NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 2293

STATE OF LOUISIANA

VERSUS

MONTREAL EMERY

Judgment Rendered: May 4, 2007

Appealed from the
Twentieth Judicial District Court
in and for the Parish of West Feliciana, State of Louisiana
Trial Court Number W-05-5-114

Honorable William G. Carmichael, Judge Presiding

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BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

The defendant, Montreal Emery, was charged by bill of information with inciting to riot wherein the death of a human being occurred, a violation of LSA-R.S. 14:329.2 and 14:329.7(C). The defendant pled not guilty. Following a jury trial, the defendant was found guilty of the lesser and included offense of inciting to riot as a result of which serious bodily injury or property damage in excess of $5,000.00 occurred, in violation of LSA-R.S. 14:329.2 and 14:329.7(B).[1] The defendant filed motions for postverdict judgment of acquittal and new trial, which were denied. The defendant was sentenced to a term of five-years imprisonment at hard labor. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

On March 12, 2005, at around midnight, the defendant and several of his friends, Derrick Emery,[2] Steven Washington, Terrence Brooks, and Booker T. Washington, went to Phat Tuesdays, a nightclub ("the club") in St. Francisville, Louisiana. The defendant and his friends were from the community of Hardwood. Many of the people in the club were from the community of Independence. Also present in the club were some people from Hardwood who knew the defendant, but did not ride with him, including Michael Paul Allen, Terrell Smith, Robert Williams, Corey Rucker, and Darnell Emery, the defendant's cousin. There was an ongoing rivalry between these two communities.[3] According to several witnesses, the defendant antagonized several Independence people in the club by engaging in overt, hostile behavior, such as dancing "in people's faces" and gesturing at them

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[1] See LSA-C.Cr.P. art. 815(2).

[2] Derrick Emery was the defendant's cousin.

[3] The record reflects that there were also some people in the club from Jackson, a community that appeared to side with Independence with regard to the rivalry between Independence and Hardwood.

with his hand in the shape of a gun. The defendant also "exchanged words" with two of the patrons at the club.

At closing time, everyone began exiting the club. Outside of the club, Rodney Cain and the defendant exchanged words and began fighting. Other people from Independence attacked the defendant. Several smaller fights broke out. People from Hardwood fought people from Independence and Jackson. Steven Washington grabbed a baseball bat from Derrick Emery's truck and struck Rodney Cain with it. Terrence Brooks and Michael Paul Allen had guns and began firing shots in the air. During the melee, Rodney Cain was shot and killed. Approximately forty-five witnesses were questioned about the incident.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was not sufficient to support his conviction. Specifically, the defendant contends that the State failed to prove the element of "willful intent" to incite to riot.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this Court must consider "whether, after 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 LSA-C.Cr.P. art. 821(B); State v. Mussall, 523 So. 2d 1305, 1308-1309 (La. 1988). The Jackson v. Virginia 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, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

Louisiana Revised Statute Article 14:329.1 provides:

> A. A riot is a public disturbance involving an assemblage of three or more persons acting together or in concert which by tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

Louisiana Revised Statute Article 14:329.2 provides:

> Inciting to riot is the endeavor by any person to incite or procure any other person to create or participate in a riot.

Louisiana Revised Statute Article 14:329.7 provides:

> A. Whoever willfully is the offender or participates in a riot, or is guilty of inciting a riot, or who fails to comply with a lawful command to disperse, or who is guilty of wrongful use of public property, or violates any other provision hereof shall be fined not more than five hundred dollars or be imprisoned not more than six months, or both.
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> B. Where as a result of any willful violation of the provisions of R.S. 14:329.1-14:329.8 there is any serious bodily injury or any property damage in excess of five thousand dollars, such offender shall be imprisoned at hard labor for not more than five years.
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> C. Where, as a result of any willful violation of the provisions of R.S. 14:329.1-14:329.8, the death of any person occurs, such offender shall be imprisoned at hard labor for not to exceed twenty-one years.

