

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0029

STATE OF LOUISIANA

VERSUS

JACOB WILSON ZIRLOTT

Judgment Rendered: September 14, 2011

**Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Case No. 176,900**

The Honorable Keith Comeaux, Judge Presiding

**J. Phil Haney
District Attorney
Walter J. Senette, Jr.
Assistant District Attorney
Franklin, Louisiana**

**Counsel for Appellee
State of Louisiana**

**Mary E. Roper
Baton Rouge, Louisiana**

**Counsel for Defendant/Appellant
Jacob Wilson Zirlott**

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

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GAIDRY, J.

The defendant, Jacob Wilson Zirlott, was charged by bill of information with aggravated second degree battery, a violation of La. R.S. 14:34.7. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant moved for a new trial and for post-verdict judgment of acquittal. The trial court denied both motions. The state filed a bill of information seeking to have the defendant sentenced as a second-felony habitual offender pursuant to La. R.S. 15:529.1. At the conclusion of a hearing, the trial court adjudicated the defendant a second-felony habitual offender and sentenced him to seven and one-half years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, urging four assignments of error:

1. The evidence was insufficient to support a verdict of aggravated second degree battery, as there was insufficient evidence to show that the defendant had a dangerous weapon when he punched the victim in the face or that he intended to inflict serious bodily injury.
2. It was error for the trial court to deny the defendant's motion for a new trial because the evidence was insufficient to support a conviction for aggravated second degree battery.
3. It was error for the trial court to deny the defendant's motion for post verdict judgment of acquittal without modifying the verdict, since the evidence was insufficient to convict the defendant of aggravated second degree battery.
4. It was error for the trial court to deny the defendant the benefit of parole as part of his sentence, since this exceeded the statutory sentencing limit for aggravated second degree battery, as well as the sentencing enhancement authorized by La. R.S. 15:529.1.

We affirm the conviction and habitual-offender adjudication. We vacate the sentence and remand for resentencing.

FACTS

In 2006, the defendant and Stephen Charpentier worked together at SMI in Centreville, Louisiana. On December 27, 2006, around noon, the defendant contacted Charpentier via telephone and advised that he wanted to talk to Charpentier after work. Charpentier told the defendant that he would call him once he got off. Later, at approximately 5:00 p.m., as Charpentier walked outside to retrieve an item from his vehicle, the defendant drove up. The defendant exited his vehicle, confronted Charpentier, and accused Charpentier of calling him a "rat." Charpentier asked the defendant, "what are you talking about?" The defendant struck Charpentier in the face once with what Charpentier described as a "small heavy object." The defendant returned to his vehicle and left the area.

As a result of the blow to the face, Charpentier became dazed. Bleeding profusely, Charpentier staggered toward Houston Cooley, a bystander who had observed the entire incident from an area nearby. Cooley went to find help for Charpentier. Charpentier was transported to Franklin Foundation Hospital for treatment of his injuries. Charpentier suffered comminuted zygomaticomaxillary facial complex fracture and facial nerve damage, which required corrective surgery with placement of titanium screws. Charpentier experienced extreme physical pain as a result of the injuries. At trial, Charpentier still had residual numbness in his face.

ASSIGNMENT OF ERROR #1

In this assignment of error, the defendant contends that the evidence presented at the trial of this matter was insufficient to support the conviction of aggravated second degree battery. Specifically, he contends that the state failed to prove: 1) that he hit Charpentier with a dangerous weapon, or 2) that he intended to inflict serious bodily injury upon Charpentier. The state

contends that the verdict was rational and the evidence presented at the defendant's trial sufficiently supports the aggravated second degree battery conviction.

On the issue of use of a dangerous weapon, the defendant notes that Charpentier's testimony did not establish that the defendant used a dangerous weapon. He further notes that Charpentier testified that he saw some unidentifiable object in the defendant's hand, but he could not tell what the object was. The defendant claims that the only testimony regarding use of a dangerous weapon was Charpentier's testimony indicating that he had previously observed the defendant in possession of brass knuckles at work and that the defendant carried brass knuckles on him all the time, and Stephanie Firmen's testimony that the defendant once told her he carried brass knuckles on him all the time. This evidence, the defendant argues, is insufficient to prove that he hit Charpentier with brass knuckles or any other type of weapon. The defendant also notes that Dr. Cook testified that the injury sustained by Charpentier could have resulted from a blow with a bare fist.

