NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0778

STATE OF LOUISIANA

VERSUS

MYRON LAMAR FRAZIER

Judgment Rendered: DEC 19 2013

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 07-11-0141

HONORABLE RICHARD D. ANDERSON, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs.

McDONALD, J.

The defendant, Myron Lamar Frazier, was charged by bill of information with two counts of unauthorized entry of a place of business, violations of La. R.S. 14:62.4 (counts 1 and 3); resisting a police officer with force or violence, a violation of La. R.S. 14:108.2 (count 2); and second degree battery, a violation of La. R.S. 14:34.1 (count 4). The defendant pled not guilty and, following a jury trial, was found guilty as charged on counts 1, 3, and 4, and guilty of the responsive offense of resisting an officer, a violation of La. R.S. 14:108, on count 2. The defendant filed a motion for postverdict judgment of acquittal, which was denied. For each of the unauthorized entry of a place of business convictions, the defendant was sentenced to six years imprisonment at hard labor; for the second degree battery conviction, he was sentenced to five years imprisonment at hard labor; for the resisting an officer conviction, he was sentenced to six months in the parish prison. The trial court ordered counts 1 and 2 (unauthorized entry of a place of business and resisting an officer) to run concurrently; it ordered counts 3 and 4 (unauthorized entry of a place of business and second degree battery) to run concurrently. The trial court further ordered counts 1 and 2 to run consecutively to counts 3 and 4. The defendant now appeals, designating three assignments of error. We affirm the convictions and sentences.

FACTS

In 2009, the defendant entered Albertsons on College Drive and attempted to steal merchandise. Todd Poor, the Store Director, caught the defendant and retrieved the item. Mr. Poor then informed the defendant that he was never allowed back into the store. Despite the ban, over the next two years, the defendant entered Albertsons on several occasions and would attempt to steal items. He was repeatedly caught by management, reminded that he was not allowed in the store, and removed from the premises.

On March 25, 2011, Marlon Lavine, Albertsons Grocery Manager, was working the closing shift. A cashier told Mr. Lavine the defendant was in the store and Mr. Lavine found him stuffing meat into his pants. When Mr. Lavine approached the defendant and asked for the merchandise back, the defendant punched Mr. Lavine in the nose. As he was falling, Mr. Lavine cut his left elbow on the edge of a shelf and momentarily lost consciousness. With his nose bleeding profusely, he went to the emergency room for treatment. He developed a staph infection in the cut on his elbow and underwent surgery. He had staples put in his elbow and has a permanent scar.

On April 28, 2011, Mr. Lavine was again working the closing shift. Mr. Lavine saw the defendant enter the store. Corporal Mickey Duncan, with the Baton Rouge Police Department, was standing in the checkout line to buy items, but was also on duty, in uniform. Mr. Lavine approached Corporal Duncan and informed him of the incident between him and the defendant a month prior, and that the defendant was not allowed in the store. Mr. Lavine and Corporal Duncan approached the defendant in one of the aisles. Corporal Duncan identified himself and asked the defendant what he was doing in the store. The defendant pushed Corporal Duncan into a shelf, yelled "I'm a crackhead," and ran. Corporal Duncan chased the defendant and, when they got outside in front of the store, Corporal Duncan deployed his Taser into the defendant's back, subduing him. Backup arrived and the defendant was handcuffed and arrested. A police officer searched the defendant and found two shampoo bottles, one in each front pocket, which he had shoplifted from the store.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to sever offenses. Specifically, the defendant contends the charges were based on separate acts or transgressions and did not constitute a

common scheme.

The defendant filed a motion to sever. Following a hearing on the matter, the trial court denied the motion. In his brief, the defendant argues the charges of second degree battery and resisting a police officer by force or violence were based on separate acts, did not constitute a common scheme, and occurred at different times. The defendant suggests that all the charges were joined solely because two of the four counts, namely the unauthorized entry of a place of business charges, were of the same or similar character.

We find no reason to disturb the trial court's ruling. La. Code Crim. P. art. 493 states:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

La. Code Crim. P. art. 782(A) provides in pertinent part:

> Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

The punishment for the three offenses for which the defendant was charged is confinement with or without hard labor. See La. R.S. 14:34.1(C), La. R.S. 14:62.4(B), and La. R.S. 14:108.2(C). Thus, the offenses would be properly joined, under La. Code Crim. P. art. 493, and tried by a six-person jury.