General criminal intent is present 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). In general intent crimes, criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal. See State v. Elliot, 2000-2637, pp. 4-5 (La. App. 1st Cir. 6/22/01), 809 So. 2d 203, 206. The criminal intent necessary to sustain a conviction for inciting to riot is shown by the very doing of the acts which have been declared criminal in the definition of the crime.

The trier of fact is free to accept or reject, in whole or in part, the testimony

of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932.

The testimony at trial established that a large altercation involving many people from Hardwood, Independence, and Jackson occurred outside of Phat Tuesdays. During the melee, Rodney Cain was shot and killed.[4] Delvin Whitaker testified that when everyone got outside, it was "just like a war." Whitaker stated that the defendant and Rodney Cain "got to fighting, then everybody was fighting after that." Whitaker further testified that it was "a gang fight or a hood fight." Jennifer Sullivan testified that the defendant and Rodney Cain were fighting and Rodney Cain was "getting the best" of the defendant. Then, "some boys from Hardwood crowded Bone [Cain] and then other people from, like Independence and Jackson and all that just starts, everybody just start (sic) fighting and everything just got out of hand." Sullivan further testified, "Everybody was fighting. Gunshots was (sic) fired and all that. People was (sic) being hit with bats." During the fighting, Ranika Cain was shot in her left ankle, and Derrick Emery was grazed in his leg.

Several witnesses for the State testified that the defendant's behavior inside the club was provocative and antagonistic. Delvin Whitaker testified that the defendant and Bobby Coates exchanged words while they were inside the club. Jennifer Sullivan testified that the defendant and Rodney Cain exchanged words

[4]Lieutenant Ontario KcKneely with the West Feliciana Parish Sheriff's Office testified that Michael Allen was charged with the murder of Rodney Cain.

while they were inside the club. Lori Coates testified that the defendant was "dancing all in people face (sic). He started pointing his finger . . . like as if he was, had a gun in his hand." According to Coates, the defendant "acted as if he was trying to start a fight." Coates further testified that the defendant, and no one else, was antagonizing people inside of the club that night. Ranika Cain testified that the defendant "decides he wants to be humbuggish, jump around the club, bounce around, bounced in my face, everybody else (sic) face." McKinley Fontenot testified that the defendant was "trying to get something started" by doing "little gun signs." He testified that the defendant was pointing toward him from across the room saying, "You're a dead man or something." Fontenot further testified that it seemed by the defendant's actions that "he wanted to get a big gang fight started or something." Bobby Coates testified that at about 1:30 a.m., near closing time, the defendant cursed at him (Coates), and Coates cursed back. The defendant gestured with his hand in the shape of a gun toward Coates.

Several witnesses for the State also testified that the defendant's provocative and antagonistic behavior was the catalyst for the resulting fighting outside of Phat Tuesdays. When asked why he thought the defendant had anything to do with the gunshots outside, Delvin Whitaker responded, "Because if he wouldn't have been fighting out there that night none of that wouldn't (sic) have happened." When asked on direct examination if she thought the defendant "kind of kicked everything off or escalated the situation," Ranika Cain responded, "Yes, sir." On cross-examination, Ranika Cain elaborated on why she thought the defendant caused the fighting:

> Q. All this commotion up there, what did Montreal Emery have to do with it?
> A. He started it.
> Q. How?
> A. By jumping around the club, shoo-shooing, whispering, this, that, you know.
> Q. Was he dancing?

A. Uh-huh. (Yes)
Q. How many other people were dancing in the club?
A. It was a bunch of people dancing but they was dancing to theirselves (sic), not like up in no one else face with the hand motions and the mean mugging, all that.

* * * * *

Q. Okay. He's inside dancing and you don't like his dancing?
A. I did not say that.
Q. You liked his dancing?
A. No. Because I don't -- it's a way you dance okay, well, a way we do it. And the type of dance he was doing or emotions he was giving out, it wasn't like a friendly dance or just in the barroom moving around or whatever. It was like, you know, moreso like he was picking.