Regarding the intent to inflict serious bodily injury element of the offense, the defendant notes that it is undisputed that he hit Charpentier only once. He argues that a single blow does not unequivocally establish intent to inflict serious bodily injury. Thus, he contends that the evidence is sufficient to support only the lesser offense of simple battery.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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 beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson* standard of review, incorporated in Article 821, 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 factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. The testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Orgeron*, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

Louisiana Revised Statutes 14:34.7(A)(1) defines “aggravated second degree battery” as a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury. The statute defines “serious bodily injury” as 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. La. R.S. 14:34(A)(2).

Aggravated second degree battery is a crime requiring specific criminal intent. See *State v. Fuller*, 414 So.2d 306, 310 (La. 1982). Specific 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. La. R.S. 14:10(1). Such state of mind can be formed in an instant. *State v. Cousan*, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred

from the circumstances of the transaction and the actions of the defendant. *State v. Graham*, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. *State v. McCue*, 484 So.2d 889, 892 (La. App. 1st Cir. 1986).

At the trial of this matter, the state presented the following evidence regarding the incident:

Houston Cooley testified that after Charpentier was struck in the face, he started staggering and walking erratically. He also had blood "pouring out of his face."

Charpentier testified that he was certain that the defendant had something in his hand when he struck him in the face. Charpentier explained that he looked down and observed the object as the defendant balled his fist. However, Charpentier could not determine exactly what the object was. Charpentier further testified that the defendant regularly carried brass knuckles on his person at work. The defendant would brandish the brass knuckles and threaten people at work. According to Charpentier, shortly after the incident occurred, the defendant called him and threatened to "smash the other side of his face."

Deputy Dan Weidenboerner, of the St. Mary Parish Sheriff's Office, testified that he made contact with Charpentier at the hospital to investigate the battery. The left side of Charpentier's face was visibly swollen. Charpentier identified the defendant as the person who battered him. Charpentier also told Deputy Weidenboerner that the defendant hit him with a small heavy object.

Stephanie Firman, a former coworker of the defendant, also testified regarding the defendant's reputation of carrying brass knuckles. Firman testified that the defendant once told her that he carried brass knuckles with

him at all times. Firman admitted, however, that she never personally observed the defendant with the brass knuckles.

The state also presented testimony from Dr. Daniel Cook regarding Charpentier's injuries. Dr. Cook testified that the defendant suffered severe facial displacement and comminuted fractures in his zygomatic arch, which likely caused him to suffer extreme physical pain. Although Dr. Cook acknowledged that he had, on at least one occasion, observed a comminuted fracture with a "purported" bare fist punch, he further noted that this type of injury more commonly results from the use of blunt objects, i.e. "bats, bottle to the face." Dr. Cook further opined that brass knuckles, by design, could have produced Charpentier's injuries.

In support of his theory that he did not hit Charpentier with brass knuckles, the defendant presented testimony from Christine Derouen. Derouen claimed that she was in the vehicle with the defendant when they arrived at Charpentier's place of employment. She denied that the defendant had brass knuckles or anything else in his hand when he exited the vehicle. Derouen claimed that she put the defendant's brass knuckles in her pocket before the defendant exited the vehicle. In an effort to explain the object that Charpentier saw in the defendant's hand, Derouen testified that the defendant picked up a rope-like cable off of the ground after he exited the vehicle. She testified that the defendant hit Charpentier only once, and she did not believe Charpentier had been seriously hurt. Derouen also denied ever hearing the defendant threaten to smash Charpentier's face over the phone after they left the scene.

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 which

raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The court does not determine whether another possible hypothesis has been suggested by the defendant, which could explain the events in an exculpatory fashion. Rather the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found guilt beyond a reasonable doubt. *State v. Captville*, 448 So.2d 676, 680 (La. 1984).

We are satisfied that the evidence presented, when viewed in the light most favorable to the state, is sufficient to support the aggravated second degree battery conviction. The record before us clearly reflects that there was sufficient evidence for a rational trier of fact to find that a dangerous weapon was used to batter Charpentier. The dangerousness of the instrumentality based upon its use is a factual question for the jury to decide. See *State v. Odom*, 2003-1772 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 589, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026. Herein, there has been no showing that the jury erred in accepting Charpentier's testimony regarding the presence of an object in the defendant's hand and in determining that the object in the defendant's hand (whether or not it was brass knuckles) was used in a manner likely to cause serious bodily injury. Charpentier's testimony, coupled with Dr. Cook's opinion that the type of comminuted fractures that Charpentier sustained more commonly resulted from the use of a blunt object, was sufficient to support the jury's conclusion that a dangerous weapon was used.