In ruling on a motion for severance, the trial court should consider a variety of factors in determining whether or not prejudice may result from the joinder: whether the jury would be confused by the various counts; whether the jury would be able to segregate the various charges and the evidence; whether the defendant could be confounded in presenting his various defenses; whether the crimes

charged would be used by the jury to infer a criminal disposition; and whether, considering the nature of the offenses, the charging of several crimes would make the jury hostile. A severance need not be granted if the prejudice can effectively be avoided by other safeguards. In many instances, the trial judge can mitigate any prejudice resulting from joinder of offenses by providing clear instructions to the jury. The State can further curtail any prejudice with an orderly presentation of evidence. A motion for severance is addressed to the sound discretion of the trial court, and its ruling should not be disturbed on appeal absent a showing of an abuse of discretion. A defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever. Factual, rather than conclusory, allegations are required. **State v. Allen**, 95-1515 (La. App. 1st Cir. 6/28/96), 677 So.2d 709, 713, writ denied, 97-0025 (La. 10/3/97), 701 So.2d 192.

In **State v. Roca**, 2003-1076 (La. App. 5th Cir. 1/13/04), 866 So.2d 867, writ denied, 2004-0583 (La. 7/2/04), 877 So.2d 143, the fifth circuit found a severance was not warranted where the defendant was charged with aggravated rape, aggravated rape of a juvenile, oral sexual battery of a juvenile, and molestation of a juvenile, which involved different victims, the defendant's biological daughter and his girlfriend's daughter. The court stated that the evidence of each offense would have been admissible as other crimes evidence at the trial of the other offense to show defendant's propensity to sexually abuse young females under his supervision and care under La. Code Evid. art. 412.2. See **State v. Burks**, 2004-1435 (La. App. 5th Cir. 5/31/05), 905 So.2d 394, 396-401, writ denied, 2005-1696 (La. 2/3/06), 922 So.2d 1176. See also **State v. Bray**, 548 So.2d 350, 353-54 (La. App. 4th Cir. 1989).

Similarly in the instant matter, evidence of either offense of unauthorized entry of a place of business would have been admissible as other crimes evidence

at the trial to show the defendant's motive, opportunity, or intent. See La. Code Evid. art. 404(B)(1). More importantly, however (any other crimes evidence notwithstanding), all four charges against the defendant were integrally connected. The defendant's unauthorized entry of Albertsons and his resisting a police officer, both on April 28, 2011, could only be given meaning and put into proper context with a description of the defendant's unauthorized entry of Albertsons and his attack of an employee that occurred about a month before on March 25, 2011. The prosecutor was entitled to present a case with narrative momentum and cohesiveness. See **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam). Why the defendant's entry into Albertsons on April 28 was considered unauthorized and why he was approached by a police officer was made more explicable only when it was further clarified in the State's case-in-chief that the defendant had attacked Mr. Lavine on March 25, had been banned from Albertsons, and that Mr. Lavine had secured the assistance of a police officer to make contact with the defendant after seeing him (the defendant) in the store again on April 28. Moreover, despite the lapse of time between the two offenses, the identity of the defendant as the perpetrator and the similar character of the offenses remained unchanged. See **State v. H.A., Sr.**, 2010-95 (La. App. 3rd Cir. 10/6/10), 47 So.3d 34, 37, 41-43 (in which the trial court's denial of a motion to sever was upheld where the charges of aggravated incest (the defendant was found guilty of attempted aggravated incest) and molestation of a juvenile occurred between eight and fifteen years apart and were committed against different victims); **State v. Williams**, 2005-317 (La. App. 5th Cir. 11/29/05), 918 So.2d 466, 475-78, writ denied, 2006-0638 (La. 10/6/06), 938 So.2d 64 (where the fifth circuit upheld the trial court's denial of a motion to sever the two charges of aggravated rape of juveniles, A.L. and B.B., one aggravated rape allegedly committed from 1998 to 2002, and the other aggravated rape allegedly committed from 1986 to 1992). See

also **State v. Dickinson**, 370 So.2d 557, 559-60 (La. 1979) (where the trial court's denial of a motion to sever was upheld in a case that involved the kidnapping-attempted rape of one victim and then, a year later, the kidnapping-attempted rape of another victim); **State v. Mitchell**, 356 So.2d 974, 978-80 (La.), cert. denied, 439 U.S. 926, 99 S.Ct. 310, 58 L.Ed.2d 319 (1978) (where the trial court's denial of a motion to sever was upheld in a case involving three rape victims over a five-month period).