* * * * *

Q. Let me ask you something, it's just -- he's dancing and you don't like it and your brother doesn't like it and he's close and then he goes on back off and comes back around and y'all get that upset over not liking somebody's dancing?
A. No, it wasn't a point about us getting upset about not liking nobody's dancing but, when like I said, it's a difference in dancing and what he was doing. When you have someone all up in your face and surrounding you like, you know, the information I gave y'all earlier, I think it's a little bit more than dancing he want to do.
Q. Okay. I'm back to my main question, what did Montreal Emery do that night? You said he started all of this?
A. Excuse me, well, by, like I say, by him doing what he was doing, you know, in the barroom, dancing around and shoo-shooing, going tell his friends something then his friends, they all leave and then they all show back up together, you know, yeah, I could possibly say that.

* * * * *

Q. I mean, how do you know he had something to do with people that walked outside? You're just guessing, aren't you?
A. No, I'm not guessing. Well --
Q. How do you know?
A. I don't know for a fact, but nine times out of ten I know that I'm probably sure because when he went back there and whispered to his friends and they all looking over there where we was and then they all leave and they all come back, you know, it's like I say, it all boils down to he started the whole thing and that, that's just my opinion.

McKinley Fontenot, who fought with the defendant outside of the club, also testified on cross-examination that he thought the defendant caused the fighting:

Q. And why did that [the defendant's hand signs] offend you so?
A. Because he was -- what you talking about, the signs he was

pointing, throwing to me?
Q. Yep.
A. Somebody throwing a sign to you like you, telling you you a dead man and all that, it wouldn't make you mad? Bouncing around, trying to get your attention like trying to get you to fight or something?
Q. Probably not, I'd leave. But, but when did you get to where you just wanted to fight?
A. When I walked outside and I seen everybody else fighting, so I got in it and I felt like he, he was out there fighting and I had wanted to a (sic) get a piece of him.
Q. You just like to bust heads sometimes?
A. No, I don't like to bust heads sometimes, no time.
Q. Do you -- I'm sorry.
A. I don't like to bust heads no time.
Q. But you went out there and saw all of them fellas fighting that night and figured you just needed to get in it?
A. Because he made me mad for what he was doing earlier.

* * * * *

Q. So, you just wanted to fight him when you went outside?
A. Yeah. I had something to get off my chest. He had, he had something he wanted to get off his chest earlier. So, I had to bring it back to his memory.
Q. You don't think that led to Rodney Cain's death?
A. What?
Q. What you were doing out there?
A. No, no, sir. What he was doing, that brought a lot of that on.
Q. Why is that?
A. Because if he wouldn't have been starting all that, it would have never went down, I believe.

Several witnesses for the defendant testified that the defendant's behavior was not provocative and that other people inside the club were antagonistic toward the defendant and others. Darnell Emery, the defendant's cousin, testified that, while he was at the club, he observed Bobby Coates confront the defendant. Rodney Cain then walked up behind them, so Darnell pulled the defendant from the middle of Coates and Cain because it looked like they wanted to fight the defendant. The defendant walked outside. Corey Rucker testified that some girls from Independence were bumping people as they walked through the door at the club. Rucker also testified that, while he was not watching the defendant the entire time, he did not see the defendant picking on people. On direct examination, Terrell Smith testified that the Coates girls were bumping into people "trying to

pick a fight or something." On cross-examination, Terrell Smith testified that he did not see the defendant while he was in the club. Therefore, he could not testify about what happened inside. Derrick Emery, another cousin of the defendant, testified that he saw the defendant and Bobby Coates staring at each other. Darnell Emery grabbed the defendant and took him outside.

