

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1543

STATE OF LOUISIANA

VERSUS

JOHN H. JONES



Judgment Rendered: March 28, 2007

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On Appeal from the 18<sup>th</sup> Judicial District Court  
In and For the Parish of West Baton Rouge  
Trial Court No. 052166A, Div. "B"

Honorable J. Robin Free, Judge Presiding

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

*Downing, J. dissents and assigns reasons.*

## **HUGHES, J.**

The defendant, John H. Jones, was charged by grand jury indictment with attempted second degree murder, a violation of LSA-R.S. 14:27 and LSA-R.S. 14:30.1. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged.<sup>1</sup> The trial court denied the defendant's motion for "judgment notwithstanding the verdict" and motion for new trial.<sup>2</sup> The defendant was sentenced to twenty-five years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, raising the following assignments of error:

1. The trial court erred in not sustaining the defense objection to the sheriff testifying that the defendants were trying to kill the deputy.
2. The evidence was insufficient to support the conviction.

For the following reasons, we affirm the conviction and sentence.

### **STATEMENT OF FACTS**

On or about May 7, 2005, just after 10:00 p.m., Corporal Fahey of the West Baton Rouge Parish Sheriff's Office led six inmates of the West Baton Rouge Parish Jail from isolation cells to the male holding cell. The inmates were allowed to use telephone and shower facilities. After about an hour and a half, Corporal Fahey tapped on the glass of the male holding area, and asked the inmates if they were finished using the facilities. After receiving a positive response, Corporal Fahey opened the door of the holding cell. Corporal Fahey held the door open as the first inmate, Shaheed Claiborne,

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<sup>1</sup> The defendant was indicted and tried with co-defendant Donald Gibson, Jr. Both defendants were originally charged with attempted first degree murder. The charges were later amended to attempted second degree murder. Gibson was also found guilty as charged.

<sup>2</sup> Although the defendant did not use the proper language, he apparently moved for the modification of the verdict and a judgment of conviction on the lesser included responsive offense of aggravated battery, pursuant to LSA-C.Cr.P. art. 821.

exited the door. Inmate Donald Gibson exited second, followed by the defendant. After Gibson exited the door he lunged toward Corporal Fahey. As Corporal Fahey turned away, Gibson began beating him in the head with several socks, one inside of the other, filled with batteries and soap.<sup>3</sup> The socks ultimately tore and the batteries and soap began to fall out. The defendant struck Corporal Fahey in the head with the wringer section of a mop bucket.<sup>4</sup>

In an attempt to escape from prison, the defendant and Gibson obtained Corporal Fahey's set of keys and pressed buttons on the control panel located behind the booking desk. As the defendant and Gibson used the control panel to open doors, Corporal Fahey ran to the office of Sergeant Charles Tuminello, the shift supervisor. Sergeant Tuminello instructed an operator to summon an ambulance.

Meanwhile, the defendant and Gibson were unable to find the correct button to release the door and a broken portion of one of the keys became lodged inside the keyhole when they attempted to use the wrong key to unlock the door. The defendant and Gibson were thus trapped between the booking and bonding room. Next, they attempted unsuccessfully to break through a plate of security glass that separates the release room from the booking area, before ultimately being captured. The blunt trauma to Corporal Fahey's head caused a laceration in the upper crown area of his head and a second laceration in the lower back portion of his head.

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<sup>3</sup> Although various witnesses during the trial of this matter referred to the "socks" containing the batteries and soap as "a sock," the socks were introduced into evidence and Detective Ronald LeJeune of the West Baton Rouge Parish Sheriff's office, who investigated the incident and collected the evidence, testified that multiple socks were used and had been placed one inside the other. We note that references made herein to the testimony of witnesses regarding "a sock" relates to the multiple socks that had been combined with batteries and soap to form the weapon used against Corporal Fahey.

<sup>4</sup> According to the scientific analysis report of the Louisiana State Police Crime Laboratory, the DNA profile obtained from the mop wringer was consistent with the DNA profile obtained from a buccal swab of Corporal Fahey.

Approximately four staples per wound were used to close the lacerations. Corporal Fahey also received defensive wounds to his right hand and a finger during the attack.

