

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2004-KA-2153**
VERSUS * **COURT OF APPEAL**
GEORGE M. GAMBINO * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
*
*
*
* * * * *

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 03-2034, DIVISION "A"
Honorable Anthony D. Ragusa, Judge
* * * * *
Judge David S. Gorbaty
* * * * *

(Court composed of Judge Charles R. Jones, Judge David S. Gorbaty, Judge Roland L. Belsome)

Charles Foti
Attorney General
Darryl W. Bubrig, Sr.
District Attorney
25th Judicial District Parish of Plaquemines
301-A Main Street
Belle Chasse, LA 70037

-AND-

Gilbert V. Andry IV
Assistant District Attorney
610 Baronne Street
New Orleans, LA 70113
COUNSEL FOR PLAINTIFF/APPELLEE

Kevin D. Conner
8719 Highway 23, Suite A & B
P. O. Box 538
Belle Chase, LA 70037
COUNSEL FOR DEFENDANT/APPELLANT

APPEAL CONVERTED TO WRIT; WRIT DENIED

On June 25, 2003, the State filed a bill of information charging the defendant with simple battery upon Edith D. Terry. On October 16, 2003, the defendant's attorney waived his appearance at arraignment and entered a plea of not guilty. The trial court granted the defendant fifteen days to file special pleadings. Trial in the matter was continued on three occasions.

On July 20, 2004, the case proceeded to trial. The trial court found the defendant guilty as charged and sentenced him to serve thirty days in Parish Prison or pay a fine of \$100.00 and court costs. The defendant subsequently filed this appeal.

FACTS

Edith Terry testified that she entered into a verbal contract with the defendant to perform cleaning services at a storage facility that the defendant managed. Ms. Terry testified that after completing the specified work, the

defendant instructed her to clean other areas of the facility as well. Ms. Terry testified that the defendant would not accept the job as completed and continued to instruct Ms. Terry to clean additional areas. Ms. Terry testified that in all, what had been a two-day job, was extended to a three-week job.

After Mr. Gambino refused to accept the job as completed, Ms. Terry went to see the justice of the peace in Belle Chase, Louisiana for advice on how to proceed. Ms. Terry testified that she was instructed to prepare an invoice and inform Mr. Gambino that the job was completed.

Ms. Terry testified that when she presented Mr. Gambino with the invoice, he crunched it up and told her that he was not going to pay her a "MF-ing" thing and then slammed the invoice into her shirt pocket. In doing so, he tore the pocket to her shirt. She stated that it felt like her chest got bruised.

Ms. Terry testified that she went to see the justice of the peace to whom she had spoken and informed him of what had happened. The justice called the police on her behalf.

Ms. Terry identified two photographs of the shirt she was wearing on the day in question depicting her torn shirt pocket. Ms. Terry testified that the photograph was taken in the justice's office. After the police arrived, she was taken to the scene where she identified the defendant.

Ms. Terry testified that her chest was red and sore and that she went to West Jefferson Hospital to have it examined two days later.

On cross-examination, Ms. Terry identified a statement she had prepared for the police. In the statement there was no mention of a torn shirt pocket. Ms. Terry also admitted that she had filed a petition in civil court seeking damages against the defendant in the amount of three thousand dollars for the work performed and \$50,000 in personal damages.

Ms. Terry admitted that she had been convicted of possession of cocaine seven years prior and that she was a recovering addict. She stated that the original price agreed upon for the cleaning services was \$800 and that the invoice she submitted was for \$1,000.

Ms. Carrie James testified that she was present on June 5th when the alleged battery took place. Ms. Carrie worked with Ms. Terry on the job in question.

Ms. Carrie stated that she observed Ms. Terry hand Mr. Gambino the invoice. She stated that he looked at the paper and then slammed it into Ms. Terry's pocket. After that, she told Ms. Terry, "Come on, let's go," and they drove to the office of the justice of the peace. Ms. Carrie related that Ms. Terry's shirt was torn and that her chest was red.

Mr. Earl Spooner testified for the defense. He is employed at the

storage facility. He stated that he was about ten feet away from Mr. Gambino when the incident took place. He observed Ms. Terry hand Mr. Gambino a piece of paper. He stated that Mr. Gambino looked at the paper and then reached over and put it in Ms. Terry's pocket.

On cross-examination, Mr. Spooner stated Ms. Terry would not accept the piece of paper, which caused Mr. Gambino to shove it into her pocket. Explaining further, he used the words "placing" or "putting" as describing how Mr. Gambino put the paper in Ms. Terry's pocket. He did not hear any raised voices. He was unable to see whether Ms. Terry's shirt pocket was torn.

Mr. Gambino testified on his own behalf. He stated that he managed the storage facility in question. He acknowledged that he contracted with Ms. Terry to do some cleaning work at the facility. He stated that the work was not done satisfactorily. He stated when Ms. Terry gave him the bill he took it and tucked it into her shirt pocket. He stated that they did not have an argument. He stated that he refused to argue. He denied tearing Ms. Terry's shirt pocket and said that he used two fingers to place the invoice in her pocket.