According to Delvin Whitaker's written statement to the police, Whitaker and Rodney Cain were walking out of the club at closing time. The defendant, Derrick Emery, Robert Williams, and Michael Paul Allen "posted up" on the wall outside of the club. The defendant and Rodney Cain exchanged words and began fighting. At that point, Sylvester Berry, Fontenot, and others jumped on the defendant. Following this main fracas, several smaller fights broke out. Delvin Whitaker saw Terrence Brooks and Michael Paul Allen with guns firing shots into the air. Whitaker also saw Steven Washington hit Rodney Cain with a baseball bat. On the other hand, according to Corey Rucker, Darnell Emery and the defendant were coming outside when Sylvester Berry, Anthony Nixon, Rodney Cain, Bobby Coates, and "some boys from Jackson" surrounded the defendant in the parking lot. The defendant was trying to walk to the other side of the club when Berry struck the defendant. The others then jumped on the defendant. Terrence Brooks testified that the defendant was walking outside when he saw Sylvester Berry strike the defendant. More than ten people began striking the defendant. According to Brooks, the defendant did not do anything to any of those people.

Given the conflicting testimony adduced at trial, the decision of the jury obviously came down to the issue of credibility. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis fails, 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). In finding

the defendant guilty, it is clear the jury rejected the hypothesis of innocence presented by the defense, namely that the defendant was not the person who caused the riot outside of Phat Tuesdays. On cross-examination, Derrick Emery testified that, while he was in front of the club, he received a phone call from an unidentified person. That person said "if Hardwood come to the club that they was gonna jump on them." The following colloquy between Derrick Emery and the prosecutor also occurred:

> Q. And they have a rivalry between Hardwood and Independence, don't they?
> A. Yeah.
> Q. And y'all fight a lot, right?
> A. Yeah.
> Q. And sometimes people get killed, like that morning, is that right?
> A. Yeah.
> Q. Okay. And somebody died as a result of that action, is that correct?
> A. Yes, sir.
> Q. And you don't know what Montreal Emery was doing inside the club before you got there, right?
> A. He was with me.
> Q. He was with you the whole time?
> A. Montreal was with me. He came to the club with me.

On cross-examination, Terrence Brooks testified that he was with Derrick Emery when Derrick received the phone call from the unidentified person. According to Brooks's written statement to the police, "When Derrick and I heard, we were in Gonzales, someone called him and told him there was going to be some mess between Independence and Hardwood." Brooks testified that Derrick Emery had received this phone call before they got back to St. Francisville. When Derrick Emery and Brooks returned to Hardwood, Brooks went home and armed himself with a pistol. Brooks then got in Derrick Emery's truck, and Derrick drove around to pick up their friends, including the defendant, before going to Phat Tuesdays less than two hours before closing time.

The evidence establishes that the defendant and his friends from Hardwood were well aware that their presence at Phat Tuesdays would be viewed as

antagonistic and provocative by those from Independence. The evidence further establishes that the defendant and his friends chose to go to the club that night to escalate the on-going antagonism and that the defendant entered the club and antagonized the patrons with overt acts of aggression. Thus, the jury's verdict reflected the reasonable conclusion that the defendant's behavior, which could easily be viewed as intending to stir up anger among these individuals or to provoke retaliation, was the cause of the riot outside of the club.

We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So. 2d 78, 83. Moreover, contrary to defendant's arguments, the fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of inciting to riot where there was serious bodily injury.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the trial court erred in refusing to include in the jury instructions a particular charge requested by the defendant.

The defendant requested the following special charge for the jury: "For speech to constitute this conduct of inciting to riot, it must be a willful, intentional 'endeavor' to gain as an immediate result, and specifically from that speech, the

participation of three or more persons in combination to do violence."[5] This language was taken from State v. Douglas, 278 So. 2d 485, 487 (La. 1973). In ruling that the instruction would not be given to the jury, the trial court stated:

> I have declined, over Mr. Howell's objection, to include that in the jury instructions. That case had to do with a speech made from the steps of the City Hall in Baton Rouge. I find that the evidence in this case does not support the finding that any action by the defendant could be considered as speech as it is construed in this case.
>
> * * * * *
>
> I think in the context of that case though they were talking about speech in terms of the spoken word.

The thrust of the defendant's argument is that the defendant's dancing, along with his actions, was "a form of expression and, therefore, speech in the forms of gestures and attitudes." Accordingly, defendant argues, his "speech" was entitled to First Amendment protection under the United States Constitution. We disagree and find no merit to these arguments.