### **SUFFICIENCY OF THE EVIDENCE**

In his second assignment of error, the defendant contends that the evidence presented herein is insufficient to support the conviction. The defendant contends that there was no motive for specific intent to kill. The defendant notes that there was no evidence that he and Gibson continued to beat Corporal Fahey after they obtained his keys. The defendant argues that the overwhelming evidence shows that he and Gibson planned to beat Corporal Fahey to neutralize him and obtain his keys in order to escape. The defendant further argues that they could have killed Corporal Fahey if they so desired. The defendant claims that the severity of the beating can be explained by the fact that he and Gibson were “so pumped up” at the time of the offense (quoting testimony of Detective Ronald Lejeune, the investigator of the incident, regarding the defendant and Gibson’s state of mind during their attempt to escape). The defendant argues that there was no specific intent to kill, as their sole intent was to escape. The defendant concludes that the severity of the beating, when evaluated in light of all the evidence, is insufficient to support a conviction for anything beyond the responsive verdict of aggravated battery.

The constitutional standard for testing the sufficiency of the evidence requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find 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). The **Jackson v. Virginia** standard of review was adopted by the

Legislature in enacting LSA-C.Cr.P. art. 821 and is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. 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. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statute 14:30.1(A) defines second degree murder, in pertinent part, as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. Under LSA-R.S. 14:27(A), a person is guilty of an attempt to commit an offense when he has a specific intent to commit a crime and “does or omits an act for the purpose of and tending directly toward the accomplishing of his object... .” Specific intent is that 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). Since specific intent is a state of mind, it need not be proved 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). To be guilty of attempted murder, a defendant must have the specific intent to kill and not merely the specific intent to inflict great bodily harm. **State v. Maten**, 2004-1718, p. 5 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 716, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544. 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(A)(3). Specific intent to kill can be implied by the intentional use of a deadly weapon such as a knife or a gun. See State v. Brunet, 95-0340, p. 8 (La. App. 1 Cir. 4/30/96), 674 So.2d 344, 349, writ denied, 96-1406 (La. 11/1/96), 681 So.2d 1258.

Detective Ronald Lejeune of the West Baton Rouge Parish Sheriff's Office investigated the scene after the attack. Evidence collected by Detective Lejeune included the wringer section of a mop bucket, several socks (one inside the other) with three AA batteries and a bar of soap inside of them, four more AA batteries (found scattered on the floor around the attack site), and a homemade knife (consisting of a toothbrush and a razor) that was located on the booking counter. A blue laundry bag with a brass shower drain was also found in the area of the attack. The shower drain had been removed from the shower facilities used by the defendant and Gibson prior to the attack. Two prison garb shirts (believed to belong to the defendant and Gibson) with blood spatter on them were collected from a table in the room where the defendant and Gibson were trapped after the attack. Corporal Fahey's uniform shirt (soiled with blood), worn on the night of the attack, was also collected. A sharpened turkey bone was located in the defendant's isolation cell. Detective Lejeune testified that these items were dangerous. Detective Lejeune also took photographs of the scene. Witnesses interviewed by Detective Lejeune indicated that Corporal Fahey begged for his life as the defendant and Gibson continued to deliver blows to his head. Based on his investigation, Detective Lejeune concluded that the two inmates severely beat Corporal Fahey in an attempt to escape from jail.

As to the specific facts of the incident, Detective Lejeune testified as follows (referencing a series of photographs taken of the scene):

The door we saw earlier with -- where they are released. An inmate might be released to go outside. This is the lobby. If you notice, this is the lobby part, and there's a key broken off into the lock. After attacking Cpl. Fahey, they took his keys, and after -- not able to find the right button on the panel, they put a key in this lock and actually they were so pumped up, it broke. And, it's a big key that fits in that lock.

Detective Lejeune had no personal knowledge as to whether the key used in attempting to open the lobby door was the correct key for the door.

During cross-examination, Detective Lejeune stated that he was unsure whether the homemade knife was used during the attack. He confirmed that he did not find any blood on the outside of the socks supposedly used during the attack. Detective Lejeune speculated that the sock-weapon may have been used before the lacerations were caused. The defense elicited testimony in an attempt to show that the defendant and Gibson could have killed Corporal Fahey if they wanted to. In response, Detective Lejeune stated that he believed they did indeed try to kill Corporal Fahey. Detective Lejeune conceded that at some point, the defendant and Gibson stopped beating Corporal Fahey and focused on their attempt to escape.

Aaron Ray, a fellow inmate at the time of the offense, witnessed the attack and was interviewed. A videotaped recording of Ray's interview was played during the trial, and he later testified.<sup>5</sup> Ray had mopped the holding cell area that day and the mop bucket was sitting just outside of the holding cell at the time of the attack. According to Ray, two inmates (whom he

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<sup>5</sup> Initially, Aaron Ray was called to testify at trial, but he refused, expressing fear for the safety of his relatives. At that time, Ray was held in contempt of court, ordered jailed, and his taped statement was admitted into evidence as he was deemed unavailable to testify. However, after the trial was recessed and then reconvened, Ray was again called to the stand and gave testimony at that time.

identified by photograph as the defendant and Gibson) began discussing plans to “take the Deputy” when they were brought to the shower facilities. He stated that they stuffed batteries and soap in a sock before the attack. Gibson pushed the door as he exited the holding cell and Corporal Fahey was pressed against the wall. Ray viewed the attack from an approximate distance of six feet. The defendant hit Corporal Fahey in the head with a portion of the mop bucket. Gibson began striking Corporal Fahey in the head with the loaded sock. He indicated that the blows were too numerous to count. Corporal Fahey was screaming for his life during the attack. As the sock broke open, Gibson continued striking Fahey in the neck and head. Ray stated that Corporal Fahey should have died from the attack. The defendant and Gibson attempted to use the button control panel to open the release door and started breaking the security glass when their attempt to open the door was unsuccessful. According to Ray, several inmates knew about the plans of the defendant and Gibson. Ray added that other inmates acted as lookouts.

Corporal Fahey testified that they were understaffed on the night of the attack. He stated that a little after 10:00 p.m., he took six inmates from the isolation cell to the male holding cell so they could use the telephone and shower facilities. After about an hour and a half, Corporal Fahey determined that the inmates had completed their use of the facilities, and he opened the holding cell door so that he could escort the inmates back to their original cells. Corporal Fahey stated that although after the initial attack, his memory was “a little hazy,” he remembered Gibson lunging toward him. Corporal Fahey specifically testified as follows:

He [Gibson] is walking up to me. He comes up to me and does this (indicating) like he is getting ready to jump on me. Well, my reaction was I turned back. As soon as I turned back, I felt



something impact my head. Initially, I was stunned, I didn't know what was going on, you know. And I looked back over toward Donald Gibson and he had a white sock in his hand and he was continuously beating me with it. I cannot tell you how many times. It was whack after whack after whack. And they were starting to take their toll on me. I didn't know what was going on. I didn't know why this was happening to me. I thought I was going to die. All I could think about was my little girl. I just had a little girl in 2003 and she was about a year and a half at the time. And all I could think about was I can't believe I'm going out like this, I cannot believe that my daughter is going to have to grow up without her daddy. And about that time, I was nearing unconsciousness.

Corporal Fahey further testified:

I think I was on my knees. And I remember looking up at Mr. Jones over there and I said, "Man, what are you doing?" I said, "I've got a little girl at home." He looked at me dead in the eye and told me that he "did not give a f[\*\*\*]." And he took that mop handle right there (indicating) and he whaled [sic] that thing over my head two or three times.[<sup>6</sup>]

Corporal Fahey stated that he believed the defendant and Gibson were trying to kill him. When he heard the door open, he ran to the supervisor's office. According to his testimony, Corporal Fahey thought the inmates were chasing him as he ran. Corporal Fahey stated that threats to use the weapons would have been sufficient to cause him to give the inmates the keys. Corporal Fahey was hospitalized for eighteen hours. He temporarily wore a cast (a support brace) on his right arm due to possible fractures and a puncture wound on his right hand.

During cross-examination, Corporal Fahey confirmed that he had handcuffs in his possession at the time of the attack. He stated that there was no animosity between him and the defendant or Gibson prior to the attack. When specifically asked how many times the defendant hit him in the head with the mop bucket wringer, Corporal Fahey stated that he could only remember deflecting one blow and receiving another to the head.

When asked whether the defendant and Gibson were simply trying to obtain the keys to allow their escape, Corporal Fahey stated as follows, “In my opinion, they were trying to kill me.” Corporal Fahey reiterated this opinion during redirect examination and stated that the lacerations to his head required a total of over ten staples.

Sergeant Tuminello was talking to another deputy when Corporal Fahey abruptly ran into his office just after the attack. Corporal Fahey stated, “Don’t let them get me,” and he was holding the back of his head, which was bleeding profusely. During cross-examination, Sergeant Tuminello testified that Corporal Fahey was conscious but mumbled when he spoke. Corporal Fahey was attacked approximately fifty feet away from Sergeant Tuminello’s office and had to enter three different doors (all could be opened by key, a “touch control” button, or by a button in the booking area) to get to the office. Sergeant Tuminello did not see anyone chasing Corporal Fahey.

