NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1723

STATE OF LOUISIANA

VERSUS

CLAYTON JENKINS

Judgment Rendered: MAR 2 4 2014

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of Washington,
State of Louisiana
Trial Court No. 09 CRS 104551

Honorable August Hand, Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

The defendant, Clayton Jenkins, was charged by bill of information with aggravated second degree battery, a violation of La. R.S. 14:34.7. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed motions for post-verdict judgment of acquittal and in arrest of judgment, which were denied. He was sentenced to twelve years imprisonment at hard labor, with seven years of the sentence suspended, and five years of probation upon release from incarceration.[1] The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On the evening of June 12, 2009, Dewey Sumrall was at the Wagon Wheel bar (the bar) on Columbia Street in Bogalusa. The defendant's son, Daniel Jenkins, was also at the bar. It appears that at some point Dewey and Daniel exchanged words. Daniel called the defendant to come pick him up from the bar, then went outside to wait for him. A short time later, Dewey left the bar to go home. As Dewey was reaching for his keys to unlock his truck, the defendant struck him on the head with a tire tool (a tire iron or lug wrench). The defendant and Daniel left the scene. Dewey was knocked unconscious and spent several days in the hospital.

Daniel testified at trial that Dewey had threatened him while they were in the bar. According to Daniel, when Dewey left the bar, he walked toward the defendant and Daniel with a knife in his hand. Daniel told Dewey to stop and to put the knife down. Dewey swung at them, missing. Then Dewey fell. In his testimony, Daniel did not describe Dewey being hit in the head with a tire iron by his father, but simply described Dewey as falling. Dewey, on the other hand,

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[1] The minutes incorrectly indicate the defendant's five-year sentence is without benefit of probation, parole, or suspension of sentence. The sentencing transcript correctly reflects there is no denial of parole eligibility. See La. R.S. 14:34.7(B). When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

testified that he never threatened Daniel in the bar. Dewey also stated that he never pulled a knife on anyone and that, when he got struck in the head, he never saw the defendant and did not know he was out there.

Daniel was brought from jail to testify at the defendant's trial. He was serving a sentence at hard labor for DWI, third offense. Daniel had prior convictions for unauthorized use of a movable and, according to Daniel, a long misdemeanor criminal record for "drinking and fighting and getting in trouble." Dewey had prior convictions for DWI and, possibly, aggravated battery.[2]

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motion for post-verdict judgment of acquittal and motion in arrest of judgment because the evidence was insufficient to support the conviction of aggravated battery. Specifically, the defendant contends that he struck Dewey with a tire iron in self-defense and/or in defense of others.

A motion for post-verdict judgment of acquittal raises the question of the sufficiency of the evidence. See ***State v. Hampton***, 98-0331 (La. 4/23/99), 750 So.2d 867, 880, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). A motion for post-verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in the light most favorable to the state, does not reasonably permit a finding of guilt. La. Code Crim. P. art 821(B) & Official Revision Comment; ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

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 **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

[2] Dewey testified on cross-examination that he was arrested for aggravated battery, but whether or not he was convicted of the offense was never clearly established during the colloquy.

analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied that 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.

Aggravated second degree battery is a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury. La. R.S. 14:34.7(A)(1) (prior to its 2012 amendment). 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. La. R.S. 14:34.7(A)(2) (prior to its 2012 amendment).

La. R.S. 14:19(A) provides in pertinent part:

> The use of force or violence upon the person of another is justifiable when committed for the purpose of preventing a forcible offense against the person . . . provided that the force or violence used must be reasonable and apparently necessary to prevent such offense, and that this Section shall not apply where the force or violence results in a homicide.

La. R.S. 14:21 provides:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

La. R.S. 14:22 provides:

> It is justifiable to use force or violence or to kill in the defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person.

The defendant does not dispute that he struck Dewey with a tire iron. The defendant argues, rather, that he was acting in defense of himself and of his son, Daniel, when he struck Dewey, who was wielding a knife. The issue, thus, is whether or not the defendant acted in self-defense. In the non-homicide situation,

a claim of self-defense requires a dual inquiry: first, an objective inquiry into whether the force used was reasonable under the circumstances, and, second, a subjective inquiry into whether the force used was apparently necessary. **State v. Pizzalato**, 93-1415 (La. App. 1st Cir. 10/7/94), 644 So.2d 712, 714, writ denied, 94-2755 (La. 3/10/95), 650 So.2d 1174.