To the extent that he was even dancing, the defendant's actions included aggressively invading the personal space of several people in an intrusive manner, in a crowded club, and gesturing with his hands that he was going to shoot some people. Such conduct, intended to antagonize and provoke, is not the type of speech (assuming it is "speech") contemplated by Douglas and the requested jury charge.[6] The Louisiana Supreme Court in Douglas found that the defendant did not willfully incite a riot with his political speech, which was "simply an appeal to

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[5]Defense counsel's explanation to the trial court regarding why he requested this particular charge was as follows:

> The reason that I did that is that the only thing that Mr. Emery did in that barroom was dance and make some type of signs with his hands. My understanding of the speech, those gestures were speech. There was nothing else in there that would have done that because he didn't really do or say anything else[.]

[6]Notably, the Douglas court opined that actions to incite others to riot do not fall within the purview of the First Amendment: "Since no one would seriously contend that actual participation in a riot is protected by the First Amendment, it would seem that actions or endeavors or conduct to procure or incite others to riot is no less outside the protection of the First Amendment." Douglas, 278 So. 2d at 487.

the black people to seek fully, within the law and in a non-violent and non-aggressive manner, reform in city government." Douglas, 278 So. 2d at 491-492.

The requested special charge by the defendant was not pertinent to the case at hand. See LSA-C.Cr.P. art. 807. Thus, the trial court did not err in refusing to include the charge in its jury instructions.

This assignment of error also lacks merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues that the trial court erred in imposing an unconstitutionally excessive sentence. Specifically, the defendant contends that since he is not the worst offender, he should not have been given the maximum sentence allowable.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Louisiana Code of Criminal Procedure Article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. Although a sentence falls within statutory limits, it may be excessive. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. State v. Andrews, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So. 2d 448, 454.

Nonetheless, the trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. State v. Holts, 525 So. 2d 1241, 1245 (La. App. 1st Cir. 1988). The trial court should review the defendant's

personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. State v. Jones, 398 So. 2d 1049, 1051-1052 (La. 1981).

At sentencing, the trial court thoroughly considered LSA-C.Cr.P. art. 894.1. The trial court found no mitigating factors. The trial court found there was an undue risk the defendant would commit another crime if given probation or a suspended sentence; the defendant was in need of correctional treatment; the defendant was in need of correctional treatment that can be provided most effectively by his commitment to an institution; and a lesser sentence would deprecate the seriousness of the defendant's crime. Thus, the trial court sentenced the defendant to the maximum sentence of five years at hard labor.

The maximum sentence permitted under a statute may be imposed only in cases involving the most serious offenses and the worst offenders. State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). Pretermitting consideration of the fact that the defendant's conduct actually constituted inciting to riot wherein the death of a human being occurred, we agree with the trial court that defendant's conduct falls within the worst type of offense in the category of inciting to riot as a result of which serious bodily injury or property damage in excess of $5,000.00 occurs. See State v. Hunter, 628 So. 2d 57, 63 (La. App. 1st Cir. 1993), writ denied, 93-2837 (La. 2/11/94), 634 So. 2d 372.

The trial court also noted in its reasons for judgment the following:

> As to factors in aggravation, you by your behavior incited others to riot when there was serious bodily injury, including serious injury to yourself. . . . Your behavior on the night in question as described by the witnesses was intended to provoke others to just the type of event that occurred. You risked the safety of everyone in that establishment, including yourself. There were many victims.

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> Because of the potential for the type of violence that actually ensued, the riot spilled out of the bar in which it began and into the parking lot and street. Weapons were drawn and used, including at least one firearm. Anyone in the community who happened to be passing was in danger. And you incited that riot.
>
> Mr. Emery, such behavior will not be tolerated in this community.

Considering the trial court's reasons for sentencing and the circumstances of the instant offense, particularly that the defendant engaged in conduct which precipitated a riot and that, during that riot, one person was killed and many others were injured and endangered, we find that the sentence is amply supported by the record. The sentence is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

This assignment of error is likewise without merit.

CONVICTION AND SENTENCE AFFIRMED.