Sheriff Michael Cazes arrived at the scene just after the attack, before Corporal Fahey was transported to the hospital. Sheriff Cazes observed the scene and Corporal Fahey’s injuries. Sheriff Cazes also took custody of the defendant and Gibson. Sheriff Cazes testified that the key used by the defendant and Gibson in their attempt to escape was the incorrect key (thus, the key broke and became partially lodged in the keyhole). Had the defendant and Gibson successfully opened that door, they would have had to open one more door before exiting the jail. When asked whether the

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<sup>6</sup> During this portion of his testimony, Corporal Fahey refers to an object used in the attack as a mop handle; however, the record consistently indicates that he was struck with a mop bucket wringer.

defendant and Gibson were trying to kill Corporal Fahey, Sheriff Cazes responded, “Yes.”<sup>7</sup>

Dr. Alfredo Suarez, an expert in pathology, reviewed Corporal Fahey’s medical records. According to the radiologist that observed a CT scan of Corporal Fahey’s injuries, Corporal Fahey may have suffered a hairline fracture of the occipital bone. The injury was not viewable by regular x-ray but was labeled a possible hairline fracture based on the CT scan. Dr. Suarez stated that blunt trauma to the head of the type suffered by Corporal Fahey could be fatal. Whether such an injury causes death depends upon the depth of the victim’s skull. Dr. Suarez stated that if Corporal Fahey had a thinner skull he probably would not have survived the blows to his head. Dr. Suarez added that an assailant would not know the depth of a victim’s skull and would aim for the head if they intended to “put them down and sometimes kill them.” Dr. Suarez stated that the memory loss suffered by Corporal Fahey was most likely caused by a concussion. Dr. Suarez stated that Corporal Fahey’s x-rays did not report a fracture to his hand. Dr. Suarez specifically confirmed that the blunt trauma Corporal Fahey received to his head could have killed him. On cross-examination, Dr. Suarez confirmed that he was unable to determine whether the perpetrators had the intent to kill or simply to immobilize Corporal Fahey. On re-direct examination, Dr. Suarez concluded that a blow to the leg would have indicated an attempt to immobilize.

The defendant and Gibson were attempting to escape from jail at the time of the offense. We find that the instrumentalities used by the defendant and Gibson in attacking Corporal Fahey, considering the manner used, were

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<sup>7</sup> The defendant’s objection and the propriety of the admission of this portion of Sheriff Cazes’s testimony will be discussed hereinafter.

clearly dangerous weapons. Thus, the jury could have reasonably concluded that specific intent to kill was implied by the use of the weapons. Corporal Fahey suffered serious injury to his head caused by several blows. The defendant and Gibson immediately began striking Corporal Fahey's head with dangerous weapons without any attempt to immobilize him by injuring other parts of his body or through use of the handcuffs that were on Corporal Fahey's person. We are satisfied that the evidence presented, viewed in the light most favorable to the prosecution, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted second degree murder. This assignment of error lacks merit.

#### **ADMISSIBILITY OF SHERIFF'S OPINION TESTIMONY**

In the first assignment of error, the defendant avers that the trial court erred in overruling the defense objection to the admissibility of Sheriff Cazes's testimony regarding his opinion as to whether the defendant and Gibson tried to kill Corporal Fahey. The defendant notes that Sheriff Cazes did not witness the beating. Citing LSA-C.E. art. 704, the defendant notes that even an expert witness is not allowed to testify to the ultimate issue of guilt. The defendant argues that Sheriff Cazes's testimony was not helpful and was prejudicial as the key issue was whether the defendant and Gibson had the specific intent to kill Corporal Fahey. In concluding that the error was not harmless, the defendant notes the trial court's comments (quoted hereinbelow) in denying his "motion for judgment (of guilty of the responsive verdict of aggravated battery) notwithstanding the verdict."

Louisiana Code of Evidence Article 704 states:

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact.

However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

The limitations on the testimony of non-expert witnesses, such as Sheriff Cazes, are found in LSA-C.E. art. 701, which states:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (1) Rationally based on the perception of the witness;
- and
- (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Generally, a lay witness can only testify to the facts within his knowledge and not to impressions or opinions. However, a witness is permitted to draw reasonable inferences from his personal observations. Where the subject of the testimony is such that any person of experience may make a natural inference from observed facts, a lay witness may testify as to such inferences, provided he also states the observed facts. See State v. LeBlanc, 2005-0885, p. 7 (La. App. 1 Cir. 2/10/06), 928 So.2d 599, 603. A reviewing court must ask two pertinent questions to determine whether the trial court properly allowed lay opinion testimony: (1) was the testimony speculative opinion evidence or simply a recitation of or inferences from fact based upon the witness's observations; and (2) if erroneously admitted, was the testimony so prejudicial to the defense as to constitute reversible error. State v. LeBlanc, 2005-0885 at pp. 7-8, 928 So.2d at 603.