In a homicide case, when self-defense is raised as an issue by the defendant, the State must prove, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. **State v. Spears**, 504 So.2d 974, 978 (La. App. 1st Cir.), writ denied, 507 So.2d 225 (La. 1987). However, Louisiana law is unclear as to who has the burden of proving self-defense in a non-homicide case, and what the burden is. **State v. Barnes**, 590 So.2d 1298, 1300 (La. App. 1st Cir. 1991).[3] In previous cases dealing with this issue, this Court has analyzed the evidence under both standards of review, that is whether the defendant proved self-defense by a preponderance of the evidence or whether the State proved beyond a reasonable doubt that the defendant did not act in self-defense. In this case, we need not and do not decide the issue of who has the burden of proving (or disproving) self-defense because under either standard the evidence sufficiently established that the defendant did not act in self-defense. See **Pizzalato**, 644 So.2d at 714.

The evidence reflects conflicting versions of the incident. Daniel testified at trial that when he was at the bar near Dewey, Dewey was cursing at him and calling him a "rat." According to Daniel, Dewey said, "Boy, you don't believe I'll cut your f---ing guts out, do you?" Daniel moved to the other side of the bar, then shortly thereafter, called the defendant (Daniel's father) to come pick him up. Not long after, Daniel left the bar and saw the defendant across the street waiting for

[3] In **State v. Freeman**, 427 So.2d 1161, 1162-63 (La. 1983), the Louisiana Supreme Court, without resolving the issue, suggested that the defendant in a non-homicide case may have the burden of proving self-defense by a preponderance of the evidence. See **Barnes**, 590 So.2d at 1300-01.

him. When Daniel crossed the street to an adjacent parking lot, he saw Dewey with a knife. Daniel asked him to put the knife down and to stop before something bad happens. Dewey swung the knife at Daniel and the defendant without striking either one. Dewey then fell down on the ground, dropping his knife. When Dewey put his hand in his pants pocket, Daniel stepped on Dewey's hand. Allan Patterson, the bar bouncer, grabbed Daniel and told him he was not going to do that. The defendant then told Daniel to get in the truck. Daniel complied, and he and the defendant left the scene.

Dewey testified he knew the defendant and Daniel most of his life, and that he and the defendant used to be friends. According to Dewey, Daniel was at the bar that night, but the defendant was not. When Daniel approached Dewey in the bar, Dewey asked Daniel to get away from him. Dewey did not threaten Daniel, and Dewey never told anyone that he would hurt the defendant. When Dewey left the bar for the evening, he was walking to his truck with Dora Parker. When Dewey got to his truck, he was hit and knocked unconscious. Dewey stated he never even saw the defendant that night, and he never pulled his knife out. When Dewey awoke in the hospital, his daughter told him the defendant had hit him in the head with a tire iron. According to Dewey, his lung had collapsed because Daniel stomped on his chest when he was on the ground. Dewey further stated that he carried in his pocket two pocket knives with about four-inch blades. He often carried the knives with him, but never pulled a knife on anyone. At the hospital, he had both knives still in his possession.

Dora Parker testified that when she was in the bar, she heard Dewey make a statement about the defendant that could be considered threatening in nature. Dora did not hear Dewey make any threatening statements about Daniel. When Dewey left the bar for the evening, Dora and Janice Turnage (and someone named Donna), were walking with him. Dora did not walk with Dewey all the way to his truck because a friend called after Dora and told her to not go over there. Dora did not

see how Dewey got injured, but she stated that Dewey did not attack anyone and that she did not see him pull a knife.

Janice Thomas (who was Janice Turnage before she got married) testified Daniel was at the bar, but the defendant was not. Janice did not see any confrontation between Dewey and Daniel, or hear any threatening statements by Dewey; however, Janice had not been at the bar very long before Dewey left. After leaving the bar, Janice walked with Dewey to his truck. When Dewey began to unlock his truck door, the defendant approached and pushed Janice out of the way. She saw Dewey and the defendant fighting each other. The defendant then retrieved a tire tool (or crowbar) from the back of the truck and struck Dewey on the head with it, knocking him unconscious. As Dewey lay on the ground, Daniel approached him and began stomping on his chest. Janice called 911. Janice never saw Dewey with a weapon and never saw him attack the defendant.