The four charges were properly joined. Even though occurring on separate dates, the incidents were of a similar character. The defendant entered the same Albertsons both times, despite being banned, attempted to steal something, was confronted, and attacked the person who confronted him. Further, the evidence of each offense was simple and distinct, and the State presented the evidence in a clear, orderly fashion to minimize any possible confusion. Finally, the jury's verdicts revealed its ability to compartmentalize the offenses, given its rejection of the charge of resisting a police officer with force or violence and finding the defendant guilty of the responsive offense of resisting an officer. See **State v. Crochet**, 2005-0123 (La. 6/23/06), 931 So.2d 1083, 1088 (per curiam). Accordingly, the trial court did not abuse its discretion in denying the defendant's motion to sever.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the evidence was insufficient to support the convictions for unauthorized entry of a place of business. Specifically, the defendant contends that the elements of La. R.S. 14:62.4 were not met because there was no barrier at least six feet in height that completely enclosed Albertsons; and the State did not prove the defendant had adequate notice that he was banned from the store. The defendant does not dispute

his other two convictions.

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 C.Cr.P. 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 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.

Prior to the 2013 amendment, La. R.S. 14:62.4(A) provided:

> Unauthorized entry of a place of business is the intentional entry by a person without authority into any structure or onto any premises, belonging to another, that is completely enclosed by any type of physical barrier that is at least six feet in height and used in whole or in part as a place of business.

In his brief, it appears the defendant suggests Albertsons is not "a place of business" because it is not a structure or premises "completely enclosed by any type of physical barrier that is at least six feet in height." This assertion is baseless. To suggest, as the defendant does, that the brick-and-mortar structure of Albertsons must also be surrounded by an additional (at least) six-foot barrier to satisfy the definition of "a place of business" would render the statute meaningless. See **State v. Palermo**, 2000-2488 (La. 5/31/02), 818 So.2d 745, 749 (in construing statutes, courts must endeavor to give an interpretation that will give them effectiveness and

purpose, rather than one which makes them meaningless). Albertsons's exterior walls, themselves, *are* the barriers that completely enclose the structure. See **State v. Brown**, 2008-0661 (La. App. 4th Cir. 12/17/08), 3 So.3d 547, 551, writ denied, 2009-0106 (La. 9/25/09), 18 So.3d 79 (Cabrini School, found to be a place of business, was a building completely enclosed by the physical barriers such as walls and doors of at least six feet in height); **State ex rel. E.D.C.**, 39,892 (La. App. 2nd Cir. 5/11/05), 903 So.2d 571, 575-76, writ denied, 2005-1568 (La. 1/27/06), 922 So.2d 544 (where a door was kicked in by the defendant at a business known as Creative Crafts, and the court found that a building that housed the business and included at least one secured door adequately proved that the store was contained in an enclosed space within walls obviously acting as a barrier to human entrance, which satisfied the physical barrier element of the offense). While self-evident, we note that Mr. Lavine testified that Albertsons's walls were above six feet.

The defendant further argues in his brief that his entering Albertsons was not unauthorized because he was in the store during normal business hours when the store was open to the public. Citing **State v. Schleve**, 99-3019 (La. App. 1st Cir. 12/20/00), 775 So.2d 1187, 1193, writ denied, 2001-0210 (La. 12/14/01), 803 So.2d 983, writ denied, 2001-0115 (La. 12/14/01), 804 So.2d 647, cert. denied, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002), the defendant points out that in the case of a building that is open to the public, the consent to enter the building at the times when it is open to the public and within the confines designated is implied, regardless of the intent of the person so entering. The defendant also notes that while Albertsons had unauthorized entry forms for those banned from the store, he was never given a form to sign.

We note initially that the defendant's reference to Albertsons "unauthorized entry forms" (which he claims he was not required to sign) is misplaced. Both Mr. Poor and Mr. Lavine testified at trial that the store does have an incident report,

which can be filled out when there is an incident of shoplifting. As the following exchange between Mr. Poor and the prosecutor revealed, however, given the reality of shoplifting situations, filling out such forms is often futile:

> Q. So it's not like when you find somebody doing something and you're escorting them out of the store, do you stop off at the manager's desk and get a piece of paper and fill it out and give it to them before you escort them out of the store?
> A. They're never going to sign that.
> Q. So you don't have any type of written document that you give them when you say--
> A. Now, if we catch them-- if we catch them at the store and they're cooperative and come upstairs, yes, we do have them sign a form, you know, saying what happened and everything. But usually at that time we ask-- the police officer will ban them from the store.
> Q. And did you at any time ever have this defendant, Myron Frazier, come upstairs and fill out any type of form?
> A. No, ma'am.
> Q. Were [sic] there times that you called the police on him?
> A. Yes, ma'am.
> Q. And was he present when the police would arrive?
> A. He was long gone.
> Q. So that would be one of the reasons that you didn't follow the procedure in giving him the written document?
> A. Correct.
> Q. But you are sure that you were clear with him that you advised him not to come?
> A. Crystal.

