NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1967

STATE OF LOUISIANA

VERSUS

TROY RAY HERMAN

Judgment Rendered: SEP 2 1 2012

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 11-09-0649

Honorable Richard Anderson, Judge Presiding

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BEFORE: WHIPPLE, McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

Defendant, Troy Ray Herman, was charged by bill of information with simple kidnapping, a violation of LSA-R.S. 14:45 (count 1), and second degree battery, a violation of LSA-R.S. 14:34.1 (count 2). He entered a plea of not guilty and, following a jury trial, was found guilty of the responsive offense of attempted simple kidnapping. See LSA-R.S. 14:27D(3). For the second degree battery count, he was found guilty as charged. Defendant filed a motion for post-verdict judgment of acquittal, which was denied. For the attempted simple kidnapping conviction, defendant was sentenced to two years imprisonment at hard labor. For the second degree battery conviction, defendant was sentenced to five years imprisonment at hard labor. The sentences were ordered to run concurrently. The State filed a multiple offender bill of information. Upon his stipulation, defendant was adjudicated a second-felony habitual offender. The trial court vacated the previously imposed five-year sentence and resentenced defendant to ten years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The ten-year sentence was ordered to run concurrently with the two-year sentence for the attempted simple kidnapping conviction. Defendant now appeals, designating two assignments of error. We affirm the convictions and habitual offender adjudication; we affirm the sentence on the attempted simple kidnapping conviction; we amend the ten-year habitual offender sentence and affirm as amended.

FACTS

Kacey Chaney was in a relationship with defendant. On October 11, 2009, Kacey and defendant began arguing. Kacey left her house on Melrose Boulevard in Baton Rouge and walked to Florida Boulevard. Defendant called Kacey on her cell phone, apologized, and picked her up in his truck. As they neared their house, defendant sped into the driveway and pulled Kacey out of the truck. He struck her in the face. Kacey ran to a neighbor's house, but the neighbor refused to open the door. As Kacey was leaving the house, defendant caught up to her, grabbed her hair, and punched her, knocking her to the ground. As she

lay on the ground, defendant repeatedly struck her in the head and the face. He also began kicking her in the back of the head and stamping on her arm. He then dragged her several feet down the asphalt street. He punched her a few more times in the head and face, then left. Kacey ran to the house of another neighbor, Claudea Beeson, and asked for help. Claudea called 911. An ambulance transported Kacey to Baton Rouge General Hospital, where she was treated for her injuries.

Later that same day after being released from the hospital, Kacey went to her friend Bonnie's house. Sometime after 10:00 p.m. that evening, defendant drove to Bonnie's house with his cousin, Tremaine Harris. While Tremaine waited in the truck, defendant walked inside Bonnie's house and grabbed and slapped Kacey. Kacey went to the ground to protect herself. As she lay on the ground, defendant kicked her. She then got up, defendant pushed her toward the door, and he told her to get in the truck. Kacey was afraid to get in the truck, but did so anyway because she feared defendant would beat her more if she refused. Kacey sat in the truck between defendant and Tremaine.

Around the time defendant was at Bonnie's house, a 911 call from Bonnie's address went out, but the caller hung up. Police officers arrived at Bonnie's house shortly thereafter. One of the officers parked his vehicle behind defendant's truck to prevent him from leaving. Officer Steven Woodring, with the Baton Rouge Police Department, spoke with Kacey and the other officers. Upon determining what had transpired, defendant and Tremaine were taken to the police station, and Officer Woodring took Kacey back to Bonnie's house.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant argues that the evidence was insufficient to support the second degree battery conviction. Specifically, defendant contends that Kacey did not suffer serious bodily injury. Defendant does not contest his conviction for attempted simple kidnapping.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; LSA-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 LSA-C.Cr.P. art. 821B; **State v. Ordodi**, 06-0207, p. 10 (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, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585, pp. 4-5 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statutes 14:34.1 provides in pertinent part:

> A. Second degree battery is a battery when the offender intentionally inflicts serious bodily injury[.]
>
> B. For purposes of this Section, "serious bodily injury" means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

In order to prove a second degree battery, the State must prove the defendant: (1) committed a battery upon another, (2) without his consent, and (3) intentionally inflicted serious bodily injury. **State v. Young**, 00-1437, p. 9 (La. 11/28/01), 800 So.2d 847, 852. Second degree battery is a crime requiring specific criminal intent. **State v. Fuller**, 414 So.2d 306, 310 (La. 1982). Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503, p. 13 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v.**

Graham, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La.App. 1 Cir. 1986).

Defendant admits in his brief that he inflicted "corporal punishment" on Kacey, succeeded in badly frightening her, and his behavior created "a great deal of juror sympathy" for Kacey. Nevertheless, according to defendant, he did not intend, nor did he cause, serious bodily injury to Kacey. Defendant suggests Kacey suffered no serious bodily injury because her medical records indicate she neither asked for, nor received, a prescription for pain medication; no acute distress was noted on her discharge from the hospital; and, according to her testimony, the pain in her face lasted a couple of months and it was hard to chew food.