Chris Patterson, a witness for the defendant, testified that he was working as a bouncer at the bar. Chris had been shooting pool with Daniel for two or three hours. Daniel had been drinking, so he called the defendant to come get him. Chris walked Daniel outside, then went back in the bar. Later, Chris walked Dewey outside. As Dewey walked across the street, Chris saw the defendant and Daniel on the other said. Daniel began walking toward Dewey. Dewey put his hand in his pocket. Chris did not know if Dewey was getting his keys or his knife. At any rate, according to Chris, Daniel threw his hands up and said, "Don't cut me. I don't want you to cut me and I don't want to cut you." At that point, Chris saw Dewey fall to the ground, but did not know who hit Dewey. Daniel approached Dewey and put his foot on Dewey's shoulder. Chris grabbed Daniel and told him he was not going to do that, that Dewey was knocked out. Chris told the defendant and Daniel to leave, which they did. The next day when Chris was cleaning up around where Dewey had fallen, he found an old bone-handled knife on the ground. He brought the knife inside and put it on the bar. The knife was

subsequently taken from the bar, but Chris did not know if someone claimed the knife or if it was thrown away. Chris stated that the knife could have belonged to anyone. Chris had prior convictions for simple burglary, aggravated flight from an officer, and eight counts of forgery.

A few defense witnesses testified that a year-and-one-half to two years prior to the incident at the bar, they were at a cookout at Larry Miley's house. The defendant and Daniel were there, and Larry did not want Daniel at his house. As Larry was trying to make Daniel leave, Dewey drove up. Dewey got out of his truck with a pocket knife and went toward the defendant. When someone told Dewey that his knife was not going to scare the defendant, Dewey went back to his truck and got a gun. Dewey shot the gun several times, into the air and the ground. The defendant and Daniel left unharmed.

In finding the defendant guilty of aggravated second degree battery, it is clear the jury accepted the state's version of the events and rejected the claim of self-defense, concluding that the scenario as suggested by the defense was not reasonable. Given the manner in which the defendant attacked Dewey - striking Dewey with a tire iron when Dewey was not even aware the defendant was anywhere near him - the jury could have concluded that the force used by the defendant against Dewey was neither reasonable nor necessary to prevent an attack, particularly since Dewey testified he never pulled a knife on anyone. See **State v. Wilson**, 613 So.2d 234, 238-39 (La. App. 1st Cir. 1992), writ denied, 93-0533 (La. 3/25/94), 635 So.2d 238.

Given the conflicting testimony, it is not possible to know precisely what occurred. A viable scenario suggested by the testimony, however, is that Dewey and Daniel exchanged words when they were in the bar. When Daniel called the defendant to pick him up, Daniel told him Dewey was threatening him. When Dewey walked to his truck, the defendant was waiting for him to settle the score. The defendant attacked Dewey with his hands, and Dewey fought back. At some

point, with the confrontation not going as the defendant had planned, the defendant procured a tire iron and struck Dewey into unconsciousness. Under these circumstances, if defendant used a tire iron to attack Dewey because perhaps Dewey was getting the better of him, the defendant is not entitled to a self-defense claim because he (the defendant) was the initial physical aggressor. See La. R.S. 14:21; **State v. Tran**, 98-2812 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1291, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101. If Chris's story is to be believed, then the defendant had the tire iron in his hand before even knowing what Dewey was going to do, since according to Chris, when Dewey put his hand in his pocket and had not yet pulled anything out, the defendant hit him with the tire iron. Thus, the defendant cannot reasonably claim self-defense under this scenario, either.

The jury heard all of the testimony and found the defendant guilty as charged. The trier of fact is free to 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. **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. 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). 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. 1st Cir. 1987), writ denied, 519 So.2d 113 (La.

1988).

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. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). In finding the defendant guilty, the jury clearly rejected the defense's theory of self-defense and/or defense of others and reasonably concluded that the defendant's striking Dewey with a tire iron was neither reasonable nor necessary under the circumstances. See **Moten**, 510 So.2d at 61. Further, flight and attempt to avoid apprehension indicate consciousness of guilt, and therefore, are circumstances from which a juror may infer guilt. See **State v. Fuller**, 418 So.2d 591, 593 (La. 1982).

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 the defendant did not strike Dewey in self-defense or in defense of others and, as such, was guilty of aggravated second degree battery. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

The trial court did not err in denying the defendant's motion for post-verdict judgment of acquittal and motion in arrest of judgment. Accordingly, the assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.