The above exchange also reveals the clear and unequivocal banning of the defendant from the store. Mr. Poor also made it clear in his testimony that other store managers and employees were also aware of the ban:

> Q. Now, you said that managers knew him. How did they know him? Was it from conversations that you had or experiences?
> A. Both.
> Q. At any time did you ever direct employees to tell him not to come into the store?
> A. I did all that.
> Q. You did that directly?
> A. Right.
> Q. So you would talk to the person directly, meaning the person that wasn't supposed to come in the store, specifically this defendant?
> A. Correct.

Other instances of testimony throughout the trial indicated the defendant had been banned for sometime, many of Albertsons employees were aware of the ban,

and the defendant, himself, knew he was not allowed in the store. According to Mr. Poor, as far back as March of 2009, he caught the defendant stealing something, escorted him out of Albertsons, and told him never to come back again. Over the next two years, Mr. Poor saw the defendant in Albertsons six to twelve more times. On these occasions, Mr. Poor would approach the defendant and tell him he knew he needed to be out of the store. The defendant would reply, "Oh, you got me this time. Okay. Yeah, I'm going to leave." Mr. Poor also testified that when the defendant was inside the store, he was asked to leave every time, and that as a retailer, Albertsons had the right to ban someone from the store.

According to Mr. Lavine, prior to either of the instant offenses (of unauthorized entry of a place of business), he saw the defendant in Albertsons five to eight times. On one of those occasions, he told the defendant, "You know you're not supposed to [be] in here." The defendant left the store.

Corporal Duncan testified that after he subdued the defendant outside of Albertsons, the defendant was taken to a D.W.I. bus nearby to be processed. When Corporal Duncan spoke to the defendant in the bus, the defendant told him that he was not supposed to be in Albertsons. Detective Darren Moses, with the Baton Rouge Police Department, testified that he interviewed the defendant on May 3, 2011, about the incident at Albertsons where he attempted to steal meat and struck Mr. Lavine in the face. In that interview, the defendant admitted to knowing that he was banned from the store for prior thefts.

The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify and presented no rebuttal testimony. See **State v. Moten**, 510 So.2d 55, 61-62 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

Based on the evidence, it is clear the State proved two counts of unauthorized entry by the defendant of a place of business, namely Albertsons. While it is true that, as noted by the defendant, entry into a building open to the public during business hours is considered as an authorized entry with the implied consent of the owner, **Schleve**, 775 So.2d at 1193-94, but there is no implied consent of authorized entry when that person has been explicitly banned from the store by management on several prior occasions.

After a thorough review of the record, we find that the evidence supports the jury's verdicts. 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 two counts of unauthorized entry of a place of business. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred in denying his request for a special jury charge. Specifically, the defendant contends

the jury charge pertaining to implied authority to enter a business should have been provided to the jury.

The court shall charge the jury as to the law applicable to the case. La. Code Crim. P. art. 802(1). Louisiana Code of Criminal Procedure article 807 provides:

> The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.
>
> A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

Defense counsel submitted his request for a special jury charge in writing. La. Code Crim. P. art. 807. See **State v. Ford**, 608 So.2d 1058, 1061 (La. App. 1st Cir. 1992). After the State and the defendant rested, but prior to closing arguments, defense counsel requested that the jury be provided with the special jury charge of implied authority to enter a business open to the public during business hours. Defense counsel relied on **Schleve**. The trial court denied the request. Defense counsel objected to the ruling.

We see no reason to disturb the trial court's denial to include defense counsel's requested jury charge. As noted in the second assignment of error, clearly entry into a building open to the public during business hours is considered as an authorized entry with the implied consent of the owner, **Schleve**, 775 So.2d at 1193-94, but this is a point of law in the abstract. Applied to the facts of this case, this law is inapposite because the defendant was explicitly banned from Albertsons, which rendered any notion of implied consent to enter the store irrelevant.

A jury instruction not supported by the evidence is properly refused. See **State v. Craig**, 95-2499 (La. 5/20/97), 699 So.2d 865, 869, cert. denied, 522 U.S.

935, 118 S.Ct. 343, 139 L.Ed.2d 266 (1997). The law of authorized entry with the implied consent of the owner was not fairly supported by the evidence and, thus, the defendant's special jury charge was not pertinent. See **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 757, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. See also **State v. Telford**, 384 So.2d 347, 350 (La. 1980). Accordingly, there was no error in the trial court's refusal to give the special jury charge.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.