The following colloquy took place at the end of the direct examination of Sheriff Cazes:

Q. In your experience with all you have just told me, look at the back of that man's head (indicating), were they trying to kill your deputy?

A. Yes.

The defense counsel lodged an objection to the above testimony stating, “I don’t know how he knows that.” In response to the objection, the trial judge stated, “The jury can give that whatever weight they think it deserves.”

As noted by the defendant on appeal, in denying the defendant’s motion for judgment of guilty of aggravated battery “notwithstanding the verdict,” the trial judge stated in pertinent part, “I would have probably come back with a guilty verdict of aggravated battery, that would have been me, the reason being I felt like had they truly wanted to kill him they could have finished it.” The trial judge added that based on the evidence the verdict “could have gone either way.” In denying the motion, the trial court noted that there was evidence to support the jury’s finding of specific intent to kill (also noting that reasonable minds could differ on the issue). The defendant cites the above trial judge’s opinions as evidence of the prejudicial nature of the testimony in question.

We note that the prohibition against expressing an opinion as to guilt or innocence is only applicable to an expert witness. LSA-C.E. art. 704. See also **State v. Hubbard**, 97-916, p. 16 (La. App. 5 Cir. 1/27/98), 708 So.2d 1099, 1106, writ denied, 98-0643 (La. 8/28/98), 723 So.2d 415 (holding that LSA-C.E. art. 704 was inapplicable regarding testimony of a detective who was not called as an expert). Based on the plain language of LSA-C.E. art. 704, general opinion testimony that is otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. As the testimony in question was rationally based on Sheriff Cazes’s perceptions and was helpful to the determination of a fact in issue (specific intent to kill), arguably the testimony was admissible.

Nonetheless, we find that any error in admitting the testimony in question was harmless beyond a reasonable doubt. Despite the trial judge’s

reservations, we find that the evidence supports the verdict herein. Moreover, the testimony in question was cumulative. In testimony elicited during cross-examination, Detective Lejeune stated that he believed the defendant and Gibson were trying to kill Corporal Fahey. Also, during direct examination (without defense objection) Corporal Fahey stated that he believed that the defendant and Gibson were trying to kill him. This was reiterated during cross-examination and re-direct examination (without objection). Based on our review of the record, we find that the verdict actually rendered in this trial was surely unattributable to any error in the admission of the testimony in question. See State v. Code, 627 So.2d 1373, 1384-85 (La. 1993), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994) (citing Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)). See also LSA-C.Cr.P. art. 921. Thus, the first assignment of error lacks merit.

**CONVICTION AND SENTENCE AFFIRMED.**


STATE OF LOUISIANA  
COURT OF APPEAL  
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2006 KA 1543

STATE OF LOUISIANA  
VERSUS  
JOHN H. JONES

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**Downing, J., dissents and assigns reasons**



I dissent because I find merit in Mr. Jones's first assignment of error. In a case where the trial court personally concluded that the evidence better fit a charge of aggravated battery, the Sheriff of West Baton Rouge Parish was allowed to speculate before the jury that Mr. Jones was trying to kill his deputy. This testimony was inadmissible, and under these close circumstances where the jury could have returned the responsive verdict of aggravated battery, I cannot conclude that the verdict was surely unattributable to the error.

Louisiana Code of Evidence art. 701 provides:<sup>1</sup>

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (1) Rationally based on the perception of the witness; and
- (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Here, Sheriff Cazes' testimony was based on his "experience," not on his perceptions. He was not present at the attack. Yet he was allowed to opine, over defense objection, that the defendant was trying to kill his deputy. This testimony fails to qualify for either limitation. I can think of

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<sup>1</sup> Since Sheriff Cazes was not tendered as an expert, I do not address his testimony under La. C.E. art. 704.



no circumstance where testifying to the ultimate conclusion would fall within Art. 701's limitations on lay opinion testimony.

In finding this error harmless, the majority dismisses the trial court's evaluation of the evidence and calls the evidence cumulative. However, I cannot agree that in this close case, the verdict was surely unattributable to the inadmissible testimony of the Sheriff of West Baton Rouge Parish, whose prestige and office may have influenced the jury.