

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0275

STATE OF LOUISIANA

VERSUS

KENDRICK DWAYNE COLEMAN

Judgment rendered: June 8, 2007

**On Appeal from the 18th Judicial District Court
Parish of Pointe Coupee, State of Louisiana
Number 72,188-F
The Honorable James J. Best, Judge Presiding**

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Kendrick Dwayne Coleman**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

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DOWNING, J.

The defendant, Kendrick Dwayne Coleman, originally was charged by bill of information with aggravated second degree battery, a violation of La. R.S. 14:34.7. He pled not guilty. Prior to trial, the State amended the bill of information to charge aggravated battery, a violation of La. R.S. 14:34. The defendant was tried by a jury and convicted as charged.

The defendant filed counseled and pro se motions for a new trial, which the trial court denied. (R. pp. 50, 51-52). At sentencing, the defendant filed a *pro se* motion in arrest of judgment, which the trial court also denied. (R. pp. 63-65). The defendant was sentenced to imprisonment at hard labor for ten years. (R. p. 7). The defendant moved for reconsideration of the sentence. The trial court denied the motion. (R. pp. 68, 71). The defendant now appeals, urging four assignments of error as follows:

1. The evidence was insufficient to convict the defendant of aggravated battery, where the evidence presented by the state did not show that the hot water was used in a manner which was calculated or likely to produce death or great bodily harm.
2. The trial court abused its discretion in denying the defense's motion for a continuance when the state provided medical records of the victim on the day before the trial was to begin.
3. The trial court abused its discretion in allowing the state to present testimony regarding the victim's medical records, since the defense had not been given an opportunity to prepare for this evidence.
4. The trial court erred in failing to inform the defendant as to the delays for filing an application for post-conviction relief as required by La. Code Crim. P. art. 930.8.

We affirm the defendant's convictions and sentences.

FACTS

The facts surrounding the instant offense are essentially undisputed. On February 5, 2006, the victim and the defendant were inmates at the Pointe Coupee Detention Center. At some point during the day, the victim walked past the cell where the defendant was housed. The defendant yelled, “Hey,” and when the victim looked his way, the defendant threw hot water into the victim’s face. (R. p. 366). The victim yelled and screamed out for help. His vision was momentarily impaired, and the skin began peeling off of his face. (R. p. 366). The victim was immediately transported to Pointe Coupee General Hospital where he was referred to a burn specialist. (R. p. 399). The treating nurse described the skin on the victim’s face as “bubbled, burnt and peeling.” (R. p. 396). The victim received treatment for his injury and was later discharged.

Evidence subsequently collected from the defendant’s cell revealed that the defendant heated the water using a Sprite can and a cigarette lighter. (R. pp. 383-384).

ASSIGNMENT OF ERROR #1

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant contends the evidence presented at trial was insufficient to support the aggravated battery conviction. Specifically, he argues the evidence failed to prove the commission of a battery with a dangerous weapon. The defendant argues the State failed to prove that the hot water was used in a manner calculated or likely to cause great bodily injury, as required by the definition of “dangerous weapon” contained in La. R.S. 14:2. He asserts that the injuries sustained by the victim in this case “did not rise to the severe level called for by the statute.” (Defendant’s brief p. 7)

The standard of review for the 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 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. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

“Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.” La. R.S. 14:33. “Aggravated battery is a battery committed with a dangerous weapon.” La. R.S. 14:34. Herein, it is undisputed that the defendant intentionally threw hot water into the victim’s face. It is likewise undisputed that the victim was injured by the defendant’s actions. Thus, the battery portion of La. R.S. 14:34 (aggravated-battery statute) is satisfied. The remaining question is whether the hot water used to batter the victim constitutes a dangerous weapon.

Under La. R.S. 14:2(3), 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.” An instrumentality may be a “dangerous weapon” not solely because of the inherent danger it poses, but also because the instrumentality is used in a manner likely to result in death or great bodily harm. La. R.S. 14:2(3). The dangerousness of the instrumentality based upon its use is a factual question for the jury to decide. **State v. Odom**, 03-1772, p. 8 (La. App. 1 Cir. 4/2/04), 878 So.2d 582, 589.

We are satisfied that the evidence presented, when viewed in the light most favorable to the State, was sufficient to support the aggravated battery

conviction. The record before us clearly reflects that there was sufficient evidence for a trier of fact to find that a dangerous weapon was used to batter the defendant. Herein, there has been no showing that the jury erred in determining that the hot water was used in a manner likely to cause great bodily harm. Although water is typically inherently harmless, it is clear that water may be considered a dangerous weapon by virtue of its use when heated and thrown into the face of another individual, causing serious injury.

Furthermore, the defendant's attempt to minimize the extent of the victim's injuries is of no moment. 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. **State v. Brown**, 00-1951, p. 3 (La. App. 1 Cir. 5/11/01), 808 So.2d 622, 623-624. Thus, the mere fact that the defendant threw the hot water (which in the manner used, qualifies as a dangerous weapon) into the victim's face is sufficient to support the conviction of aggravated battery. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #2

DENIAL OF MOTION TO CONTINUE

In this assignment of error, the defendant argues the trial court erred in denying his oral motion to continue. La. Code Crim. P. art. 487(A) reads:

A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

Before the trial begins the court may order an indictment amended with respect to a defect of substance.

After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

Louisiana Code of Criminal Procedure art. 489, in pertinent part, provides as follows:

If it is shown, on motion of the defendant, that the defendant has been prejudiced in his defense on the merits by the defect, imperfection, omission, uncertainty, or variance, with respect to which an amendment is made, the court shall grant a continuance for a reasonable time. In determining whether the defendant has been prejudiced in his defense upon the merits, the court shall consider all the circumstances of the case and the entire course of the prosecution.