ERRORS PATENT

Although a review of the record for errors patent reveals none, we

note that because Mr. Gambino was convicted of a misdemeanor he has no right of appeal. La. C.Cr.P. art. 912.1(B). However, Mr. Gambino does have a right of judicial review by application for a supervisory writ of review. La. C.Cr.P. art. 912.1(C)(1). In the interest of judicial economy and justice, we convert this appeal to an application for supervisory writ of review as this court has done in the past. *State v. Landry*, 2001-0784 (La. App. 4 Cir. 12/12/01), 804 So.2d 791.

ASSIGNMENT OF ERROR NUMBERS 1 & 2

Defendant alleges that his due process rights were violated by the introduction of the photographs of Ms. Terry's torn shirt pocket. Defendant alleges that the photographs should have been excluded as "Brady Material."

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." See also, La. C.Cr.P.. Art. 718.

Evidence is material, and hence discoverable, if there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed to the defense. *U.S. v. Bagley*, 473 U.S. 667, 105

S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Apparently, the defendant had not been informed of the existence of the photographs in advance of trial. As proffered by defendant, the photographs were only produced to the prosecution by Ms. Terry on the day of trial. Accordingly, when defendant conducted his open file discovery, he did not become apprised of the existence of the photographs. Defendant contends that had he known of the photographs he would have subpoenaed the person who took the photographs, which would have enabled him to discredit Ms. Terry's testimony. Defendant alleges that either he would have been able to show that no such photographs were taken in the justice of the peace's office or that Ms. Terry's shirt pocket was not in fact torn.

The defendant's assignments of error fall short of demonstrating a *Brady* claim as it rests on pure speculation and supposition. In order to assert a *Brady* claim, the defendant must demonstrate that **actual** exculpatory evidence was withheld. In this instance, defendant's claim rests on the **possibility** that exculpatory evidence would have materialized had he been apprised of the photographer's name. Accordingly, this claim lacks merit.

ASSIGNMENT OF ERROR NUMBER 3

In this assignment of error, the defendant contends that the trial court

erred in admitting the photographs over defense objection. The record reflects that when the prosecution moved to admit the photographs into evidence, the defense counsel made the following objection:

Your Honor, for the record, I am going to object to the photographs, unless Mr. Lobrano [the prosecutor] will produce the photographer of those pictures to identify that he in fact took those pictures.

It is a well-settled rule that a photograph need not be identified by the person who took it to be admissible in evidence. *State v. Robertson*, 358 So.2d 931 (La. 1978). Generally, photographs are admissible when they are shown to have been accurately taken and to be a correct representation of the subject in controversy, and when they tend to shed light upon the matter before the court. *Id.* Sufficiency of identification of a photograph for the purpose of admissibility thereof rests largely with the discretion of the trial judge. *Id.*

A proper foundation for admission in evidence of a photograph is laid when witnesses, having personal knowledge of the item or incident depicted by the photograph, identify it. *State v. Leggett*, 363 So.2d 434, 439 (La. 1978). See also, La. C.E. art. 901 B (1). Ms. Terry testified that the photographs were an accurate depiction of her shirt. The photographs were certainly relevant. No further foundation was necessary. The assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 4

Defendant alleges that the evidence was insufficient. The standard of review for the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979).

In order to sustain a conviction for simple battery, the State was required to prove that the defendant committed a battery without the consent of the victim. La. R.S. 14:35. Battery, as it pertains to this case, is defined as the intentional use of force or violence upon the person of another. La. R.S. 14:33.

Defendant argues that credibility issues should have created a reasonable doubt as to his guilt in the mind of the trier of fact. Defendant suggests that as a businessman without any criminal history his testimony should have been seen as more credible than that of Ms. Terry, given her previous criminal history and her apparent monetary incentive in the outcome of the trial.

When, as here, there is conflicting testimony about factual matters, the resolution of which depends upon a determination of credibility of the witness, the matter is one of the weight of the evidence, not its sufficiency.

State v. Allen, 94-1895 (La. App. 4 Cir. 9/15/95) 661 So.2d 1078. The trier of fact determines the weight to be given the evidence presented. It is not the function of an appellate court to assess credibility or reweigh the evidence. *State v. Rosiere*, 488 So.2d 965 (La.1986). Absent clear evidence to the contrary, a trier of fact's determination as to the credibility of a witness will not be disturbed. *State v. Vessell*, 450 So.2d 938, 943 (La.1984). Viewing the totality of the evidence in the light most favorable to the prosecution, the evidence was sufficient to convince a reasonable trier of the defendant's guilt. The assignment of error lacks merit.

CONCLUSION

Accordingly, for the foregoing reasons, this appeal is converted to a supervisory writ. The defendant's conviction and sentence are affirmed, and the writ is denied. **APPEAL CONVERTED TO WRIT; WRIT DENIED**