Furthermore, the defendant's argument that the evidence of a single blow is insufficient to prove intent to inflict serious bodily injury also lacks merit. That this defendant had specific intent to cause serious bodily injury

through the use of force or violence by using a dangerous weapon reasonably could have been inferred by the jury from the defendant's actions of hitting Charpentier (even once) directly in the face with the metal object with enough force to cause severe displacement and several bone fractures. From the evidence presented at the trial, it is clear that the defendant specifically intended, at a minimum, to cause Charpentier extreme physical pain.

Considering the foregoing, we find that the evidence presented at the trial in this case is sufficient to prove all of the essential elements of aggravated second degree battery. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, the defendant contends that the trial court erred in denying his motion for a new trial, which was based upon La. Code Crim. P. art. 851(1). The defendant argues that the trial court, weighing the evidence as the thirteenth juror, should have granted the motion for a new trial.¹

Article 851(1) states, in pertinent part, as follows:

The court, on motion of the defendant, shall grant a new trial whenever:

(1) The verdict is contrary to the law and the evidence[.]

Under La. Code Crim. P. art. 851, the trial court, in ruling on a motion for new trial, can only consider the weight of the evidence, not its sufficiency, and must conduct a factual review of the evidence as a thirteenth juror. See *State v. Steward*, 95-1693 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1014; *State v. Morris*, 96-1008 (La. App. 1st Cir. 3/27/97), 691 So.2d 792, 799, writ denied, 97-1077 (La. 10/13/97), 703 So.2d 609. An appellate

¹ In his motion for a new trial, the defendant also cited La. Code Crim. P. art. 851(2) and 851(5). However, on appeal, he only challenges the trial court's ruling as it relates to La. Code Crim. P. art. 851(1).

court, on the other hand, is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases, that determination resting solely within the discretion of the trier-of-fact. See Steward, 681 So.2d at 1014. Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See La. Code Crim. P. art. 858. See also State v. Guillory, 2010-1231 (La. 10/8/10), 45 So.3d 612, 614-15 (per curiam).

In the instant case, the defendant has made no showing that an error of law was committed. Accordingly, the denial of the defendant's motion for new trial based upon La. Code Crim. P. art. 851(1) is not subject to review on appeal. See State v. Hampton, 98-0331 (La. 4/23/99), 750 So.2d 867, 879-80, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). The constitutional issue of sufficiency of the evidence in this case was treated in the previous assignment of error. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #3

In this assignment of error, the defendant argues that the trial court erred in denying his motion for post verdict judgment of acquittal based upon the insufficiency of the state's evidence. For the reasons set forth in assignment of error number one, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR #4

In his fourth assignment of error, the defendant argues that the sentence imposed is illegal because the trial court denied him eligibility for parole when neither the substantive offense nor the habitual-offender law restricts eligibility for parole. The state agrees.

The trial court imposed the sentence herein without benefit of parole. Denial of parole for a second-felony habitual offender is not provided in La. R.S. 15:529.1 nor La. R.S. 14:34.7(B), the aggravated second degree battery statute. Thus, the trial court's imposition of seven and one-half years at hard labor without benefit of parole is an illegal sentence as it is contrary to the sentencing provisions set forth in the statutes governing the defendant's conviction of aggravated second degree battery and his adjudication as a second-felony habitual offender. The appellate court is authorized to correct an illegal sentence pursuant to La. Code Crim. P. art. 882, when the sentence does not involve the exercise of sentencing discretion by the trial court. See State v. Haynes, 2004-1893 (La. 12/10/04), 889 So.2d 224.

In the instant case, we find that the correction of this error necessarily involves sentencing discretion. The defendant was not sentenced to the maximum sentence so, had the court known that the defendant was parole eligible, it is possible that the court might have given him a different sentence. Therefore, we vacate the sentence and remand the matter to the trial court for resentencing.

For the foregoing reasons, the defendant's conviction and habitual-offender adjudication are affirmed. The sentence is vacated and the matter is remanded for resentencing.

CONCLUSION

The defendant's conviction and habitual-offender adjudication are affirmed. The sentence is vacated, and the matter is remanded for resentencing.

**CONVICTION AND HABITUAL-OFFENDER
ADJUDICATION AFFIRMED, SENTENCE VACATED,
REMANDED FOR RESENTENCING.**