The granting or denial of a motion for continuance rests within the sound discretion of the trial court, and its ruling shall not be disturbed on appeal absent a showing of a clear abuse of discretion. La. Code Crim. P. art. 712; **State v. Spradley**, 97-2801, p.3 (La.App. 1 Cir. 11/6/98), 722 So.2d 63, 67; **State v. Spencer**, 444 So.2d 354, 356 (La.App. 1 Cir. 1983). Whether refusal of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not reversible absent a showing of specific prejudice. **State v. Strickland**, 94-0025, p. 23 (La. 11/1/96), 683 So.2d 218, 229. The purpose of the continuance is the prevention of prejudicial surprise to the defendant. It is incumbent upon defendant to show in what respect his defense has been prejudiced by the amendment of the bill. **State v. Brown**, 338 So.2d 686, 687 (La. 1976).

As previously noted, the defendant herein was originally charged with aggravated second degree battery, which is defined as “a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury.” La. R.S. 14:34.7(A)(1). “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. La. R.S. 14:34.7(A)(2). Thus, to secure a conviction for aggravated second degree battery the State was required to prove 1) a battery, 2) with a dangerous weapon, and 3) intentional infliction of serious bodily injury.

On the day before the scheduled trial, the State provided the defense a copy of some of the victim's medical records. In response, counsel for the defendant requested a continuance so that he could "adequately prepare for the trial." (R. p. 79). Counsel noted that the gist of his defense was that the injury sustained by the victim did not constitute "serious bodily injury," and thus, additional time to review the medical records was necessary. (R. p. 79). The State responded by amending the bill of information to reduce the charge to aggravated battery, which did not require any proof of the extent of the injury or of any actual injury. (R. p. 80). Counsel for the defendant again moved to continue the trial, arguing that the amendment changed the defense he prepared for trial. The State opposed the postponement of trial noting that proof of the use of a dangerous weapon is required in both offenses. The trial court denied the motion. (R. p. 84).

After reviewing the record, we conclude that the trial court did not abuse its discretion in denying the defendant's motion for a continuance. The defendant has failed to demonstrate that his defense was prejudiced as a result of the amendment to the bill. As the State correctly noted, the amendment of the bill of information from aggravated second degree battery to aggravated battery could not have prejudiced the defense because both offenses required proof of a dangerous weapon. The amendment only eliminated the need to prove that the dangerous weapon actually caused serious bodily injury. Consequently, we find no error or abuse of discretion

in the trial court's denial of the motion to continue. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #3

ADMISSIBILITY OF TESTIMONY REGARDING VICTIM'S INJURIES

In this assignment of error, the defendant contends the trial court erred in allowing the State to question Darlene Morel (the nurse who treated the victim) regarding the victim's injuries. The defendant argues that since the court ruled in favor of the State when it argued that evidence regarding the victim's medical records was not relevant, the State should not have been allowed to rely on the medical records to prove that the water had been used in a manner which was likely to produce "great bodily harm." (Defendant's brief p. 10). The State asserts the defendant's argument in connection with this assignment is misleading and inaccurate. The State notes that none of the victim's medical records were introduced into evidence at the trial. The State contends the nurse's testimony was relevant to prove the existence of an injury as a result of the battery. Thus, the State contends, this particular relevant evidence was properly admitted and did not present any undue prejudice to the defendant.

Upon review of the record, we find no error by the trial court in allowing the testimony in question. The record reflects that, contrary to the defendant's assertions, the victim's medical records were never introduced into evidence and/or relied upon by the State. Instead, the state presented testimony from the treating nurse describing the victim's injuries and photographs depicting the injuries. As the State correctly asserts, this particular evidence was relevant to show the existence of the injury resulting from the battery inflicted upon the victim by the defendant. The trial court's

ruling on the motion to continue, which spoke only to the relevance of the medical records to prove the extent of the victim's injuries, had no bearing on the evidence regarding the existence of the injury. Without evidence of the injury, which proved that the water doused upon the victim was, in fact, very hot, the State could not have met its burden of proving that the water was a dangerous weapon. The trial court did not err or abuse its discretion in allowing this evidence. The defendant was not unduly prejudiced by the evidence. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #4

POST-CONVICTION RELIEF DELAYS

In his final assignment of error, the defendant asserts that at the time of sentencing, the trial court failed to advise him of the two-year time limitation contained in La. Code Crim. P. art. 930.8(A) for the filing of post-conviction relief applications. The defendant argues that this matter should be remanded to the trial court with instruction to provide notice of the applicable prescriptive period. (Defendant's brief p. 11).

Section C of Article 930.8 states that at the time of sentencing, the trial court shall inform the defendant of the prescriptive period for seeking post-conviction relief. The record in this case reflects that the defendant is correct in his observation that the trial court failed to advise him of the Article 930.8 prescriptive period. However, as the issue has been raised herein, it is apparent that the defendant has notice of the limitation period and/or has an attorney who is in the position to provide him with such notice. Although we have done so in the past, we decline to remand for the trial court to provide such notice. Instead, out of an abundance of caution and in the interest of judicial economy, we note that La. Code Crim. P. art. 930.8(A) generally provides that no application for post-conviction relief,

including applications that seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. Code Crim. P. arts. 914 or 922. See State v. Godbolt, 06-0609, pp. 7-8 (La. App. 1 Cir. 11/3/06), 950 So.2d 727, 732.

DECREE

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED