NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2018 KA 0211

STATE OF LOUISIANA

VERSUS

TROY JONES, SR.

Judgment rendered OCT 18 2018

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On Appeal from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
No. 34,852-53, Div. "B"

The Honorable Thomas Kliebert, Jr., Judge Presiding

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BEFORE: McDONALD, CRAIN AND HOLDRIDGE, JJ.

Crain, J. concurs in part and dissents in part and assigns reasons

HOLDRIDGE, J.

The defendant, Troy Jones, Sr., was charged by bill of information with second degree kidnapping (of M.J.), a violation of La. R.S. 14:44.1 (count 2); second degree kidnapping (of D.B., a child), a violation of La. R.S. 14:44.1 (count 3); and aggravated battery (upon M.J.), a violation of La. R.S. 14:34 (count 4).[1] The defendant pled not guilty to all charges. He waived his right to a jury trial and, following a bench trial, was found guilty as charged on counts 2 and 4, and not guilty on count 3. The defendant filed a motion for postverdict judgment of acquittal, which was denied. He also filed a motion for new trial, which was denied. For the second degree kidnapping conviction, the defendant was sentenced to twenty years imprisonment at hard labor, with five years of the sentence to be served without probation or suspension of sentence; for the aggravated battery conviction, the defendant was sentenced to five years imprisonment. The sentences were ordered to run consecutively. The defendant now appeals, designating one assignment of error. We affirm the convictions, vacate the sentences, and remand for resentencing.

FACTS

The defendant was separated from and no longer living with his wife, M.J.[2] M.J. lived in Prairieville, Ascension Parish, and on the morning of September 19, 2015, she was getting in her car to go to work. M.J. had her two-year-old grandson, whom she was going to drop off at her daughter's house. The defendant approached M.J. as she got in the car and stuck her in the leg and arm with a sharp metal object. He told her to move to the front passenger seat so that he could drive. After initially refusing, M.J. acquiesced. As the defendant drove, M.J. kept

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[1] Originally the defendant was also charged with armed robbery, which was count 1. The State nol prossed that count, but did not renumber the counts.

[2] The victim is referred to by her initials. See La. R.S. 46:1844(W).

her grandson on her lap. At times during the drive, she put her grandson in the backseat. The defendant drove to Lake Charles. They rented a hotel room where the defendant and M.J. had sex. As they were leaving the hotel[3] to drive back to Ascension Parish, the police pulled up behind the defendant to stop him. The defendant sped off with M.J. and the child in the car. M.J. held her grandson as the defendant drove around, evading the police. Eventually, the defendant drove to a dead-end. He got out of the car and ran, but was apprehended.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the evidence was insufficient to support both 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 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 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, in order to convict, the factfinder must be satisfied that the overall

[3] This all occurred on the same day, so it was late afternoon on September 19 when they left the hotel. An FBI task force, Ascension Parish police, and Calcasieu Parish police were informed of the situation, and a BOLO and Amber Alert had been issued. Around 4:00 p.m., authorities spotted the defendant, driving M.J.'s car, in the hotel parking lot.

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.

The defendant argues the State did not prove he committed aggravated battery because there was no proof that he used a weapon. Further, even if he did have something in his hand, the defendant argues, it was not likely to cause death or great bodily harm. According to the defendant, "the mere fact that [M.J.] had a superficial injury is not sufficient to prove dangerousness." The defendant further avers that the "poking" M.J. described "was not calculated or likely to cause death or grave bodily injury."

Louisiana Revised Statute 14:34 provides that aggravated battery is a battery committed with a dangerous weapon. Louisiana Revised Statute 14:33 defines the term "battery" as "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." The term "dangerous weapon" is defined to include "any...substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. La. R.S. 14:2A(3). In order to convict the defendant of aggravated battery, the State must prove beyond a reasonable doubt that: (1) the defendant intentionally used force or violence against the victim; (2) the force or violence was inflicted with a dangerous weapon; and (3) the dangerous weapon was used in a manner likely or calculated to cause death or great bodily harm. See La. R.S. 14:2A(3); **State v. Day**, 468 So.2d 1336, 1340 (La. App. 1st Cir. 1985). See also **State v. Rainey**, 98-436 (La. App. 5th Cir. 11/25/98), 722 So.2d 1097, 1102, writ denied, 98-3219 (La. 5/7/99), 741 So.2d 28.

Despite the defendant's assertion in brief, the testimony adduced at trial established the defendant had an object in his hand, likely a shank-type weapon, that he used to stick M.J. with when he first approached her in her car. M.J.

testified that she was confronted by the defendant, who insisted she get over in the passenger seat to let him drive. She stated the defendant had something in his hand and that he poked her with it. As the defendant poked her, he told her to "get over." When asked if she was injured from being poked, M.J. responded, "They had the mark on my arm."

M.J. testified at one point, and the defendant points this out in brief, that while the defendant had stuck her on her arm with something, it could have been a "scratch by his nail." M.J. was a reluctant witness, however, having to testify against her husband. At trial, a reticent M.J. appeared to downplay the defendant's actions and what had actually occurred to her over a year ago. Only when pressed on direct examination by the prosecutor about what the defendant had in his hand when he stuck her, M.J. explained that it was still dark (that early in the morning) and she could not see what was in the defendant's hand; but as the day grew brighter, M.J. could see the defendant's hand on the steering wheel, and there was a sharp metal object sticking between his fingers.

Detective Danny Vara, with the Ascension Parish Sheriff's Office, met M.J. at the Calcasieu Parish Sheriff's Office shortly after she and the defendant were stopped by the police in the hotel parking lot in Lake Charles. Detective Vara testified that during his interview with M.J., she told him she was approached by the defendant who had a sharp object that she described like a shank. The defendant poked her in the leg with it and told her to get in the car. She also had a wound on her hand. Another detective took photographs of the wound on M.J.'s hand, which showed a puncture wound on the right side of M.J.'s arm, near her wrist. M.J. indicated the defendant had caused this wound. Detective Vara further indicated that M.J. used the word "shank" to describe the metal object in the defendant's possession.

The foregoing testimony clearly established the defendant had a dangerous weapon - a sharp metal object - and that he used it with force or violence to inflict injury upon M.J. Whether a weapon is dangerous is a factual question to be determined by considering not only the character of the weapon, but by whom, and upon whom, and in what manner it was used. **State v. Pamilton**, 43,112 (La. App. 2nd Cir. 3/19/08), 979 So.2d 648, 654, writ denied, 2008-1381 (La. 2/13/09), 999 So.2d 1145. Louisiana jurisprudence has upheld determinations that a stick, an ink pen, rum, a tennis shoe, and a metal pipe were dangerous weapons in the manners used in individual cases. Id. See also **State v. Pleasant**, 2010-1533 (La. App. 4th Cir. 5/18/11), 66 So.3d 51, 55-57 (upholding a jury's factual determination that a pizza plate, which was thrown like a Frisbee at the victim, constituted a "dangerous weapon" for the purpose of La. R.S. 14:33).

The defendant in brief asserts that even if he did have something in his hand, M.J.'s superficial injury was not sufficient to prove dangerousness, and that his "poking" her with the weapon was not calculated or likely to cause death or grave bodily injury. Aggravated battery, however, is a general intent crime. See **State v. Barnes**, 491 So.2d 42, 50 (La. App. 5th Cir. 1986). 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. La. 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. **State v. Howard**, 94-0023 (La. 6/3/94), 638 So.2d 216, 217 (per curiam). Thus, aggravated battery requires neither the infliction of serious bodily harm nor the intent to inflict serious injury. **State in Interest of**

T.M., 2012-436 (La. App. 5th Cir. 11/27/12), 105 So.3d 969, 973. See **Howard**, 638 So.2d at 217-18.

The testimonial and documentary evidence at trial established that the defendant committed an aggravated battery upon M.J. when he stuck her in the arm with a shank-type weapon. See **T.M.**, 105 So.3d at 971-74 (finding that a pencil-sharpener razor blade, used to cut the victims' skin and causing them to bleed, constituted a "dangerous weapon"); **State v. Black**, 2009-1664 (La. App. 4th Cir. 6/17/10), 41 So.3d 1243, 1251-53, writ denied, 2010-1678 (La. 1/28/11), 56 So.3d 966 (finding that a high-heeled boot, the heel of which acted as a sharp knife and cut the victim's forehead, constituted a "dangerous weapon"); **State v. Ceasar**, 37,770 (La. App. 2nd Cir. 10/9/03), 856 So.2d 236, 238-41 (finding puncture wound to back and two puncture wounds to bicep caused by a shank constituted aggravated battery); **State v. Gordon**, 2000-1013 (La. App. 5th Cir. 11/27/01), 803 So.2d 131, 143-44, writ denied, 2002-0362 (La. 12/19/02), 833 So.2d 336, writ denied, 2002-0209 (La. 2/14/03), 836 So.2d 134 (finding a split lip caused by a slap to the face with a gun constituted aggravated battery).

We next address the defendant's contention that the evidence was insufficient to support the second degree kidnapping conviction. Second degree kidnapping is defined in La. R.S. 14:44.1, in pertinent part, as follows:

> A. Second degree kidnapping is the doing of any of the acts listed in Subsection B wherein the victim is:
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> * * * * *
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> (3) Physically injured or sexually abused;
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> * * * * *
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> B. For purposes of this Section, kidnapping is:
>
> (1) The forcible seizing and carrying of any person from one place to another; or
>
> (2) The enticing or persuading of any person to go from one place to another[.] . . .

The provisions of this statute apply when any one occurrence mentioned in Subsection B combines with any one or more occurrences enumerated in Subsection A. **State v. White**, 593 So.2d 882, 887 (La. App. 2nd Cir. 1992).

The defendant argues that the relevant elements of the second degree kidnapping statute were not proved by the State. He urges in brief that M.J. being poked with something "that could have been a fingernail causing a scratch or a bruise is not an injury serious enough for a conviction of anything more than simple battery." Further, according to the defendant, M.J. testified that she had consensual sex with him.

M.J. testified that she was leaving for work about 6:00 a.m. with her two-year old grandson, when she was "confronted" outside of her home by the defendant. According to M.J., the defendant came to the car, poked her with something, and "insisted" that she move over to let him drive because they were going for a ride to talk. She told the defendant "no," and that she needed to go to work. When asked why she moved over to the passenger seat, M.J. stated, "He insisted that I get over so I just went on and complied with him." As the defendant drove, M.J. held her grandson on her lap because she did not have a child-seat for him. The defendant took M.J.'s cellphone and removed the battery; he then threw the phone in the back seat because he did not want her to call anyone. The defendant also took M.J.'s Bluetooth headset and threw it out of the window.

The defendant drove from Prairieville to Lake Charles. Several stops were made along the way, including a gas station and a McDonald's. They also stopped at a carwash in Lake Charles. At one point while the defendant was driving, he asked M.J. if she wanted to call anyone to let them know she was alright. M.J. testified she told the defendant she did not want to call anyone because she wanted them to keep looking for her. When asked on direct examination why she did not

let anyone know at the gas station about what was going on, M.J. stated, "Well I didn't want to take the chance of making him mad if I was to do something."

On cross-examination, M.J. indicated that if she had made it home with the defendant, before being stopped by the police in Lake Charles, she would not have called the police. M.J. also indicated that in the six hours that she was with the defendant, he never threatened her or her grandchild.

Detective Vara testified that M.J. told him that she did not consent to go with the defendant that morning. According to Detective Vara, M.J. left with the defendant because she "was concerned for the safety of her grandson so she discontinued resisting."

Based on the foregoing testimonial evidence, a rational factfinder could have concluded that the defendant forcibly seized and carried M.J. from one place to another; or at the very least, M.J. was enticed or persuaded to go from one place to another. See La. R.S. 14:44.1(B)(1) & (2). Further, a rational factfinder could have readily found that the defendant physically injured M.J. See La. R.S. 14:44.1(A)(3). While the defendant suggests that the "scratch" or "bruise" he caused was not a serious enough injury to satisfy the "physically injured" element of second degree kidnapping, the evidence established that M.J., at the hand of the defendant, suffered a pronounced puncture wound on her right arm. Moreover, bruising alone can satisfy the "physically injured" element of second degree kidnapping. See **State v. Fontana**, 35,826 (La. App. 2nd Cir. 6/12/02), 821 So.2d 571, 576, writ denied, 2002-2072 (La. 6/27/03), 847 So.2d 1251 (finding that married but separated victim who sustained bruising as a result of a struggle with defendant, combined with the photographs that depicted the bruises, was sufficient to satisfy the "physically injured" element of second degree kidnapping).

Despite M.J.'s somewhat conflicting accounts of what transpired, the trier of fact makes credibility determinations and may, within the bounds of rationality, 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. See **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. See also **State v. Weary**, 2003-3067 (La. 4/24/06), 931 So.2d 297, 311-12, cert. denied, 549 U.S. 1062, 127 S.Ct. 682, 166 L.Ed.2d 531 (2006). 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. 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). 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).

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, 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). Here, the trial court's finding of the

defendant's guilt on both counts reflected the reasonable conclusion that based on the physical and testimonial evidence, the defendant physically injured M.J. with a dangerous weapon, and kidnapped her from her home in Ascension Parish and drove her to Lake Charles. In adjudicating the defendant guilty, the trial court clearly rejected the defense's theory of innocence. See **Moten**, 510 So.2d at 61.

After a thorough review of the record, we find that the evidence supports the trial court's finding of guilt on both counts. 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 aggravated battery and second degree kidnapping. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

The assignment of error is without merit.

SENTENCING ERRORS

This court routinely reviews the record for error under La. Code Crim. P. art. 920(2), whether or not such a request is made by a defendant or defense counsel. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found sentencing errors. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

Whoever commits the crime of second degree kidnapping shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without benefit of parole, probation, or suspension of sentence. La. R.S. 14:44.1(C). Whoever commits an aggravated

battery shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than ten years, or both. La. R.S. 14:34(B).

For the second degree kidnapping conviction, the trial court sentenced the defendant to twenty years imprisonment at hard labor, with five years of the sentence to be served without benefit of probation or suspension of sentence. The trial court did not include the required parole restriction in the sentence. For the aggravated battery conviction, the trial court sentenced the defendant to "five years." The trial court failed to designate whether the sentence was to be served with or without hard labor and, as such, the sentence is indeterminate.[4]

The correction of both sentences requires the exercise of discretion. See **State v. Chehardy**, 2012-1337 (La. App. 3rd Cir. 5/1/13), 157 So.3d 21, 24; **State v. Matthew**, 2007-1326 (La. App. 3rd Cir. 5/28/08), 983 So.2d 994, 996, writ denied, 2008-1664 (La. 4/24/09), 7 So.3d 1193. See also **State v. Mitchell**, 2009-2124 (La. App. 1st Cir. 6/11/10), 2010 WL 2342839 (unpublished), writ denied, 2010-1605 (La. 1/28/11), 56 So.3d 968. Therefore, under **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam), we must vacate the defendant's sentences and remand the matter to the trial court for resentencing. See **State v. LeBlanc**, 2014-1455 (La. App. 1st Cir. 6/5/15), 174 So.3d 1187, 1189-90.

CONCLUSION

For the foregoing reasons, the defendant's convictions are affirmed. Both of the defendant's sentences are vacated. The matter is remanded to the trial court for further proceedings.

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[4] The minutes include the parole restriction in the second degree kidnapping sentence; and the minutes indicate the aggravated battery sentence is to be served at hard labor. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). The Uniform Commitment Order and the trial court's written reasons for sentence indicate that both sentences are to be served at hard labor, and that five years of the second degree kidnapping sentence is to be served without benefit of parole, probation, or suspension of sentence.

CONVICTIONS AFFIRMED; SENTENCES VACATED; REMANDED TO TRIAL COURT FOR RESENTENCING.

STATE OF LOUISIANA

VERSUS

TROY JONES, SR.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0211

CRAIN, J., concurring in part, dissenting in part.

I concur with the majority in affirming the convictions and remanding for clarification of whether the aggravated battery sentence is with or without hard labor. I respectfully dissent from the finding that the second degree kidnapping sentence does not include a restriction on parole for the first two years, the minimum required by Louisiana Revised Statute 14:44.1C. That restriction, although not expressly stated at sentencing, is imposed by law pursuant to the self-activating provisions of Louisiana Revised Statute 15:301.1A. *See State v. Carvin*, 14-1017, 2015WL224063 p. 8, (La. App. 1 Cir. 1/15/15). Thus, the sentence is not erroneous or otherwise contrary to the provisions of Section 14:44.1C. This court need only remand for correction of the minutes and commitment order (which incorrectly indicate a restriction on parole for five years) to reflect the second degree kidnapping sentence shall be served without benefit of parole for the first two years. *See Carvin*, 2015WL224063 at p. 9. I disagree that the prison terms must be vacated to correct these errors.