In **Fuller**, 414 So.2d at 310, where the supreme court addressed the intent element of second degree battery, the defendant hit the victim with one blow sufficient to knock him over a pool table. In finding a rational trier of fact could certainly have found the defendant possessed the intent to do "serious bodily harm," the supreme court opined that when a much stronger man hits a younger, smaller man, the fact finder could rationally conclude that the offender intended to cause, at a minimum, unconsciousness and/or extreme physical pain.[1] While the victim in **Fuller** suffered a single blow to the face, Kacey suffered several closed-fist strikes to her face, as well as blows and kicks to her head while she was on the ground. In one of the 911 calls made while defendant was attacking Kacey, the eyewitness described that she had seen defendant "beating this lady real real bad." She further informed the 911 operator that she saw him "beating her from one end to the other" and that "we were just concerned 'cause he was kicking her and beating her real bad." Accordingly, any fact finder could rationally conclude that defendant intended to cause Kasey, at a minimum, extreme physical pain. See **State v. Robertson**,

[1] As noted, under LSA-R.S. 14:34.1B, "serious bodily injury" means bodily injury which involves, among other things, "extreme physical pain."

98-883, p. 6 (La.App. 3 Cir. 12/9/98), 723 So.2d 500, 504, writ denied, 99-0658 (La. 6/25/99), 745 So.2d 1187.

Regarding the extent of her injuries, Kacey testified that defendant punched her in the face after pulling her out of the truck. She ran to a house, but the door was locked. As she turned to leave, defendant came from behind the house and grabbed her. Defendant grabbed her hair and punched her. She fell to the ground. Defendant punched her and kicked her in the back of the head. He stamped on her wrist. He then dragged her ten to fifteen feet down the asphalt street. Defendant struck Kacey a few more times before he left. Kacey testified that following this beating, her eyes were swollen and she could not really talk. Her face was swollen and her jaws felt like they were "wired." She could not move her wrist and thought it was broken. She was in a lot of pain from a bruised shoulder. She had knots on her head. After the incident, it was difficult for her to chew food. She stated she drank a lot of fluids for about a week. The pain in her face lasted a couple of months.

Claudea Beeson, whose house Kacey ran inside crying for help, testified at trial that Kacey would not use one of her arms. Kacey was holding her injured arm to her body with her other arm. Deputy Woodring testified at trial that when he stopped defendant and Kacey in defendant's truck, after Kacey had received treatment at the hospital, he observed that she had a cast on her arm and two black eyes.

Kacey's medical records from Baton Rouge General Hospital were submitted into evidence at trial. The "Clinician History" section stated: "beat up by boyfriend; left lower arm swollen, splinted by ems; kicked in face...c/o jaw pain and difficulty closing mouth; abrasions to left knee and right elbow; bruise to left eye." The medical records indicated that while Kacey did not have any broken bones, she had a sprained right wrist.

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 fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La.App. 1 Cir. 9/25/98), 721 So.2d 929, 932. Further, 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, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

The jury's guilty verdict indicates that, after considering the credibility of the witnesses and weighing the evidence, it accepted the testimony of Kacey, Officer Woodring, and Claudea Beeson regarding the extent of Kacey's injuries and the pain she suffered. 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**, 03-1980, p. 6 (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). Further, the testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La.App. 1 Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). A rational interpretation of the evidence adduced is that defendant, in repeatedly punching and kicking Kacey in the face, head, and arm, intended to cause her extreme physical pain and that Kacey, in fact, suffered extreme physical pain due to simultaneous, multiple injuries she suffered, including to her jaw, face, shoulder, and wrist. See **State v. Odom**, 03-1772, pp. 6-7 (La.App. 1 Cir. 4/2/04), 878 So.2d 582, 587-88, writ denied, 04-1105 (La. 10/8/04), 883 So.2d 1026; **State v. Accardo**, 466 So.2d 549, 551-53 (La.App. 5 Cir.), writ denied, 468 So.2d 1204 (La. 1985).

After a thorough review of the record, we find that the evidence supports the jury's verdict. 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 defendant was guilty of second degree battery. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant argues that his ten-year sentence as a habitual offender is excessive. Specifically, defendant contends his sentence is illegally excessive because it was imposed without the benefit of parole. Defendant is correct.

Following defendant's adjudication as a second-felony habitual offender, the trial court vacated the original five-year sentence for the second degree battery conviction and resentenced defendant to ten years imprisonment at hard labor "without benefit of probation, parole, or suspension of sentence" pursuant to LSA-R.S. 15:529.1A(1)(a) (prior to the 2010 amendments). Both the minute entry and the criminal commitment order also indicate defendant's ten-year sentence is without the benefit of parole. Neither LSA-R.S. 15:529.1A(1)(a) nor LSA-R.S. 14:34.1C (the penalty provision for second degree battery) contains a restriction on parole. Thus, the denial of parole eligibility on defendant's ten-year sentence is unlawful. See **State ex rel. Calvin v. State**, 03-0870 (La. 4/2/04), 869 So.2d 866. Accordingly, we amend defendant's sentence to delete that portion providing that the sentence be served without benefit of parole. Resentencing is not required. Because the trial court sentenced defendant to the maximum possible period of imprisonment, it is not necessary for us to remand for resentencing after removing the parole prohibition. See LSA-C.Cr.P. art. 882A. However, we remand the case and order the district court to amend the commitment order and the minute entry of the sentencing accordingly. See **State v. Benedict**, 607 So.2d 817, 823 (La.App. 1 Cir. 1992). See also **State v. Miller**, 96-2040, p. 3 (La.App. 1 Cir. 11/7/97), 703 So.2d 698, 700-01, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459.

CONVICTIONS AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE ON ATTEMPTED SIMPLE KIDNAPPING CONVICTION AFFIRMED; HABITUAL OFFENDER SENTENCE AMENDED BY REMOVING PAROLE RESTRICTION AND AFFIRMED AS AMENDED; REMANDED WITH ORDER.