

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1517

STATE OF LOUISIANA

VERSUS

RACHEL M. BRISBI



Judgment Rendered: March 23, 2012

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Appealed from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Trial Court Number 502,984

Honorable Raymond S. Childress, Judge

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and  
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Defendant – Appellant  
Rachel M. Brisbi

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

The defendant, Rachel M. Brisbi, was charged by bill of information with one count of aggravated battery, a violation of La. R.S. 14:34. She pled not guilty and, after trial by jury, was found guilty as charged. The trial court denied the defendant's motions for post-verdict judgment of acquittal and for a new trial. The defendant was given a suspended sentence of five years at hard labor, placed on probation for five years, and ordered to pay a \$500.00 fine. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, alleging one assignment of error. For the following reasons, we affirm the defendant's conviction and sentence.

### **FACTS**

On November 27, 2010, at Shooters Sports Bar in Slidell, Louisiana the defendant attacked Frederick Harris, striking him, twice, in the face allegedly with a beer bottle. As a result of the attack, Harris suffered severe lacerations on his left eyebrow and on his face just below his left eye.

After a trial in which multiple eyewitnesses, including the victim, testified that the defendant acted without provocation in attacking Harris, the defendant was found guilty of aggravated battery.

### **ASSIGNMENT OF ERROR**

In her sole assignment of error, the defendant argues that prosecutorial misconduct rendered her trial unfair. Specifically, the defendant asserts that, during the prosecutor's cross-examination of a defense witness, he intentionally asked assertive questions that unethically alluded to contents of a voicemail recording that were not supported by evidence. The defendant contends that the actions of the prosecutor were in violation of Louisiana State Bar Articles of Incorporation, Art. XVI, Rules of Prof. Conduct, Rule 3.4(e), which prohibits a

lawyer from alluding to any matter at trial that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

During the prosecutor's cross-examination of Jennifer Karraker, the defendant's roommate who testified on her behalf as a witness to the incident, the following exchange occurred:

[State]: Are you aware of the voicemails that [defendant] sent to the victim following this incident?

[Karraker]: Yes, sir.

[Defense Counsel]: Objection. This clearly [sic] beyond the witness's scope of knowledge.

[State]: She said yes.

[Trial Court]: Okay. If he objects, you need to be quiet.

[Karraker]: Yes, sir. Quiet.

[Trial Court]: I need to rule on his objection.

[Karraker]: I apologize.

[Trial Court]: Since you've already answered the question, the objection is moot. She already stated she is aware of them.

[State]: Are you aware of the contents of those e-mails?

[Defense Counsel]: Again, same objection.

[State]: Voicemails?

[Karraker]: Some of it.

[Trial Court]: Wait.

[Karraker]: Sorry.

[Trial Court]: Give me a second here. Overruled on the objection. Go ahead.

[State]: Are you aware of the contents?

[Karraker]: Some of it. Not all of it.

[State]: Are you aware that she called [sic] had said that she was happy, that she hoped she disfigured him?

[Karraker]: No, I was not.

[State]: Are you aware that she was said [sic] that she was happy she hit him in [sic] a beer bottle?

[Defense Counsel]: Objection. Relevance. Beyond the witness's scope of knowledge.

[Trial Court]: Well, she can answer as to whether or not she knows that.

[Karraker]: No.

The prosecutor later put on rebuttal testimony from the victim whereby he introduced a voicemail recording left on the victim's phone by the defendant. In the voicemail, the defendant stated that she was not sorry for hitting the defendant, but she did not say that she hoped she disfigured him, and did not mention using a beer bottle.

We agree with the defendant's contention that the prosecutor, during his cross-examination of Karraker, impermissibly referred to facts that were apparently not supported by any admissible evidence. Although the prosecutor introduced a voicemail recording left on the victim's phone by the defendant during rebuttal, this recording did not contain either of the alleged statements that were the subject of the prosecutor's questioning of Karraker on cross-examination. From our review of the record as a whole, we cannot find any evidence of the existence of additional voicemail recordings other than the one played at trial.

Although we agree with the defendant and find that the prosecutor impermissibly referred to facts that were not supported by admissible evidence, we find this error to be harmless beyond a reasonable doubt. Article 921 of the Louisiana Code of Criminal Procedure states that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." The test for determining whether an error is harmless is whether the verdict actually rendered

in the case “was surely unattributable to the error.” **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

In the instant case, two eyewitnesses and the victim all testified that the defendant attacked Harris with a beer bottle, without provocation. As such, the prosecutor’s statement referencing an alleged statement by the defendant in which she admitted to using a beer bottle to attack Harris was merely cumulative. In contrast, Karraker testified that the defendant attacked Harris in self-defense after he had grabbed her and that the defendant did not use a beer bottle to attack Harris. Therefore, the jury heard two different versions of the instant offense and still elected to convict the defendant, apparently finding that Karraker’s testimony was not credible. Thus, the prosecutor’s assertive questioning, while objectionable, did not deprive the defendant of a fair trial. In light of the overwhelming eyewitness testimony, we find that the defendant’s guilty verdict was surely unattributable to the prosecutor’s references to voicemail messages that were never introduced into evidence.

This assignment of error lacks merit.

### **CONCLUSION**

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

**CONVICTION AND SENTENCE AFFIRMED.**