 15:529.1(D)(1)(a). After a habitual offender information is filed, the court in which the subsequent conviction was had shall cause the person to be brought before it and shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law. **Id.** The court shall also require the offender to say whether the allegations are true. **Id.** The statute further implicitly provides that the court should advise the defendant of his right to remain silent. **State v. Griffin**, 525 So.2d 705, 706 (La. App. 1st Cir. 1988).

In the instant case, at the habitual offender arraignment, the trial court advised the defendant, "Mr. Stuckey, the district attorney has filed a habitual offender bill of information against you charging that you are a second offender." Defense counsel indicated she had not had an opportunity to speak with the defendant. Thereafter, the court stated, "All right.

I assume you want a hearing?" The defendant replied, "Yes, Sir." The court ordered that a plea of not guilty be entered and set the matter for a habitual offender hearing and sentencing.

At the beginning of the habitual offender hearing, defense counsel advised the trial court, "Your Honor, this is going to be a stipulation. We will stipulate that [the defendant] is, in fact, a second felony offender." Thereafter, the state set forth, in conjunction with the stipulation, that it would like to offer into evidence a certified copy of the bill of information and minutes concerning the predicate offense listed in the habitual offender bill. Defense counsel stated she had reviewed the referenced minutes and bill of information with the defendant, and he admitted he was the person listed in those documents. The trial court asked the defendant if he had conferred with his attorney and further asked, "[I]s that your understanding, is that what you want to do?" The defendant answered affirmatively. Thereafter, the court adjudged the defendant a second-felony habitual offender. The defendant's interests were fully protected and any technical non-compliance with the statutory directives in LSA-R.S. 15:529.1(D)(1)(a) was harmless. See LSA-C.Cr.P. art. 921; **State v. Cook**, 11-2223 (La. 3/23/12), 82 So.3d 1239, 1240 (per curiam).

At the habitual offender sentencing, defense counsel advised the trial court that the state was pursuing habitual offender proceedings against the defendant on count 1.[3] The court recognized the state was pursuing habitual offender proceedings on the cruelty to the infirmed charge. In sentencing the defendant, the court stated, "[t]he facts in this case are so disturbing that a man, Mr. Stuckey, would beat his mother on more than one occasion." The court told the defendant, "[t]his is the second time that you beat your mother, and I find it typical of what I have seen of you the entire time that I've been your judge by saying, well, you know, we just can't live together. I moved my stuff out so, you know, things ought to be all right." The court noted the defendant had beaten the victim's

[3] The habitual offender bill of information concluded, "WHEREFORE, the State of Louisiana through the District Attorney for East Baton Rouge Parish prays that this Honorable Court adjudge Gilbert Stuckey a second felony offender under case number 02-10-403 [sic] of the 19th Judicial District Court, for his conviction of the charge of Cruelty to the Infirmed, and sentence him thereunder."

head against a refrigerator and had threatened "to come back and kill" her. Thereafter, the court imposed maximum enhanced sentences on counts 1 and 2.

The state did not attempt to establish the defendant's habitual offender status as to count 2. Thus, the applicable penalty on count 2 was a fine of not more than two thousand dollars or imprisonment, with or without hard labor, for not more than five years, or both. LSA-R.S. 14:34.1(C). The trial court, however, imposed sentence on count 2 as if the defendant had been adjudged a second-felony habitual offender on that count. This court may, however, correct the illegal sentence by amendment on appeal, rather than by remand for resentencing, because the trial court attempted to impose the maximum legal sentence on count 2, and thus, no exercise of sentencing discretion was involved. See LSA-C.Cr.P. art. 882(A); **State v. Miller**, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. Accordingly, the sentence on count 2 is hereby amended to five years of imprisonment at hard labor, which sentence shall run concurrently with the sentence imposed on count 1.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT 1 AFFIRMED; CONVICTION ON COUNT 2 AFFIRMED; SENTENCE ON COUNT 2 AMENDED AND AFFIRMED AS AMENDED.