

**NOT DESIGNATED FOR PUBLICATION**

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**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2014 KA 0349**

**STATE OF LOUISIANA**

**VERSUS**

**MEL PETE McGLAUN**

**Judgment Rendered: SEP 19 2014**

**Appealed from the  
Twenty Second Judicial District Court  
In and for the Parish of Washington, State of Louisiana  
Trial Court Number 13 CR9 121709**

**Honorable Reginald Badeaux, Judge Presiding**

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**BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.**

*McCleunden, J. concurs and assigns reasons.*

## **WHIPPLE, C.J.**

The defendant, Mel Pete McGlaun, was charged by bill of information with aggravated battery, a violation of LSA-R.S. 14:34. At his arraignment, the defendant pled not guilty, but was later found guilty as charged by a unanimous jury. After the trial court denied the defendant's motions for new trial and post-verdict judgment of acquittal, the defendant was sentenced to five years at hard labor. The sentence was suspended and the defendant was placed on three years supervised probation. The defendant was also ordered to pay a fine of \$500.00 plus court costs, to have no contact with the victim or his tenants, to be subjected to random drug screens during his probationary period, and to pay a supervision fee of \$60.00 per month. He now appeals, contending that the evidence was insufficient to support the verdict and that, in the alternative, at most, he should only be guilty of simple battery because he did not use a dangerous weapon during the commission of the crime. For the following reasons, we affirm the defendant's conviction and sentence.

### **FACTS**

The victim, Andrew Sharp, testified at trial. On May 25, 2013, the victim traveled to one of his two rental properties located on Westside Drive in Franklinton, Louisiana to repair a water leak for his tenant, Sherman Banks. After repairing the leak, the victim got in his truck, and began to turn around when he noticed the defendant "walking out his yard with a big grubbing-hoe handle on his shoulder like he was a big soldier." When the victim arrived on the roadway near the defendant's residence, the defendant was standing in the middle of the road. The victim testified that the defendant stood in the middle of the road, tapped on the hood of the victim's truck, and said, "I'm going to whip you with this handle." While remaining in his truck, the victim called his tenant, Banks, and asked that he notify the police. The defendant moved from the front of the victim's truck to the

driver's side, where he began to beat and tap on the window and hood of the truck with the maul handle. The victim testified that the defendant stated, "Get out the truck," and "I'll whip your ass with this." The victim further testified that the defendant stated, "I'll break that window with this maul handle." The victim testified that he opened the truck door and that when he did, the defendant "stuck that maul handle in the truck door and hit me on my arm." The victim further testified that the defendant "jabbed [the maul handle] in the truck door when I opened it..." he defendant then went inside his residence and told the victim he would tell the police he was in the shower the whole time. When the police arrived, the victim was asked if he needed medical assistance, which he declined.

The victim testified at trial that he did not pick up a weapon and threaten the defendant; nor did he make any threatening moves toward the defendant. The victim also testified that he does not own a handgun and does not keep a weapon in his truck. He also indicated that he does not consider himself a violent man and has never threatened anyone, although the instant confrontation was not his first encounter with the defendant.

Sherman Banks also testified at trial. Banks, a tenant of the victim, indicated that on the day of the attack, the victim completed repairs on his Westside Drive air conditioning unit and began traveling back down the road. Banks testified that he noticed the victim's truck stopped in the middle of the road with the defendant standing in front of it. Banks indicated that as he began walking towards the back of the victim's truck, he saw the defendant walk towards the driver's side window and grab the victim's arm and attempt to pull him out of the truck. Eventually, the victim exited his vehicle, and when he did, the defendant had the maul handle in one hand, and grabbed the victim by the other. Banks testified that the defendant raised and "cocked" the handle in his right hand, swung it like a baseball bat, and struck the victim on the arm. Banks testified that the

victim did not do anything which would provoke or justify the defendant hitting him, nor did the victim attack the defendant with a weapon.

Deputy Jonathan Williams of the Washington Parish Sheriff's Office also testified at trial. He was dispatched to Westside Drive to investigate the incident, and upon his arrival, he observed the victim standing behind his vehicle, with a paper towel wrapped around his arm and blood soaking through it. Deputy Williams noted that the victim was "bleeding quite well" and that the wound did not stop bleeding during the entire time he was at the scene, despite the victim's efforts in applying pressure to the wound. The victim told Deputy Williams at the scene that the defendant, while armed with a maul handle, began beating on his truck and that when he attempted to exit his vehicle, the defendant struck him on the arm with the maul handle. Deputy Williams described the victim's demeanor as irritated, but respectful.

Deputy Williams also spoke with the defendant. The defendant had a superficial scratch on his arm with a minor trail of blood going down to his hand. The defendant claimed that the victim had attacked him, and that both the victim and Banks were lying. Deputy Williams testified that the defendant stated, "Mr. Sharp had attacked him and that he had turned around and walked away...." Deputy Williams testified that he asked the defendant if he needed medical assistance, and the defendant replied he did not. Deputy Williams's partner then retrieved a napkin from his vehicle for the defendant to use to wipe off the blood, at which time the defendant took the napkin, and "threw it back at me and told me to wipe the blood off." Deputy Williams testified that the defendant was "very agitated," "irate," and "noncompliant," and was not respectful or cooperative.

At trial, Deputy Williams indicated that based on the evidence he observed at the scene, he did not believe that the defendant was the victim of an altercation. Deputy Williams explained: "If anything, I would say that it was quite possible, in

my opinion, that [the defendant] either scratched his arm on the fence that was poorly built or possibly received a scratch from the victim as he was attempting to defend himself, if there was a defense made that way.”

Vicky Voiron, the defendant’s long-time girlfriend, also testified at trial. According to Voiron, the defendant had suffered a stroke and became disabled three to four years prior to the incident. On the day of the attack, she and the defendant returned home after working in Madisonville. Upon their arrival, Voiron proceeded to take a bath, and when she finished, she heard screaming. Voiron testified that the defendant told her that the victim had attempted to run over one of his Chihuahuas. When she looked out of her front door, Voiron noticed Banks and another male (presumably the victim) on the road, and the unknown male proceeded back to Banks’s trailer. When the police arrived, they asked for the defendant. However, she testified that her dogs were “going crazy” and that she put them away before retrieving the defendant. She testified that the defendant did not resist the police. Voiron testified that she did not have any knowledge regarding the defendant’s attack on the victim, that she and the victim were “acquaintance[s]” and that she had never had any bad dealings with him previously. Voiron further testified that because of the defendant’s disability, he does not have any mobility or ability with his right arm.

The defendant also testified at trial. On the day of the incident, he and his girlfriend returned home from working, and while she was taking a bath, he let his two Chihuahua dogs out into the front yard while he performed some gardening work. After approximately ten to fifteen minutes, the defendant noticed the victim driving down Westside Drive, and claimed “you can actually hear the truck speed up and you can see the rocks throwing up behind his truck. And he was aiming at my little Chihuahua.” He testified that he grabbed the axe handle he uses as a cane, walked to the end of his driveway, and then stopped the victim in the middle

of the road. He indicated that the victim did not enter his yard. The defendant claimed he then approached the driver's-side window of the victim's truck and asked the victim why he was trying to run over his dog. According to the defendant, the victim "swung his door open" two or three times, hitting the defendant in his chest. The defendant testified that he stepped backwards, brushed up against "the briars" and felt himself being cut. The defendant also claimed that the victim reached for and grabbed a black revolver from his truck's door panel, and pointed it at him. The defendant testified that he then moved toward the back of the truck, and that as he was doing so, the victim leaned out of his truck, and his foot came off the brake, causing the victim to almost fall out of his vehicle. The defendant claimed the victim slammed on the brake pedal, causing the truck door to open completely, and then swing back onto the victim's arm, causing the victim to discharge the revolver. The defendant testified he then went inside his house, changed his clothes, and penned his dogs. The defendant testified that he changed his clothes "because I knew I was going to be the one going to jail." After the police arrived, he spoke with the deputies and answered their questions. The defendant denied hitting the victim with the maul handle and stated that he has never been involved in a fight.

### **SUFFICIENCY OF EVIDENCE**

In his sole assignment of error, the defendant argues the evidence was insufficient to support the jury's guilty verdict on the aggravated battery charge. Specifically, he contends the evidence presented by the State regarding the attack was contradictory and cannot support the verdict. In the alternative, the defendant claims that the maul handle was not a dangerous weapon as he did not use it in a method calculated or likely to cause death or great bodily harm and therefore, at most, he should be guilty only of simple battery. The defendant does not challenge his identity on appeal.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime, and defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); State v. Patton, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So. 3d 1209, 1224; See LSA-C.Cr.P. art. 821(B). In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test, *i.e.*, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." LSA-R.S. 15:438; State v. Millien, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So. 2d 506, 508-09.

Louisiana Revised Statute 14:33 defines a battery, in pertinent part, as "the intentional use of force or violence upon the person of another." The offense of aggravated battery is "[a] battery committed with a dangerous weapon." LSA-R.S. 14:34(A). 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(3). 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. State v. Johnson, 598 So. 2d 1152, 1158 (La. App. 1st Cir.), writ denied, 600 So. 2d 676 (La. 1992). The dangerousness of an instrumentality because of its use is a factual question for the jury to decide for purposes of determining whether an aggravated battery occurred. State v. Odom, 2003-1772 (La. App. 1st Cir. 4/2/04), 878 So. 2d 582, 589, writ denied, 2004-1105 (La. 10/8/04), 883 So. 2d 1026. 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. Howard, 638 So. 2d 216, 217 (La. 1994) (per curiam); Odom, 878 So. 2d at 589. “General criminal intent is present whenever there is specific intent, and also 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, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts that have been declared criminal. State v. Payne, 540 So. 2d 520, 523-24 (La. App. 1st Cir.), writ denied, 546 So. 2d 169 (La. 1989).

Applying these precepts, we conclude that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of aggravated battery. The verdict rendered against the defendant indicates the jury accepted the victim’s testimony, and rejected the defendant’s claim that the victim’s foot slipped off his truck’s brake, causing the truck door to swing back on the victim’s arm, resulting in his injury. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant’s own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984). No such hypothesis exists in the instant case.

On review, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder’s determination of guilt. Moreover, the testimony of the victim alone is sufficient to prove the elements of the offense. As the trier of fact, the jury was entitled to accept or reject, in whole or in part, the testimony of any witness. Additionally, 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. State v. Lofton, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So. 2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So. 2d 1331.

As to the jury's apparent determination that the maul handle used by the defendant in this case constituted a dangerous weapon, we note that courts have previously recognized that various items, though not necessarily inherently deadly, could be considered dangerous weapons pursuant to LSA-R.S. 14:2(3) based on the surrounding facts of the case. For example, in State v. Price, 93-0625, 93-0626 (La. App. 1st Cir. 3/11/94), 636 So. 2d 933, 937-38, writs denied, 94-0742 (La. 6/17/94), 638 So. 2d 1091 & 94-1566 (La. 10/14/94), 643 So. 2d 159, this court determined that a baseball bat constituted a dangerous weapon. Further, a "drawn back" broken broomstick handle has been deemed to be a dangerous weapon for purposes of determining a defendant's intent to commit aggravated battery. State v. King, 385 So. 2d 223, 225 (La. 1980).

In the instant case, testimony at trial indicated that the defendant struck the victim while swinging the maul handle like a baseball bat, causing an injury to the victim's arm. Thus, any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find the maul handle used by the defendant constituted a dangerous weapon.

After reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory

hypothesis of innocence presented to, and rationally rejected by, the jury. State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

Accordingly, the defendant's assignment of error lacks merit.

**CONVICTION AND SENTENCE AFFIRMED.**

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**VERSUS**

**MEL PETE McGLAUN**

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**McCLENDON, J., concurs.**

The determination of what constitutes a dangerous weapon as set forth in LSA-R.S. 14:2A(3) is a factual question for the jury to decide. Considering that we cannot sit as a thirteenth juror in making this factual determination, I concur with the result reached by the majority.